APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT

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Abstract

A certain aspect is necessary for a behaviour or conduct rule to become a legal norm or standard. Hence the expression forms of the legal norms in the legal literature have acquired the name of source of laws.

The contract is an individual legal act because it sets rights and obligations for determined subjects. Nevertheless, there is a type of contracts which do not concern directly the rights and obligations of certain determined subjects (as participants in a legal relationship), but suppose general regulations. That is why they are also called normative contracts and are considered sources of the positive law.

In the labour law, the normative contracts have very important applications. Basically, the labour law is considered to be a "negotiated law having a conventional background". Collective agreements are specific sources of law, labour law part, not being issued by the legislature or other state body, but having a conventional nature, including legally negotiated rules.

Thus, the collective labour agreement acts like a subsequence to the legislation, but which is the main source of labour law in respect to the issues regarding the conclusion, modification, suspension or termination of individual labour contracts, that are binding for the courts. Therefore, the collective labour contract was considered in the literature as a "regular contract" while by the conclusion of collective labour contracts, the labour law becomes a "negotiated law, having a conventional background", created by the employers and employees, depending on their interests and their social and economic positions.

Keywords:

Source of law, Contract, Labour, Collective bargaining, Employee

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I. "Source of law" - the concept

Certain authors make a distinction between the „formal" or „legal" sources of law and the „historical" or „material" sources. In one of the meanings (i.e."material", „historical") a source is simply represented by the causal or historical influences explaining the existence of a given norm in a given place and time. In this respect, for example, the sources of certain contemporary English law norms can be the norms of the Roman law, of the canonical law or even the norms of the people's morals. Yet, when we speak about the „code" as a source of law the word „source" does not refer to simple causal or historical influences, but to one of the criteria of legal validity accepted within that system.

A certain aspect is necessary for a behaviour or conduct rule to become a legal norm or standard. Hence the expression forms of the legal norms in the legal literature have acquired the name of source of laws. In this strictly legally respect, the form shows us that the rule is the result of the state normative activity, expresses the will of those charged with the state power and its observance is guaranteed through the state coercion power where necessary.

The legal literature also suggests the word „the law form" meaning source of law. We do not think it is a good solution because the word is more extended in meaning than that of source of law from the legal point of view. If we start from the ethimological meaning of the word „source", we see that it was the means by which the legal literature called the sources, the origin, the determining and creation law factors. Moreover, even the word of source of law has several meanings, such as: source of law in the material meaning and source of law in the formal meaning, internal and external sources, direct and indirect source of law, written or unwritten sources a.s.o.

The source of laws in the material meaning indicate the social fact (sometimes they are called real sources) or the factors making up the law. These sources include elements pertaining to different areas of the social life. In Ion Dogaru's opinion, material law is nothing else but the entirety of the existing material conditions generating the legal regulations. These sources include:

- The factors which make up the law (natural setting, social and political environment and the human factor);
- Natural law and human reason;
- Legal conscience;
- Economic conditions; and
- Cultural, ideological sources a.s.o.(Dogaru, I.,(1994) : p.161).

All these ensure the actual content of the positive law as they are very important for the legislator when he elaborates the law. It is obvious that the scientific analysis of law cannot ignore the importance of material sources. They are the factors which provide real content for the positive law, concentrating the

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real life needs and revealing to the legislator under the shape of social commands (Popa, N.,(1992): p.121) .

Yet, from the legal point of view, the formal sources of law play an important part because they designate the specific ways of expressing the legal norms, namely the legal acts where these norms are concentrated. These are usually taken into account when we talk about the source of laws.

Finally, the notion of source of law is used in other meanings as well. It is said that politics is the political source of law, namely the public political authority is the one which elaborates the future legal norms, issues them by identifying and projecting social needs in the legal area (Vrabie, G., (1995) : p.34) .

We don't exclude the use of this term in the field of historical sciences which through law „sources" aim at indicating the sources of knowledge of a legal system, such as: the written or unwritten sources, the archaeological sources, etc. That can provide information about the law of a certain historical era, about the legislation of a country, etc. (Ceterchi, I., Craiovan, I.,(1993) : p.52).

II. Classification of the sources of law

We already mentioned that the sources of law are divided into formal and material sources. Throughout the historical development people encountered the following formal sources of law: the legal common law, legal practice and precedent, doctrine, normative contract and normative act.

1. The legal common law

The first legal organizations known as legal common laws are those from the Ancient Orient. The legal common law is a rule of conduct generated spontaneously as a result of its repeated use throughout a period of time within a human group if it is recognized by the state power and having this power with legal force. The first sources of law were greatly connected with the religious norms. We mention that the legal common law is more specific for slavery and feudalism. The influence of the legal common law decreases in the system belonging to the Roman-German civilization area after the bourgeois revolutions because it is replaced in almost all its elements with legal norms of the public or private law.

