

# Workers' rights. A new perspective

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## **Abstract**

*What will be the effects of the current trend in Labour Law of emancipation from the constraints of contractualism? Could the worker be regarded as other than a contracting party and his/her actions be addressed beyond purely contractual rights and obligations? The worker does not limit himself/herself today to the performance of the work tasks, but acts as a citizen in the workplace; it is a reality calling for new theoretical approaches, away from the contractual constraints. The individualization of labour law appears as the result of the evolution of the rules of labour law, which contributes to promoting the figure of each employee as an independent and unique human being. This paradigm shift also generates changes in the relationship between labour law and human rights protection; none of the two being currently estranged from the orientation towards the individual (and not to the collectivity). Labour law cannot resist to post-modern, individual-centred approaches that shift the focus from the group – to persons, recognizing (and celebrating) the uniqueness of each of them. The paper offers an approach to the rights of the worker from the perspective of human rights, by investigating the advantages and disadvantages of such an extension. It seeks to identify the obstacles between the two categories of rights and the extent to which they could be overcome.*

**Keywords:** labour law, human rights, workers' rights, International Labour Organisation.

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## **1. Introduction**

By its nature, the employment relationship, since it exposes the worker to subordination, generates a type of vulnerability that labour law (through its legal and also contractual component – represented by collective labour agreements) seeks to compensate. Lately, not only has this disadvantage been maintained – as it derives from the nature of the employment relationship – but it has also been accentuated, as an effect of the new contractual arrangements present on the labour market.

However, there is a certain evolution which fundamentally marks the position of the worker in the employment relationship and even beyond it. It is the very profile of the worker, who has acquired new traits. Today, the contemporary worker asserts himself above all as a citizen, intervenes as a holder of the right to environmental protection, reacts on identifying acts of corruption and reports violations of the law. The worker of today is more educated, more involved in social and civic issues, asserts his non-patrimonial rights, such as the right to private life; she is, in fact, more sophisticated, more creative (which generates interesting problems of distribution of intellectual property rights in relation to the

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employer), has a clearer perception of their dignity, reacts to acts of discrimination and understands to participate in the social integration of minorities and disadvantaged people. Thus, from the perspective of labour law, the paternalistic vision of the last century should be abandoned. The strictly victimizing approach does not do justice to the contemporary worker.

The fact that the worker no longer strictly limits himself to the performance of contractual rights and obligations, but imposes himself as a citizen at the workplace (even the concept of "industrial citizenship" was created) calls for new theoretical approaches, in order get away from the contractual constraints. Because beyond the relation of subordination that characterizes the employment relationship, the employee does not cease to be a "person" and, furthermore, a human rights holder. And indeed, the penetration of the human rights protection movement in the sphere of labour relations is increasingly being noticed in the landscape of the legal literature today.

However, it must be pointed out that there are justified reservations in classifying worker rights as human rights. Opponents of such an approach are found in both camps: among the labour law theorists and also in the human rights literature. However, a vision that puts less emphasis on the contract and a greater focus on the person – can prove fruitful. The problem therefore deserves to be analyzed, especially in the context where its practical effects are not few.

## 2. Arguments

**2.1** It is usually stated that human rights differ from worker rights by their moral weight<sup>2</sup>. Thus, human rights would impose higher ethical standards than those of labour law. If we compare, it was argued<sup>3</sup>, the right to life, liberty or the prohibition of torture with rights such as fair pay or the right to rest leave, one would easily notice their different nature.

And indeed, the axiological perspective is frequently invoked when one considers the extent to which workers' rights are or are not human rights. But is there really a value difference between the rights protected by the branch of labour law and those protected in the field of human rights?

One of the arguments of those who say that workers' rights are not human rights is the seriousness of their violation. It would follow that a person is protected by human rights, when he cannot be forced to work; when he is employed he exercises a human right – the right to work – and also a human right is exercised during the course of the employment contract, when he is protected against discrimination or violation of his private life. Workers exercise a human right – the right to association – when they form a union. But as soon as the right is exposed to other (secondary force) violations such as unjust remuneration, unfair working conditions or unjustified dismissal, it remains subject to labour law.

