SOME DEFINING COMPONENTS OF A LABOUR LAW INFLUX

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Abstract

It is not always easy to differentiate the foundation (ethical, political, philosophical, economic) of labour law from its theoretical and institutional construction. It is not easy either to consider the latter separated from the economic, social or technological facts that affect its performance and evolution.

While admitting these difficulties of differentiation and, for now, operating only on that "intermediate" level - the one of the theoretical and institutional construction of labour law - this essay seeks to identify the defining components of labour law, understood as the basic and constitutive elements of its most widespread and stable configuration. This approach includes, of course, all the elements that made the original and historical conception about Labour law and, in addition, everything that this branch of law has accumulated through its path of expansion and consolidation.

It is very difficult, if not impossible, to imagine that this "defining" configuration could be recognized as so comprehensive that it can be considered as an entity almost universal. Perhaps closer to that condition of universality is a conception characterized by us in a previous study as the basic or historical idea of labour law, which can only be established in an extremely elemental, schematic and stylized dimension. Other components -which can also be considered as defining features of the labour law and in which, consequently, we are also interested for the purposes of this analysis- are part of what we called in that previous study, the particular ideas of the labour law. At this time, we will try to recognize them in the continental idea -one of these particular ideas- to which social rights in Latin America are also ascribed. It seems that similar exercises could be carried out on other particular ideas.

If in that initial attempt we have formulate some hypotheses about the diverse proclivity of the different particular ideas for departing from the historical idea of labour law, the inquiry now proposed takes place in a second level which is more comprehensive (because it includes the first one but also adds other features incorporated later but considered too as defining characteristics). This exercise of theoretical and institutional recognition does not have a purely descriptive interest; on the contrary, it is about knowing which are these features to "measure" the impact of the processes of theoretical transformation, understanding that if these processes operate on the so called "defining" features, the resulting changes are more substantive and radical -the labour law changes then in a more intimate and profound way- that if the transformations operate on features that, as important as they are, can be considered merely contingent or less structural.

Beyond the degree of accuracy in identifying the defining components of labour Law - or, rather, of one of its particular ideas - this essay proposes to draw attention to the usefulness of such a distinction to follow-up the intensity of the transformation processes that a labour law in flux is experiencing.

What is this essay about

It is not always easy to differentiate the foundation (ethical, political, philosophical, economic) of labour law from its theoretical-juridical and institutional construction. It is not easy either to consider the latter disregarding the economic, social or technological facts that affect its

performance and evolution.

While admitting these difficulties of differentiation and, for now, operating only on that "intermediate" level - the one of the juridical and institutional construction of labour law - this essay seeks to identify some of *the defining features* of that branch of law, understood as the basic and constitutive components of its most widespread and stable configuration. This approach includes, of course, all the elements that have made the labour law in its *original and historical conception* and, in addition, everything that this branch of law has accumulated through its path of expansion and consolidation. In other words, the issue here is to identify and briefly describe some features of labour law (that have a defining aptitude, in so far as they have shown to be able to maintain some overtones of permanence as they traverse the stages of creation, deepening and development traveled by this branch of the law.

However, it seems evident to us that it is not possible to recognize some "universal" dimension to the result of this investigation; that condition, which we actually thought might be attributed to the *basic and historical idea of the labour law* conceived in its most elementary and stylized level[1], does not seem to be extended to other supervening defining features that therefore, and as widespread as they are, I will relate here only to the *continental idea of labour law* -one of those I have called *particular ideas of labour law* in that study- to which the *particular ideas of social rights in Latin America* are ascribed in spite of the differences. I will return concisely to both concepts -the *basic and historical idea* and the *particular ideas* of labour law- in a few lines.

As anticipated in the very first sentences, the recognition task has to operate only on a technical-juridical perspective, typical of the normative science. However, this does not imply an option radically positivist nor denies the significance of considering these same mechanisms in terms of value or preference (e.g., of justice or, alternatively, of efficiency). It is only a methodological option, just partial and fragmentary, of recognizing some traits of labour law that have proved their ability to transverse instances of creation, development, deepening, crisis and reform, demonstrating their aptitude to endure and therefore claiming recognition of their defining character in the logical-juridical construction of labour law. We can not ignore, therefore, that the introduction of these legal devices has responded in each case to considerations of value implied in them; for the present time, our question only seeks to establish whether it has succeeded or not to be a part of that defining configuration of the labour law, in the framework of one of its *particular ideas*.

Some previous clarifications

In the first place, I have to point out -and it is self-evident- that not all the instrumental techniques that will be mentioned here are singular by themselves, since they reproduce those of other sectors of the legal order; their singularity is given here by the mode or context in which they operate and express themselves, and it is in this relative dimension that they are recognized[2].

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[1] See, Adrián Goldin, “Global conceptualizations and local constructions of the idea of labour law” Chapter 5 of “The idea of labour law” Davidov and Langillle, comps., Oxford University Press, 2011; a Spanish version has been published by Relaciones Laborales (Madrid) in the issue of October 19, 2010.

[2] Evoking Palasí Villar construction for administrative law, Joseph Vida Soria (“La esencia y la existencia del Derecho del Trabajo. Observaciones críticas acerca del proceso de conceptuación del Derecho del Trabajo”, 1975, unpublished) has placed labour law among "horizontal" rights, conceived to be applied to certain individuals whose special qualification in the world of the Law determines the creation of singular regulations, that "capture" many of its techniques from various "vertical" rights, homogeneous due to a certain function. Horizontal rights cross transversally the latter (among others, the civil, administrative, international, criminal law) and source from them. Of such a way, the *horizontal rights* refer or forward to the diverse *vertical rights*, and reformulate their institutions to satisfy their own singularity.

On the other hand, I will avoid in this opportunity to venture into the realm of the specific contents of the labour law -for example and among many others, the way of regulating the services provided by the worker and the wage compensation (salary exchange), the working day, the work breaks, the rules concerning the duration and termination of the employment contract -without denying, of course, the wealth of approaches that go in those directions, particularly in the comparative task.

It is the same methodological approach that separates me in this essay from the rich and extensive debates about the raison d'être and the foundations of labour law. The functional analysis itself remains on the sidelines of my reflexion despite its very high significance; so I postpone the contemplation of its permanent functions and I limit myself to the observation of certain techniques of its technical-juridical construction that, it seems to me, have shown a very significant ability to standardize and to persist.

I can not also leave aside the dynamic view that characterizes labour law as a process in constant transformation[3]; it is certainly true, and this perspective is expressive and fruitful. Today, nevertheless, in this strictly technical-juridical approach and at this point of the evolution of labour law, I try to select what it seems to be able to provide us with a valid input for the knowledge of our subject because it had the ability to endure over time.

How the current trends of transformation[4] "play" in this endeavor orientated to recognize the historical constants that have demonstrated aptitude to endure? Just as it is not possible to understand the process of change if there is not a clear perception of the object of knowledge considered , *the tensions of change serve also to identify and to recognize the structural significance of the components that are intended to alter*. Something, indeed, about what is labour law, is revealed to us by the trends about labour flexibility, about contractualization, about its *subjective weakening* …

Certainly, this modest attempt is not new. The efforts of legal experts to walk through the labour law singularities have been multiple, either to recognize and support its autonomy[5], whether to explore its particularisms with fewer methodological restrictions that I impose to myself today, or simply to set a basic configuration from which to undertake some analysis with various objectives[6]. The vast

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[3] In the introduction to “La formación del derecho del trabajo en Europa. Análisis comparado de la evolución de nueve países hasta el año 1945” (Bob Hepple, comp.) pp. 17-52 , Colección Informes y Estudios, MTySS, Madrid 1994, Hepple reviews the processes of industrialization and economic development, the modernization, the characteristics of employers and unions' organizations and the role of the ideology and of the expansion of legal logic in labour relationships.

[4] Trends that I tried to review in my work "Transformation Trends of Labour Law", Lexis-Nexis 2003

[5] This is the case of Paul Durand, for which the particularisms serve as distinctive signs that enable the autonomy of labour law. (Paul Durand, Traité de droit du travail t. 1 Dalloz 1947, pp. 254/258). It is also the case of Barbagelata, who considers as a singular data the need to explain the legal effects of collective agreements, which are difficult to resolve "resorting to the clichés of Civil law". For Barbagelata, it is convenient to examine the features that make this law different from the others and that configure what, following Paul Durand, he qualifies as labour law particularisms (in "The particularism of the labour Law." Fundación de Cultura Universitaria, 1st. edition, Montevideo, 1995).

[6] Among so many others, Jeammaud, Le Friant and Lyon Caen in “L’ordennancement des relations du travail" in Recueil Dalloz 1998, 38 Cahier, Chronique, páginas 359-368, and Wilfredo Sanguinetti Raymond in "El Derecho del Trabajo como categoría histórica", article published in C.Arenas Posadas, A. Florencio Puntas and J.I. Martínez Ruiz (editors), "Mercados y organización del trabajo en España (siglos XIX y XX)", Sevilla, Grupo Editorial Atril, 1998, pp. 459-478; Sanguinetti Raymond seeks to establish from an historical analysis what is permanent and what is contingent in the Labour law, and which are its basic identity signs.

plurality of attempts to identify, from the most diverse perspectives. the differentiating elements of labour law, brings to light that none of them -and *even least this one that now is meant*- can presume of being complete or definitive. All of them, nevertheless, contribute to a better understanding of labour law and it is this fragmentary, partial and very modest objective that is sought now.

The historical idea of labour law

In this search of some of the more widespread defining features, we started not long ago a reflection aiming to establish if there exists a widely implemented historical idea of labour law with the capacity to transcend the differentiation of the various legal systems; in other words, a primary and initial idea of labour law that is common to a significant part of the labour laws all around the world[7].

Soon, I found apparent that an idea of this tenor could only be reached if it is formulated in the most basic and stylized way that it could be conceived.

To recognize it, it seemed appropriate to look to the liminal time of the appearance of regulatory actions which would be collected later by their common belonging to the emerging labour law, remembering that till then human labour, except in exceptional manifestations that were considered to be high and distinguished, was expressed in ties that did not include the component of the free will of the provider (slavery, feudal serfdom, unions and corporations; and in the American continent, before and even after colonization, the mita, the encomienda and the yanaconazgo).

In this ominous context, labour law finds its first space of construction around the *recognition of the voluntary character of the bond* that ties the provider of his own effort; *it is the advent of the contract in this order of relationships, as luminous manifestation of freedom*[8].

It is nevertheless probable that this opening to the freedom would not have happened if at the same time they had not been the necessary precautions to ensure the disciplining of vast cohorts of workers who would be employed in the industry[9]. In this effort of stylization, these precautions of disciplining are provided by the *dependence* or *subordination* that the work contract itself, based on the apparent inequality of one of the parties, makes possible[10].

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7 Op. cit. in note 1

8 Bruno Veneziani, in "La evolución del contrato de trabajo", his contribution to "La formación del Derecho del Trabajo en Europa. Análisis comparado de la evolución en nueve países hasta el año 1945" (Bob Hepple Comp.), op.cit. in note 3, says on page 79 that no branch of the legal system have demonstrated better the wisdom of Maine's affirmation according to which the definitive forward movement of the progressive societies coincides with the passage from a situation defined by the status to a situation regulated by the contract.

9 Referring to the British experience, Antonio Ojeda says "... a new figure of contract arising at such time should meet the needs of manufacturers to impose a strong work discipline to a mass of people especially when living in hazardous conditions and dedicated to an activity that required a great synchronization because of the division of labour ... conditions which were already established in the UK since 1750, well in advance of other European countries ... (“La genealogía del contrato de trabajo”, in Revista Española de Derecho del trabajo No. 135 pp. 533-555).