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<sup>2</sup> H. Collins makes a detailed comparison of the two legal categories, finally concluding that human rights are different from industrial rights by: moral weight, universality, the level of standards and perennality: H. Collins, *Theories of Rights as Justification for Labour Law*, in G. Davidov, Brian Langille (eds.), *The Idea of Labour Law*, Ed. Oxford University Press, 2011, pp. 142-143.

<sup>3</sup> H. Collins, *op. cit.*, p. 142.

Only that the delimitation of what is serious or important from what is secondary can almost never be done precisely and generally; it depends on the circumstances of each violation, its effects, as well as on the geographical space or the cultural and moral customs of the society, at a certain time. Even violations of rights that have been recently established and in regional documents, such as the protection of migrant workers, can have dramatic consequences in terms of life and freedom.

Moreover, the relationship of subordination of the worker, as the debtor of the obligation to submit, can itself be a risk factor from the perspective of human rights, placing him in a position of greater vulnerability than he would be had he not been a worker.

As a result, the axiological criterion cannot always be used to distinguish human rights from those protected by labour law. The overlap points are too many and then, even rights such as those regarding pay, working conditions or dismissal – are in some cases expressions of the right to dignity itself<sup>4</sup>, here in the form of dignity at work<sup>5</sup>. Indeed, the wage claim can be more than a mere contractual claim governed by the rules of demand and supply and can even be interpreted through the lens of human dignity, which transcends purely contractual relationships. In today's society, work has an identity value and the payment of a certain salary can not have only economic effects, but it is also viewed in terms of social status<sup>6</sup>. So, the essential function of labour law has become precisely that of maximizing the dignity of the worker and optimizing his capabilities, within the working relationship<sup>7</sup>.

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<sup>4</sup> Dignity is sometimes seen as underpinning the entire construction of human rights. For example, JP Costa, *Human Dignity in the Jurisprudence of the European Court of Human Rights* in C McCrudden (ed.), *Understanding Human Dignity*, Oxford, Oxford University Press, 2013, p. 393; J Griffin, *On Human Rights*, Oxford University Press, 2008, p. 200. However, there are authors who consider that, on the contrary, the philosophy of dignity is distinct from the philosophy of human rights. For an analysis of the various theories in the matter, see, M.D. Linte, *Asupra demnității în drept și nu numai [On the dignity in law and not only]*, in the “Pandectele Române” [Romanian Pandects] no. 6/2011, p. 103-129, C. Sâmbolan, *Demnitatea în muncă [Dignity at work]*, CH Beck, Bucharest, 2017, pp. 114-119.

<sup>5</sup> But also the relationship between dignity as a human right and dignity at work is itself an object of analysis and doctrinal controversy. We just mention here that, while some authors consider dignity as a general basis for exercising workers' rights (M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations*, Oxford University Press, 2011, p. 372), others consider that the notion of dignity at work is narrower than that used in the sphere of human rights. (“For dignity to be fit for purpose in labour law theory and practice, it needs to be understood as a more complex conception than the one that Freedland and Kountouris appear to envisage, and a thicker one than human rights law appears to adopt.”) - C. McCrudden, *Labour Law as Human Rights Law: A Critique of the Use of ‘Dignity’ by Freedland and Kountouris*, in Bogg, A., Costello, C., Davies, A, Adams-Prassl J., *The Autonomy of Labour Law*, Hart Publishing, 2015, p. 305.

<sup>6</sup> For developments, R. Dimitriu, *Dreptul muncii. Anxietăți ale prezentului [Labor Law. Anxieties of the present]*, Rentrop and Straton Press, Bucharest, 2016, p. 317.

<sup>7</sup> M Freedland and N Kountouris, *op. cit.*, p. 49. For an analysis of the principles of labor law, see I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii [Theoretical and practical treaty of labor law]*, Universul Juridic, Bucharest, 2017, p. 82-96; A. Athanasiu, A.M. Vlăsceanu, *Dreptul muncii [Labour Law]*, CH Beck, Bucharest, 2017, p. 18-33, Al. Țiclea, *Tratat de dreptul muncii [Treaty of labor law]*, Universul Juridic, 2015, p. 55-63, L. Dima, *Dreptul muncii [Labour Law]*, Ed. CH Beck,

In essence, every time when in the history of labour law, employees have gained the recognition of a new right, they have thus regained a new dimension of dignity. The right of the worker to dignity at work is therefore complex; it supports a whole range of workers' rights. The human nature, the quality of the worker as a person should prevail in relation to any other circumstances of the work performance, and the relation of subordination or the proximity of those next to whom he works for does not erode, during the working hours, the quality of holder of human rights.