10 As pointed out by Bruno Veneziani in op. and loc. cit. in note 8, even if the labour contract freed the worker from the web of police regulation in continental Europe and from the Master and Servant Laws in Britain, it submitted him to the power of the employer to regulate his working life; Veneziani argues that this power was hiding under the guise of the contract. From a strictly juridical perspective, derived in this case from the categories of civil law, Muriel Fabre-Magnan said lucidly that the dependency function is to serve as a substitute for the typical dispossession of

So labour law has to start from this remarkable contradiction that comes with the advent of the contract; the *freedom-contract* and the *submission-contract* coexist in it. The contract implied, as stated above, the luminous recognition of the worker as a free person empowered to decide about making available the provision of his capacity of work, but also placed him in a position of submission[11].

Perhaps as a result of this contradictory coexistence, labour law -from its historical center of imputation, which is the contract thus configured- highlighted the drastic inadequacy of the latter to assume by itself the function of regulating the resulting relationship, *and incorporated a typology of actions tending to impose some limits to the submission*, a typology of limits, therefore, to the exercise of the problematic autonomy of the will[12]. Against the idea that this point implied the need to leave the contractual perspective for being formalist and patrimonial[13], it seems that what takes place is the realization of the *inadequacy of the contractual perspective*, and the search of a way to complete it by introducing these limits and restrictions, *that every legal system -every particular idea of labour law-* would accomplish in its own way.

The elementary historical construction of the labour law rests, then, on a complex and paradoxical formula: freedom + submission + limits to the submission[14]. Labour law is responsible for the difficult task of solving a complex situation: "In the kingdom of ends everything has a price or a dignity: the man has a dignity"[15;] .The man has a dignity and labour has a price; it is not easy to solve this contradiction in relation to a phenomenon -the human labour- that is inseparable from the man who provides it.

To complete the idea, it could be said that *the original idea of labour law* travels the time as a kind of arbitration or composition between the two inseparable aspects of the labour contract: the *freedom-contract* and the *submission-contrac*t, and differs from the dominant idea in the field of

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exchanges in civil contracts but inaccessible in the labour tie because of the recognized feature of the inseparability between an individual and his or her work (Fabre-Magnan, Muriel, "Le contrat de travail défini par son objet*", in Le travail en perspectives, dirigé par A. Supiot*, LGDJ, París, 1998, pp. 101-124).

11 Alain Supiot, in "Por qué un derecho del trabajo" (Documentación laboral N° 39 1993-1, page 11 and following, especially page 19) affirms that in labour law, unlike in civil law, the will is not committed but submitted. Sharing that lucid precision, and just paraphrasing it, I would say that the contradictory dimension of the labour contract implies that the will of the worker is committed and submitted at the same time, and in an indiscernible way.

12 It is problematic because it is a value that can not be ignored from the perspective of freedom, but it conveys also some elements of negative implications from the perspective of the submission that put in question that same luminous condition.

13 So says Antonio Baylos in "Derecho del trabajo, modelo para armar" Ed Trotta, Madrid 1991. In a similar vein, Otto Kahn-Freund argues that the liberal system requires that subordination situations appear as coordinating relationships between free and equal individuals, and requires therefore that an act of submission is presented under the guise of a contract (in "Trabajo y Derecho", translation of the third edition in English of "Labour and the law" (Paul Davies and Mark Freedland, eds.) published by Ministerio de Trabajo y Seguridad Social de España , Madrid, 1987.

14 In the words of Sinzheimer ("La esencia del Derecho del Trabajo" in "Crisis Económica y Derecho del Trabajo" Cinco estudios sobre la problemática humana y conceptual del derecho del trabajo, Instituto de Estudios labourales y de la Seguridad Social, Colección Estudios e Investigaciones, MTySS Madrid 1984, p. 71), labour law expresses an itinerary: from man as a thing, to the civil law in which he is recognized as a subject of relationships of equality, to culminate in the social law, in which he is hosted in his condition of inequality.

15 This is the way in which Sinzheimer evokes and quotes Kant in op. and loc. cit. in note above.

civil law because in labour law what predominates is the indiscernible intermingled presence of the components of will and freedom, along with dependence and submission. From a perspective that we admit sublimated but serves to our purpose of stylization, what the labour law prosecutes, in differentiated juridical expressions that we will consider immediately, is *the recognition of the optimal level of shared freedom* (on which, it goes without say it, for ideological, sectoral, or other kind of reasons, the various positions often diverge in an overwhelming way). If this is the case, the usual debate around labour law would have no other purpose than of establishing which *is the optimal level of shared freedom.*

The particular ideas of labour law

If the more widespread, *basic, historical idea* of labour law gets so far, it would be valid to affirm that it is from that idea that the diverse *particular ideas of labour law* can be differentiated. There would not be universal rules for the delimitation and recognition of those particular ideas: according to the degree of aggregation / disaggregation with which one intends to perform the analysis, these *particular ideas* might be sorted by countries (by each country), by groups of countries according to a regional configuration or to other grouping criteria, by legal systems, etc.

As anticipated, those *particular ideas* take over the function of limiting the submission. However, the sources and technical instruments of its execution vary.

For instance:

a. In the continental system, it is the law, as the primary and dominant legal experience in it[16] (although collective autonomy, in different measure, accompanies its exercise).

b. In the German communitarian system it is also the law, but with a dominant presence of professional communities.

c. In the common law system, it is the abstentionism of the legislator and the judge, which is replaced by the unions' voluntarism[17] in a context of regulation of the collective phenomenon -that is the case of the United States of America- or of not-regulation[18].

It is valid to suggest that this original difference in sources and instruments as well as in other elements of the various labour laws in force around the world, characterizes what I called the *particular ideas of labour law,* beyond the greater or lesser degree of dissemination or generalization on their implantation. It means that however widespread is one of those elements - a technique, a function, a certain content in several or even in many of the *particular ideas* of labour law-, it does not reach the dimension of "quasi-universality" that would possess the one that we have called "*basic or historical idea*" of labour law. These *particular ideas* have historically experienced identical, similar or singular challenges; in all the cases, their answers to them have been varied, sometimes coincidental, sometimes very different[19].

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[16] See Luis Diez Picazo, “Experiencias Jurídicas y Teoría del Derecho”, Ariel, Barcelona 1973.

[17] See, Otto Kahn Freund in op. and loc. cit. in note 13

[18] In the case of the British "particular idea", the central objective of labour law materializes in the maintenance of an equilibrium between employers and workers, ensuring a fully operational and autonomous system of collective bargaining free from the intervention of both governments and judges.

[19] From the very beginning of the development of labour law -and even more rapidly from the challenges of the last quarter of the 20th century- all labour laws have experienced similar challenges (e.g. recently, economy claims, the changing of the dominant ideological paradigms, the clamour of markets' deeper internationalization, new hard and

It remains to say that, in my opinion, the various *particular ideas of labour law*, most of them including what we call the *historical idea of labour law*, exhibit a different proclivity to detaching from it[20], apparently due to the diverse condition of certain elements in those *particular ideas*.

In the following lines I will try to deliberate on the defining features that, in addition to those who form a part of the *basic or historical idea of the labour law*, are present in the continental legal system, no matter how much similar reflexions can be justified on some of these features in other legal systems, other *particular ideas* of labour law.

On the contract, again

We anticipate our certainty that *the labour contract is the cornerstone on which stands the labour law*[21], but we must admit that even if the contract marks the starting point of labour law, it is not sufficient to define it.

This centrality of the contract is consistent with the formation of a society that establishes equality between men and values the free agreements of will[22]. The labour contract took the worker outside of the police regulations that hitherto prevailed in continental Europe, and of the Master and Servant laws in England[23], but at the same time placed him in a singular condition of dependence/ subjection/ submission regarding his employer. For some authors it would be therefore a false achievement, because the freedom of contract was never really available. I do not share that exclusionary view: rather than a "false achievement" it is, in my opinion, an *incomplete accomplishment* since the component of freedom that it indeed has appears nevertheless to be insufficient to materialize a tie between equals.

The labour contract means freedom to the extent that it expresses the power that the man has over himself to engage his own efforts, but it also implies submission because it makes possible the dominance of the greater power of one man over another. *Labour law assumes the complex task of harmonizing that freedom factor enabled by it with, as expressed before, the latter submission factor that it attempts to limit.* It is not, therefore, that the labour law withdraws the contractual perspective[24], but recognizes its uniqueness, and precisely because of this characteristic, its

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organizational technologies of work and production, new ways of hiring and including human labour, among others) and, before, unique challenges according to each country, connected for instance to the different degree of industrialization, the state model, the type of dominant collective phenomena, the ideological imprint of social phenomena and the prevailing juridical logic (Hepple, in op. & loc. cit. in note 3). Therefore, there are challenges raised in differentiated or coincidental forms, and the answers are not always the same.

20 So we said it, as an hypothesis, in op. cit. in note1.

21 Alain Supiot says in "A faux dilemme: la loi ou le contrat? Droit Social No. 1 January 2003, p. 59: "Ce droit (le droit du travail) est né de l'irruption du travail dans la sphère du contrat. Arraché aux disciplines des corporations, le travail est devenu un objet d'échange dès 1789 et la contractualisation des relations de travail est donc de ce point de vue une chose aussi ancienne que fondamentale…".

22 Conf. Veneziani, Bruno, in op. cit. in note 8

23 See Deakin, Simon and Frank Wilkinson (2005) "The law of the Labour Market. Industrialization, employment and legal Evolution" Oxford University Press, Oxford.

24 This withdrawal was suggested by Baylos in " Derecho del trabajo, modelo para armar". Ed Trotta, Madrid 1991, by attributing to the contractual perspective a "formalistic and patrimonial" character because it involves the recognition of a the loss of the freedom.

insufficiency to contain by itself such sensitive ties. It tries then to complete this perspective, as we shall point out later, by using a set of techniques that aims to redistribute the powers and, in some *particular ideas,* by incorporating as a foundation the community perspective which results, in these cases, in the construction of the contractual-communitarian hybrid evoked by Supiot[25].

It is worthwhile, therefore, to insist that *the labour contract and its limitation are an inseparable part of that historical idea*. The collective phenomenon, which despite its wide dissemination integrates better the so called *particular ideas of labour law*, not undermine that centrality. Rather on the contrary, it adds *more contract,* and more limitations (it is subject to the limitations imposed by the law, imposes its own limitations on the individual contract).

Inside it, the idea of dependence

From the recognition of the contract, the theoretical constant of attributing to the labour law the condition to be *a system of rules applicable to dependent labour relationships* [26] is restated, with the uniqueness of being the only tie that places a individual, if only for institutional necessity, under the jurisdiction of another individual[27], legitimizing thereby one characterizing status of inferiority[28].

Let's look with a little more attention to the idea of *labour dependence*. Even if I am aware that there is a risk of become isolate in the inevitable narrowness of simplifications, I think it is valid to characterize the process of construction of the concept of labour dependence as the product of the recognition of the notes that historically characterized the way in which the typical industrial worker and the holder of the productive organization were tied in the framework of the first industrial revolution. In other words, first was the tie (what an Aristotelian evocation!) and only after the theoretical construction of the concept, which uses the factual contents recognized in each of those typical individual relationships, reproduced constantly in those of the same type, and transferred inductively to higher levels of abstraction, configuring thereby a reference "matrix" that would only be a conceptual and abstract projection -the replica- of the concrete material entity of the subordinate industrial worker

From there, the determination of the existence of a relationship of dependence in every specific tie is the result of comparing and adjusting it to the "matrix" or, as in a less mediated way (and anticipating the conceptual "expansion" that I will describe next), D 'Antonna[29] proposes "... closer to a judgment of similarity, case by case, whit the embodiment of a subordinate worker reconstructed empirically, that to a judgment of inclusion in a legal type".

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25 In Supiot, Alain, (2004) Le droit du travail, PUF (Que sais-je) Paris.

26 From the earliest times, Sinzheimer himself, in op.cit. in note 15. More recently, and on behalf of all, Antoine Jeammaud, "Le droit du travail en proie aux changements" (text for a collective work on the changes of law, under the direction of Michel Miaille, forthcoming 1997, in the Collection Droit Et Societé à LGDJ.