**2.2** Secondly, human rights would be universal and perennial, as opposed to worker rights, who have a qualified subject and are fundamentally linked to a certain historical period.

Moreover, sometimes workers' claims can even collide with human rights. This is the case, for example, of protests against the closure of polluting companies, which naturally results in job losses. It is the role of the society organized as a state to step in, with respect for the right to a healthy environment, even at the expense of sacrificing the rights or interests of the workers.

Nevertheless, workers' rights also have a series of "invariables" from which one cannot abdicate, regardless of the historical period. It is true they evolve, changing with society itself, but so do human rights themselves. New rights, such as those of immigrants or refugees, make their way within the perimeter of human rights, as the change in social realities requires it.

In addition, we note that some of the human rights are exercised only by qualified subjects, such as prisoners or refugees. The mere fact that a right is not universal in nature, but exercised only by qualified subjects, does not take it out of the realm of human rights<sup>8</sup>.

As a result, although it is true that the holder of workers' rights is a qualified subject, he is under protection not necessarily as a contractual party, but as a human being, who is, in fact, in a specific situation.

**2.3** It was also shown that the place of the legal act – as source of law – is different in the two approaches: while in the case of labour law it represents only one of the sources of law, together with collective labour agreements, on the contrary, the human rights protection movement is profoundly legalistic<sup>9</sup>. In other words, the main source of law in the case of human rights is the law, having as its basis international and regional sources, which enshrine a series of freedoms generally recognized as the basis of the functioning of the society as a whole. While in the case of labour law, negotiated sources are as important a basis as the law itself, which in turn has the particularity of being the result of negotiation between social partners. The rules of labour law are thus a fruit of the mutual

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2017, p. 16-19, S. Panainte, *Dreptul individual al muncii [Individual Labour Law]*, Hamangiu, 2017, p. 19, F. Roşioru, *Dreptul individual al muncii [Individual Labour Law]*, Universul Juridic, 2017, pp. 168-235 etc.

<sup>8</sup> For further analysis, V. Mantouvalou, *Are Labour Rights Human Rights?*, in "European Labour Law Journal", Vol. 3, no. 2/2012, p. 163 ff.

<sup>9</sup> K. Kolben, *Labor Rights as Human Rights?* in "Virginia International Law Review", vol. 50, 2010, p. 476.

compromises made by the social partners, while human rights are incompatible by their nature with the idea of compromise.

However, we cannot help but notice that in the sphere of human rights there is a certain "game" of mutual concessions. Along with the "actual rights" (such as the prohibition of forced labour, protection against discrimination, the right to trade union association, the right to data protection etc.) we also encounter a series of "aspiration-rights"<sup>10</sup>, the degree of recognition depending on the concrete possibilities of each country. The actual rights are exercised immediately and independently of the economic situation of each country, while the precise degree to which the aspiration rights are exercised can only be evaluated in relation to the economic context of each country. If, on certain coordinates of time and space, one can say whether an "actual right" was violated, in the case of "aspiration rights" the violations are somewhat more difficult to establish. The correlative obligations can be in the first case obligations of result, and in the second case, of aspiration-rights, obligations of diligence.

It is up to national legislation to determine, in concrete terms, what are the limits under which aspiration-rights are considered breached. This inevitably entails the possibility of prioritization in their recognition – as a prerogative of the political decision-makers in each country, practically an element of negotiation also found in the affirmation of this category of human rights.

**2.4** Probably the most relevant criticism that is brought to the process of assimilating worker rights with human rights derives from the confrontation of the individualism specific to the human rights branch with the collectivism of labour law.

Indeed, with regard to civil law, from which it emerged, the branch of labour law brought with it a significant peculiarity: the possibility of one of the contracting parties to negotiate and act not only individually, but also collectively, thus compensating, by the force of the group, the power imbalance of an individual negotiation. Thus, one of the essential components of labour law was born, i.e. the collective labour law, understood as the totality of the regulations of relations – peaceful or conflicting – between the workers' group and the employer<sup>11</sup>.