27 See, Francesco Santoro Passarelli (1963) " Nociones del Derecho del Trabajo" Translation of the 14th Italian edition by Fernando Suarez Gonzalez.

28 The Sinzheimer's idea of "dependence" is a product of Marx and Renner conception, in the sense that the capitalist property implies a domination over the individuals (Bob Hepple, in his Introduction to La formación del derecho del trabajo en Europa" (Bob Hepple, comp.) Análisis comparado de la evolución de 9 países hasta el año 1945. Colección Informes y Estudios, MTySS, Madrid 1994).

29 In D'Antonna, Massimo, "La subordinazione e oltre. Una teoria giuridica per el lavoro che cambia", *in "Lavoro subordinato e dintorni. Comparazione e prospettive"*, a cura di Marcello Pedrazzoli, Ed. Il Mulino, Trento, 1989, p. 43.

It is necessary to say, in addition, that this *matrix* implied also *a stylization of the social dominant type* that should allow the subsequent incorporation of other subjects demanding protection[30], making possible the expansive trend of labour law.

In spite of that condition of implicit inequality in the tie of the labour dependence, the course of the time and the advance of the social ideas were not enough to abolish it, but just to improve the design of the limits that restrain it, *one of whose more recent manifestations is, without doubts, the recognition of fundamental rights of the individual at work.* To my way of seeing, the modern speeches on abolition of the dependence, located principally in a very good Anglo-Saxon literature about labour law[31], only manages to shift the dependence in an argumentative way, as this concept still remains a dominant reality though maybe it expresses itself in diverse modes. *It seems to me that what happens rather is that we have not managed yet to rewrite it in a way closer to some of its most current expressions.*

Once the dependence is thus conceived, and denoted by that evoked status of inferiority (of the worker), it becomes clear that the same order that legitimizes it -since while the law does not create it, it certainly recognizes and confirms it- should give it a treatment that seems to be appropriated, after confirming the worthlessness of the usual helps of the private law, informed by the idea of the equality of its subjects. Of there so -of the idea of the inequality and the consequent inferiority of the provider of the service- comes the recognition of an overriding public interest in the observance of labour law, and the consequent need to incorporate techniques nearer to the public law, such as the imperative character of standards, the idea of public order and, finally, the active intervention of the state[32]. It is needless to say, in addition, that there is also a logical sequence between the dependence /submission pair, the collective response, and the collective subjects that take part in its formulation, all ideas that explain themselves reciprocally and successively.

It is valid to bring to question, at least as an hypothesis, that the opposition dependent work/

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[30] Workers in the commercial sector and in other services, agricultural workers, domestic workers, civil servants, etc. For Rodríguez Piñero (in *"Contrato de trabajo y autonomía del trabajador"*, registered in "Trabajo subordinado y trabajo autónomo en la delimitación de las fronteras del derecho del trabajo", Estudios en homenaje al Profesor José Cabrera Bazan, Ed. Tecnos y Junta de Andalucía, Madrid 1999), this separation from the social model (*the stylization I have just evoked*) allowed to build a general and universal category of worker, extremely wide, which overflows and exceeds the initial sphere of the industrial workerism "... although this one long remains as the ideological model of reference".

[31] See Freedland, Mark and Kounturis, Nicola, (2011) "The Legal Construction of Personal Work Relations", Oxford Monographs on Labour Law, OUP; Freedland, Mark, (2007) "Developing the European comparative law of personal work contracts", in 28-3 Comp. Lab. L. & Policy J. 487; Deakin, Simon, "Does the "Personal Employment Contract" Provide a Basis for the Reunification of Employment Law" Industrial Law Journal Vol 36 No. 1 March 2007 pp. 68-83; Linder, M (1999), "Dependent and Independent Contractors in Recent U.S. labour Law: An ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness" 21 Comp. Lab. L. & Policy J.187. These authors' constructions differ from each other, and so do their respective conceptions of the path that labour law should take - in some cases they are even contradictory-; however, all of them coincide in questioning the traditional idea of subordination and contract of employment, and that is what is worth to point out here within the framework of the hypothesis constituting the subject of this reflection. Until now, the law does not seem to have come this far: the British figure of the 'worker' as an individual enabled to access to some rights (see its conceptualization in G Davidov, 'Who Is a Worker?' (2005) 34 Indus LJ 2005, 57) and the one of the dependent contractor in Canada seem -mutatis mutandis- rather to recall the idea of the 'quasi-dependent' worker of the continental experience.

[32] Sinzheimer says in op. and loc. cit in note 14 that " … the Labour law opens a gap in the system of traditional law, by eliminating the separation between public law and private law and, together with the legal order of things, introduces a legal order of persons in the entire body of the Law ".

autonomous work has a virtuality that determines and defines labour law[33], preventing the future possibility to include labour forms that do not conform to this theoretical model, though it is true that the evoked type of dependence has been dominant in the historical conception of labour law. The formula that constituted the presupposition of application of the protection order [human work + legal-personal subordination] *implied in fact the difference of contractual power at the time of the fixation and preservation of employment conditions, since the dominant type was presented in this way.* In an elliptical and also pragmatical exercise, it was necessary then to stand on the legal side of the dependence, the more apprehensible one, to reach in fact the phenomenon always implicit of the imbalance of the contract subjects, conspicuous manifestation of economic inequality. If the type configured in that way tended to lose its dominant character, *it would just retain the status of being one of the variants* in which appears the formula that really demands a protection system: *[human work + contractual inequality]*. We have to say that this formula is not new; we think that it would be the truly defining feature. The need for protection has always found its deepest foundation in the terms of that binomial, *but the novelty (what is possible to notice today) is that the contractual inequality does not necessarily have to find in the legal facet of the dependence its more visible substantial "alter ego", its status of effective intermediary criterion*[34].

Meanwhile, it will be difficult not to notice a certain process that I would call *subjective weakening of labour law*, produced by converging phenomena such *as informality, delabourization*[35]*, vertical disintegration of the companies, fraud and flight (not always fraudulent) of the labour law, preference for self-employment, multiplication of ambiguous relationships* between other phenomena involving a gradual loss of representation of the dominant type of representation, everything which produces a process of contraction of the personal scope of labour law.

The labour law and the redistribution of power

The inequality of powers and the need to redistribute them

Because the worker is subjected to an unequal relationship, *the employer has since the dawn of labour law some powers which the worker lacks*. Certainly, it is not the legal system which establishes them as they are pre-existing powers and, it has often been said, labour law only recognizes them ... to submit them to its techniques of limitation[36]. The powers of the employer, therefore, form part of the basic configuration of labour law and constitute the foundation of some of its defining features, such is the one examined in this section.

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[33] A defining character that Alain Supiot attributed to it in "Introducción a las reflexiones sobre el trabajo" International Labour Review vol. 115 (1996) No. 6 p. 665

[34] With that endlessly amazing ability to anticipate, Deveali said (almost 50 years ago!) (Revista Derecho del Trabajo 1953 p. 53) that "... it is our opinion that the concept of legal subordination ... is destined to disappear ...". That prediction was based on the idea that "... the concept of legal subordination adopted to characterize the labour contract does not always match that of *hypo-sufficiency*, which is the true ratio of the labour laws ..." Read: when the dominant factual coincidence between economic inequality and legal subordination was no longer systematically verified, this criterion will lose its qualifying effectiveness; at that moment (has that moment come?) it will be necessary to "shuffle and deal again."

[35] Neologism that means to deal -in the law, in the collective agreements- with a dependent tie as if it were not.

[36] Ojeda Avilés says in “El nacimiento del contrato de trabajo en el siglo XIX”, Revista Derecho del trabajo (Buenos Aires, Ed. La Ley) n°. 2, 2011, pp. 235 to 246, that the birth of the labour contract requires recognition of two important aspects: first, that its core is the hierarchical power exercised by the employer over the workers, second, that the labour contract emerges to highlight this aspect and to seek a real balance through the internal counter-powers of the contract immediately afterward

Almost with the intention to return to the *basic and historical idea of labour law* one could make at this point a sort of dogmatic corollary that somehow expresses and completes it: labour law is a law based on a). inequality as a factual presupposition b). equality in dignities as an axiological counterpart and c). the construction of equilibria as an instrument of accomplishment.

There is a widespread consensus, in effect, in the sense that labour law aims at the *construction of equilibria*[37], in a context where *equality* is an axiological foundation but by no means the subject of a possible accomplishment by the parties involved in the labour contract, since, as wisely noted, the system tends to the preservation of the established order[38]. It remains to add that the construction of this structural balance is not simple at all, since it must be articulated with another one which in fact also composes it, according to which the system must also ensure a balance between the freedom of enterprise -and its productive capacity- and the protection of the wage labour[39].

Once understood that the work contract establishes a power relationship, it seems clear that the way to achieve the sought balance is to make a redistribution of the power energies situated inside this tie. In the logic of the "*particular ideas*" of the labour law, each system achieves that redistribution in a different way[40].

How is this redistribution of power carried out?

In the framework of the individual relationship the issue is to expropriate the bargaining power of the employer by means of the limitation rules that every system conveys in its own sources and resources: limitation on the working conditions and limitation also in the exercise of the powers of the employer (including among others, to organize and direct the company, to apply sanctions, to specify and change working conditions, to regulate). Other techniques in this field propose to provide the worker with a better relative position of power, e.g. facilitating the direct access to benefits that the employers were reluctant to give, increasing the fines and indemnities in favor of the employee and at the expense of the employer who attacks in reprisal, stating the absolute nullity of the acts performed in fraud to the law and the possibility of reversion of those that had been committed [41].

In the collective frame the redistribution of power materializes in the recognition of the collective action -already a way of legitimizing a conspicuous manifestation of power- and in the promotion

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37 In behalf of all authors, Manuel Carlos Palomeque Lopez in "La función y la refundación del DT", published in Relaciones laborales (Madrid)" Año XVI, N°13, July 8th, 2000 pp. 21 and following.

38 Conf. Otto Kahn Freund in op. and loc. cit. in note 14.

39 Conf. Palomeque in op. and loc. cit. in note 37.

40 Alain Supiot, in "Introducción a las reflexiones sobre el trabajo" in Revista Internacional del Trabajo vol. 115 1996 n° 6 p. 657 and following, evokes the way the French and German legal orders conceived the redistribution of powers (we quote him here only to illustrate these diversity): the French approach, now as then, raises the problem in terms of individual rights guaranteed by the public powers, the German system, as a result of actions performed by organized communities.

41 It is clear that the techniques that orchestrate the resistance to the employers' circumvention also form a part of this pattern (orientated to the redistribution of the power, but assume a dimension so characteristic and widespread that justifies that they are recognized, in addition, as an expression of one of the identifying features of the labour law; I will return on them immediately.

of the union power by means of varied instruments.

In the procedural sphere it expresses itself in the consecration of a special jurisdiction that incorporates the principles of protection, in the improvement of the probationary position of the worker (presumptions, appraisal of the omitted forms in favor of the worker), in the avoidance of the economic restrictions by means of gratuitousness (free litigation expenses, fee waiver, communications free of cost), in the dismissal of agreements that imply resignations, in the recognition of reality above agreements or qualifications.

In the administrative field, finally, controlling and punishing the employers' breaches, restricting the transactional or release agreements legally improper, etc.

A system "under fire", configured for resistance

It is a truism to say that labour law is a law "under fire" in at least two fronts.

Labour law is indeed attacked from the perspective of its own theoretical legitimacy; to say it very synthetically, from its compatibility with the criteria of efficiency and flexibility and with the appropriate functioning of the labour market and the employment, and of the markets of products. The asymmetries that labour law provokes between "*insiders and outsiders*" are evoked as one of its deficits, among other imputations not less known. From that perspective, it is argued that (internal and external) labour markets are counterbalanced by adjusting quantities (labour supply and demand) or prices (wages), preferably both of them, and that they work better as these adjustments quickly respond to the changes in the markets of products and to the situations of crisis; within that framework, labour regulations are perceived as interfering factors that disturb the spontaneous adequacy of supply and demand in the market and, concretely, as a cost that must be controlled and limited and, in all that it is possible, be suppressed (deregulate).