However, in a postmodern universe, in which all areas of knowledge are increasingly addressing the individual, and not categories of individuals, the theory of labour law also acquires a new configuration. "Standard" employment contracts are often replaced by atypical, specific contracts, individually adapted to the personal needs of the employee, respectively to the production needs of the employer. The employees no longer express themselves with a single voice; they are no longer driven by identical interests, but convey a wide variety of

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<sup>10</sup> For an examination of these approaches in human rights theory, see Judy Fudge, *The New Discourse of Labour Rights: From Social to Fundamental Rights?*, "Comparative Labor Law and Policy Journal", vol. 29, no. 1/2007.

<sup>11</sup> For developments, R. Dimitriu, *O perspectivă asupra dreptului colectiv al muncii [A perspective on collective labour law]*, "Revista Română de Dreptul Muncii" [„Romanian Journal of Labour Law”], no. 7/2010, pp. 9-19.

possibilities and aspirations. Could they still be satisfactorily and integrally included in a collective labour agreement? Today, in the age of individualism, the approach centred on the collective labour agreement, which involves the expression by the employees of common options in relation to the employer, no longer covers entirely the need for regulation.

We notice, for example, the way teleworking, working at home, relocation of the company – removed workers from one another and diminished the collective power they once enjoyed in the enterprise.

Indeed, for a long time, labour law was tailored to suit the interests of the "universal worker" – the prototype image of an employee who has the most common traits, thus being an exponent of the majority (in terms of identity, ethnicity, gender, age etc.) rather than the minority.

Of course, the universal worker was, and still is, a fiction, any regulation that starts from this image automatically abandons many (most) of the attributes specific to each real worker in particular. And the current trend seems to be, on the contrary, one that is directed at rediscovering the real worker, different from his colleagues, characterized by a series of special interests that give specificity to the negotiation of the employment relation. To value the individual does not mean to reincorporate labour law into civil law, nor to opt for a *civil-esque* interpretation of the employment contract. The space left to the individual will in the arrangement of the labour relations still has significant limits, and the rehabilitation of the employee-individual did not cause the restriction of the rules of public order.

However, the idea of the "individualization" of labour law<sup>12</sup>, as a form of recognition of the individual rights of the employee, independent of his belonging to a certain group, is increasingly articulated<sup>13</sup>.

The focus on the individual and on his personal interests and aspirations, distinct from those of the others, has sometimes been borrowed and adapted to the labour law from other areas of activity. Thus, indeed, the management of labour relations, in its new, individualizing form (individualized work rate, individualized work schedule, etc.), has created changes in the regulation of the legal working relations and of the specific contractual forms. The recent management structures of a modular type, characteristic of a digital civilization, allow today the affirmation of a new type of autonomy for the worker.

The individualization of labour law thus appears as the result of the evolution of the rules of labour law, which contributes to promoting the figure of each employee as an independent and unique human being.

This paradigm shift also generates changes in the relationship between labour law and human rights protection; none of the two being currently estranged from the orientation towards the individual (and not to the collectivity). Should labour law be a branch of law that is resistant to post-modern, individual-centred approaches that shift the focus from the group – to persons, recognizing (and

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<sup>12</sup> On the tendency of individualization in labor law., R. Dimitriu, *op. cit.*, p. 204 - 209.

<sup>13</sup> A. Supiot, *apud* P. Adam, *L'individualisation du droit du travail. Essai sur la réhabilitation juridique du salarié-individu*, Librairie Générale de Droit et de Jurisprudence, Paris, 2005, p. 21.

celebrating) the uniqueness of each of them? I would say that no; the roots of labour law might have been collectivist, but its future looks rather individualistic.

### 3. The sources of human rights - possible sources of labour law?...

International and regional documents such as: Universal Declaration of Human Rights, International Human Rights Covenants, European Convention on Human Rights, European Social Charter (revised), Charter of Fundamental Rights of the European Union are recognized as a major source of human rights (without the list being exhaustive).

There is widespread controversy over the extent to which human rights are *all* rights enshrined in these sources, or *only* those rights. In essence, a right does not become a human right because it is established internationally, but it is established in recognition of a pre-existing condition. But by the fact that they are recorded in these documents, either with normative or programmatic value, their importance and visibility increases significantly.