All this items belong to a theoretical, economic, philosophical and political debate that we are not intending to approach today

There is another front of assault, not theoretical but rather directly operational. Labour law is attacked to neutralize its effectiveness[42] and efficiency. Along with its *normative weakening*, that is sought through demands of flexibility and deregulation -of reduction of its regulatory intensity- an *applicative weakening*[43] is also sought from immemorial time by limiting the significance, the power and the competences of the actors who are responsible for the application of labour law and social protection (ministers of work, labour inspection, special courts, etc.) and of the social actors themselves (weakening and loss of influence of the unions), along with strategies more directly elusive, as the labour fraud, the vertical disbandment of the companies, the flight from labour law and other ways of avoiding the effective application of its standards.

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[42] In "Droit du travail" (2000), Jean Pelissier, Alain Supiot and Antoine Jeammaud, 20th Edition Precis Dalloz p. 38 paragraph 41, consider the Labour law as "un droit exposé à l'ineffectivité". The standards of the Labour law seem to be particularly exposed to the ignorance and to the rejection of their application in a private space, where a not shared employer's power is often imposed.

[43] I characterized these processes of *normative weakening* and *applicative weakening* together with that of *subjective weakening* in my "Labour Subordination and the Subjective Weakening of Labour Law", in *Boundaries and frontiers of labour law. Goal and means in the regulation of work"(*Guy Davidov and Brian Langille, comps.), Hart Publishing, Oxford, 2006.

It does not seem to me that other legal systems that relate private individuals in that imperative dimension are submitted to the same type and intensity of attacks and challenges.

That intensity can be explained perhaps by the systematic conflict of interest underlying the labour phenomenon itself[44], which does not exist in the various manifestations of public law -to which belong most of the imperative standards- or in other areas of private law[45]. Neither it seems to us that has a minor incidence in this matter the "semi imperative" character (that of "relative imperativeness" of these rules, which restrictive effects play only in favour of one of the parties, attracting the rejection of the remaining one.

It is, in short, a system that legally recognizes and replicates the basic conflict and *take sides*, at least in the way that its rules are configured.

All this may have an aptitude to explain the intensity of the attacks that affect it and thereby contribute to its *applicative weakening* and, correlatively and referred to what interests us here, serves to justify *the enormous apparatus of resistance -the richness and centrality of its set of instruments - that labour law has incorporated, and that in my opinion has reached such a significance that constitutes one of the features that denote and define what that system is like.*

Just by way of example it is possible to mention, since forming a part of the "technology" of that *apparatus of resistance*, the reality principle and its effects, the fraud and the simulation raised as real "counter-institutions" of labour law and the techniques deployed to limit them, along with other techniques that have an "anti-fraud" function, the special guarantees to ensure the access of workers to their rights, the imposition of diverse forms of passive solidarity between diverse counterparts of the worker, the imperative nature of the contractual type and the restrictions to the free qualification of the labour ties, the nullity of the transgressive acts, the presumptions and other mechanisms to facilitate the probatory activity of the worker, all techniques which are arbitrated to discourage and to prevent retaliation against the worker who exercises his rights and, of course, outside the standards themselves, and in central dimension, the labour inspection and the unions' comptroller action.

In short, *along with the techniques used to operate the redistribution of the powers, to which we referred earlier, labour law exhibits a huge institutional arsenal conceived to ensure the implementation of its standards, that constitutes a prominent and defining feature of that system and explains, in a myriad of laws, regulations and jurisprudential and administrative mechanisms, a good portion of its operations and, therefore, of its "way of being".*

The quantification and the quantitative element

The quantification of the labour provision is a condition to the possibility of conceiving an abstract notion of labour that allows its measurement and exchange on the market. It was present since the advent of capitalism and the necessity to reward the work of free men, and it is exacerbated, says Supiot, when it serves, from the last quarter of last century, as an instrument of the idea of a *total market*, in order to found the policies in purely quantitative considerations detached from the

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[44] One of the "particularisms" pointed up by Barbagelata in op. cit. in note 5.

[45] The family law, for example, no matter how institutionally complex it is, does not recount a such fundamental conflict; nor, at least in the same historical dimension, other contractual experiences frequently intervened by the rules, such as can be (in certain circumstances, contents and contexts) the leasing, the mutual or the insurance regimes.

possibility of dogmatic determination of the values involved in the provision of human work[46].

But long before this interested exercise of maximization of the quantitative dimension, *quantification* was a frequently dominant technique proper of the labour protection system: to price a good portion of the rights -the quantitative element about which Mario Deveali was speaking in the first half of the 50s[47]- was *also* intended to facilitate the access to protection, avoiding the otherwise inevitable necessity to go to the courts to establish the quantification of the rights. If it involves facilitation in the access to the rights, it is necessary to admit that it always served also to the prevailing interest of the employer of assuring the predictability and insurability of costs, configuring therefore here one of the manifestations of ambivalence that is attributed to the labour law standards from a functional logic[48].

That technique of imposition of a system of prices has become so a *dominant feature* in many *particular ideas of labour law*, without visualizing this recurrent numerical trend - prices fixed in cash and/or mathematical formula, in coverage periods, in rest periods, etc.., - it would not be possible to explain or understand many labour systems.

In conclusion we must say that this technique is not necessarily the one that should be in question, but the options of value applied in each case to determine its terms, and the legitimacy and fairness of the way in which the interests at stake are arbitrated.

The uniqueness of the system of sources and its collective component

The sources system itself

The system of sources is a key element in the characterization of labour law. In effect, a labour system *is as it is*, depending on how its contents are distributed among its various sources. In particular, from the continental logic, according to the space they occupy in three of them: the law (whose role in the continental system is of utmost significance), the products of the collective autonomy, and the individual labour contract.