It is no less true that there is no consensus in the legal literature - regarding the list of human rights themselves, and even less about which of the rights of the worker could be part of this list. However, we can notice that some of the rights unanimously recognized as human rights are undoubtedly workers' rights, being taken over by the national legislator and detailed in the internal labour law. Thus, in these sources, we find human rights such as:

- prohibition of slavery and forced labour;
- the right to work;
- the right to dignity (in work);
- protection against discrimination, equal treatment and equality between women and men;
- respect for privacy and protection of personal data;
- fair work remuneration;
- the right of association, trade union rights, the right to negotiate and collective action;
- the right to fair working conditions and the right to rest;
- the right to information and consultation;
- reconciling family life with professional life, equal treatment of workers with family responsibilities, etc.

In general, human rights are classified into civil, political, economic, social and cultural rights. The rights that reverberate on employment relationships often have a mixed nature and are the result of the combination between these categories. Indeed, although workers' rights are traditionally regarded as subsuming the social, from the second generation of rights, their sphere goes beyond these boundaries<sup>14</sup>.

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<sup>14</sup> Some of them also reverberate in the rights of the third generation (solidarity rights). Some authors argue that, with the new information technologies, the emergence of "fourth generation" rights related to digitalization should also be discussed. See, L. Favoreu et al, *Droit des libertés fondamentales*, Dalloz, Paris, 2015, p. 39. On that occasion, in the context of teleworking and use

Notably, the sources referred to above are added to the Fundamental Conventions of the International Labour Organization, regarding:

- freedom of association and the effective recognition of the right to collective bargaining;
- elimination of all forms of forced or compulsory labour;
- effective abolition of child labour;
- elimination of discrimination in employment and occupation.

According to the ILO Declaration on the Fundamental Principles and Rights of Employees in 1998, all members, even if they have not ratified the Convention in question, have the obligation – as a result of their mere membership in the organization – to respect, promote and apply in good faith and in accordance with the Constitution the principles regarding the fundamental rights that are the subject of these Conventions<sup>15</sup>.

Referring only to these four rights as fundamental rights, however, the International Labour Organization has set aside many other rights, enshrined in the Conventions adopted over time; it is an option that can raise questions about the status of other (non-fundamental) rights.

In any case, it is very difficult to identify the position of the International Labour Organization on the relationship between human rights and worker rights, because:

- on the one hand, the documents of the International Labour Organization have never expressly described worker rights as human rights, not even the fundamental ones;

- on the other hand, in the conventions other than the fundamental ones, the International Labour Organization has made repeated express references to the protection of human rights. For example, in Convention no. 189 (2011) regarding decent work for domestic workers repeated references to such sources are made in the Preamble. And art. 3 paragraph (1) provides that each state must take all measures to promote and protect human rights for all domestic workers. It can thus be speculated that if the approach of some non-fundamental Conventions is circumscribed to human rights, the more so should be the one regarding the Fundamental Conventions.

But a definitive answer was not given even on the occasion of the Declaration on the Future of Work, adopted by the International Labour Organization on the occasion of the 100<sup>th</sup> anniversary of its establishment, on 21 June 2019. The declaration uses the concept of "human-centred approach", without making explicit reference to human rights, but rather aims to eliminate fears about the impact of digitalization on labour relations.

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of computer technologies in the production activity, the rights of the worker will in turn be enriched with new implications.

<sup>15</sup> See also I.T. Ștefănescu, *op. cit.*, p. 71.



#### 4. Conclusions

The employee does not waive his attributes as a citizen when entering into an individual employment contract. He still has private life, continues to exercise his constitutional freedoms and holds human rights, a platform from which he will not step down by the mere conclusion of an employment contract.

Obviously, the rights of the worker cannot in any way be reduced to those established internationally as human rights, but have largely a contractual source. In addition, the worker, as a qualified subject, will be able to exercise only part of the human rights in the performance of the employment contract, the others being completely independent of this relation.

But beyond these specificities, the figure of the worker and his rights is imbued with the spirit of the rules for the protection of human rights. Labour law itself tends to emancipate itself from the contractualism it has built and to take on norms and rules specific to human rights.

Thus, by emphasizing the quality of the worker as citizen, by asserting the role of the dignity of the employee in the whole legal construction of labour law, by reducing the collectivist dimension of labour law and amplifying the individual one and by penetrating the post-modern paradigm in law, with its inclination towards the uniqueness of the person, the premises of a real approximation of labour law to human rights are created.

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