This is so much the case that the changing trends of the labour system usually involve a question of sources. The relatively recent - and still current - demands for *flexibility* demonstrate it dramatically. As has often been said, they imply a systematic pressure orientated to reduce the contents of the law (to make it more "flexible", and at its maximum expression, to suppress it) in order to transfer these contents to the field of collective autonomy; and in the more pronounced variations, they seek to reduce the contents of the law and of the collective agreements to open major spaces for the exercise of individual autonomy. All these practices are conducive with what we evoked some lines above under the designation of "normative weakening" of the Labour law.

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[46] See Alain Supiot (2010) "L'esprit de Philadelphie. La justice sociale face au marché total" Seuil, pp. 59 and following.

[47] Conf. Deveali, Mario L. (1954) , "El Elemento cuantitativo en las normas del Derecho del trabajo", in "Estudios de derecho del trabajo en memoria de Alejandro M. Unsain", Buenos Aires, Ed. Ateneo, pp. 123 and following.

[48] On the ambivalence of the labour Law, see, among others, Jeammaud, Antoine (1980) in his contribution to "Le Droit capitaliste du Travail" Collection Critique de droit , Presses Universitaires de Grenoble. Also, in a certain dimension, G. Lyon-Caen in his : "Le droit du travail. Une technique réversible" when he says "...le droit du travail est donc constitué de règles et d'institutions à double sens et toutes réversibles, qui peuvent coïncider avec les intérêts des entreprises ou des salariés selon qu'on les présente sous une face ou une autre..." ; the latter would be a "micro" version of the broader concept of ambivalence that explains the historical distrust of Marxist thought regarding labour law.

From that perspective, the system of sources could be denoted by a series of continua, and a particular national system can be described and characterized by its own place inside each of them. Such continua are, among others certainly possible:

a) Precisely, the continuum determined by the mode in which the contents are distributed between the law, the collective agreement and the individual contract; by the way, not every position in this continuum is consistent with the *historical idea* and with some *particular ideas* of the labour law.

b) The continuum between the state and the contract (more contract means less state intervention and vice-versa); the continental system, for example, is placed at an inclusive point of more law, whereas the *common law* refers to more contract.

c) Still in the relationship between state and contract, the continuum that goes from the law's most wide acceptance of substantial contents, to the mere legal fixation of rules of procedure that allow that the autonomy should be the one that determines those contents , a process called proceduralization.

d) The continuum between maximum centralization and maximum decentralization of its various sources

e) The continuum that goes from the maximum to the minimum degree of international influence, measured in the force and the compliance with the international labour standards and other expressions of the international labour law.

From a functional perspective, it is pertinent to note a singularity -perhaps the most marked- of the system of sources of the labour law: it is, above all, *a system of limitations to the autonomy of the will (of the individual will, generally, and also of the collective one, in the systems of continental root)*. It is where *the exercise of redistribution of powers mentioned above is normatively achieved*.

The collective phenomenon and the sources

This scheme of limitations determines that when the moment of choosing the applicable standard comes -when operates the order of precedence of rules - we have always to resort *to the standard of minor hierarchy that establishes the major benefit for the covered workers*. Certainly, this precedence of the minor hierarchy standards does not imply in any way to leave the hierarchical approach, on the contrary, if that is the order of precedence is because it is the one that (implicitly) prescribes in each case the standard of superior hierarchy as it is configured as a standard of *relative imperativeness.*

Certainly, the system of sources of the labour law owns much of its singularity and also of its always remembered plural character to the phenomena of collective action, and to its juridical framework (the collective labour law). It is precisely on that order of relationships that it can be said that if the worker is subordinate to the power of the employer (aspect that we have considered above), the latter is, at the same time, a power coordinated with that of the unions' organizations. In this way, the mutual obligations between the employer and the worker are set unilaterally by the employer, bilaterally by the collective negotiation and finally, by means of the law, in an imperative way for both of the aforementioned levels[49].

[49] See Otto Kahn-Freund in op. and loc. cit. in note 14.

Of course, the phenomenon of the collective action is absolutely determinant, in general, in the configuration of the labour law and, especially, in that of the system of sources that concerns us now. Certainly, the role of the collective phenomenon as *an apparatus producing a normative typology* contributes to the sharpest singularization of labour law but, it has to be said, it also contributes to the affirmation of the effectiveness of the law that "... everywhere ... depends on the unions much more than these depend on the efficiency of those" [50].

It is mostly thanks to the collective phenomenon that it can be argued that labour law is far from being just a product of the action of the state powers; it is also the result of professional groups (of unions and employers), of labour regulations imposed by employers within the limits fixed to their powers, of customs and practice of the unions, etc. *It is worthwhile to point the paradoxical configuration of a system such as labour law, closely penetrated by the state intervention, the public order and other manifestations of the public law, which has nevertheless an out-standing presence, - dominant in some systems-, of the participation of private subjects in the formation of its systems of sources.*

By means of conclusion

It remains to say that this exercise of theoretical and institutional recognition that we have just achieved does not have a purely descriptive interest; on the contrary, to know which are those defining features helps to "measure" the impact of the transformation processes ongoing for several decades, in the understanding that *if these processes operate on those features, the resulting changes should be more substantive and radical - the labour law that changes, changes then in a more intimate and profound way - that if the changes operate on other traits that, as important as they are, can be considered merely contingent or less structural.*

These *defining features* are, moreover, some other keys of comprehension of the labour law[51] that allow us to travel across it, through its more profound and deep-rooted identity signs.

Finally, beyond the greater or lesser success achieved in the identification of some of these *defining features* of labour law - rather, of one of its *particular ideas* - this essay intends to draw attention to the usefulness of such a distinction to follow-up the intensity of the transformation processes experienced by a labour law that changes and, even more simply, to better understand it.

[50] Conf. Baylos, Antonio, also quoted in op. and loc. cit. in note 13.

[51] Alain Supiot (2004) in " Le Droit du Travail" Collection Que sais-je » PUF, Paris, calls them "clés d´inteligibilité" .