In order to change a custom from the general system of social norms to the system of sources of law it is necessary to observe one of the two important moments: either the state acknowledges a custom and introduces it into an official norm with the help of its legislative bodies or the custom is alleged by

ARNAUTU, L., TUDURACHI, C., (2010) APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

the parties as a rule of conduct before a trial court and the latter makes it a legal rule (Motica, I.R., Mihai, Gh., (1995) : p.131). .

The changes taking place at the social and economic level are so dynamic that the law field requires a legislative policy and a corresponding dynamics. Nowadays the field of action of the legal common law is limited both for the continental legal system and for the Anglo-Saxon one although it is still kept under the shape of the common law.

2. The legal or administrative precedent and the legal practice.

The legal decisions are individual acts, acts of applying the law which are not source of laws as a rule lacking legal norms. The precedent is more characteristic for the Anglo-Saxon legal system. Professor L.P.Marcu asserts that „within the Romanian legal system the legal precedent does not represent a source of law, while the previous decisions, especially those of the superior courts are taken into account for the solutions of different cases (Marcu, L.P., (1995) : P.194).

We note the fact that the role of case law is to interpret and apply the law to real cases. From this point of view the case law cannot have a creative role and cannot be a source of law. Yet, in practice, we note that most of the time the trial courts come to unitary solutions as regards the interpretation and application of the content of a law.

The reserved attitude towards acknowledging the characteristic of source of law as concerns the case law is also based on the principle of the separation of powers. It is true that in the rule of law the legislative bodies have to create laws, while the judicial bodies have to apply the laws to real cases. To acknowledge the court right to elaborate norms would mean to force the path towards creating laws, affecting thus the balance of powers.

3. The normative contract.

The contract is an individual legal act because it sets rights and obligations for determined subjects (for example, for the salesman and the purchaser, for the lodger and the owner of a house etc.). Art.942 Civil Code defines the contract as follows: an agreement between two or more people in order to begin or end a legal relationship. In this sense, the contract cannot be a source of law.

There is a type of contracts which do not concern directly the rights and obligations of certain determined subjects (as participants in a legal relationship), but suppose general regulations. That is why they are also called normative contracts and are considered sources of the positive law.

ARNAUTU, L., TUDURACHI, C., (2010) APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

The history of law has records of such a source of law from the feudal period when the relations between the social categories or between them and the monarch were established by means of certain conventions. *Magna Charta Libertatum (1215)* concluded under the form of a convention between the barons, the knights and the rebellious townsmen on the one hand and King John without country on the other hand is an example often quoted to illustrate the role of the normative contract.

In constitutional law the normative contract is a source of law as concerns the organization and function of the state federative structure. Generally speaking, federations are created as an effect of concluding certain contracts between the states wishing to make up the federation.

In the field of labour and social security law the normative contract is a source of law, by way of collective labour contracts which stipulate the general conditions for organizing the labour process in a certain area and based on which individual labour contracts are concluded afterwards.

In connection with the existence of collective contracts and adhesion contracts the legal theory states that they come to support the opinion according to which the law does not come only from the state, considering the fact that the compulsory general provisions are stipulated in these contracts by the trade-unions (negotiated with the employers' association). We must also mention that these provisions are guaranteed by the state, they are created in fact based on other provisions which consecrate the possibility of the collective or adhesion contract. They exist because the state allowed them through its legislation.

The treaty also exists in the international practice and doctrine under different equivalent names: „final agreement", „commitment", „truce", „charter", „book", „compromise", „concordate", „official statement", „memorandum", „convention", „declaration", „gentleman's agreement", „modus vivendi", „pact", „protocol", „diplomatic note",etc.

Nonetheless, the normative contract constitutes the main source of law in the international public law under the form of the treaty. The treaty is always the expression of the state free consent and only as such is it a source of rights and obligations for the signatory states. In the modern international law the treaty is the most important means of regulating the relations between countries, of cooperation based on the state ruling equality in order to respect their sovereignty and independence.

4. The normative act

The legal normative act is the most important in the system of the sources of law. Its outstanding place is explained both by historical causes and by reasons pertaining to the characteristics of content and form of this source of law in relation to the other sources of law.

ARNAUTU, L., TUDURACHI, C., (2010) APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

When we use the phrase: „the law as a source of law" we must take into account the extended meaning of the notion of law (as a compulsory act) and not its restricted meaning (the normative act that the parliament enacts following a specific procedure).

The system of normative acts is made of: governmental laws, decrees, decisions and ordinances, ministerial regulations and orders, decisions by the local administrative bodies. The constitutional laws are emphasized within the general laws by their importance and fundamental characteristics. Constitutions set the essential rules related to the organization and function of order within a state. Being itself positive law, the Constitution of a state lays at its basis in the sense that it materializes the absolute value – Justice and that it is as a real sound box of the national spirituality. In this respect, laws in general but especially the Constitution must be the reflection of a people's state of mind, must show the latter's degree of development and understanding.

III. The Collective Labour Contract – specific source of labour law

In the literature, it was stated that the regulatory approach used in employment law is mixed. Thus, legal work relations are governed both by the method of direct regulation by mandatory rules drawn up by the legislative power legislative and also by the method of equal parts, by the rules freely negotiated by them (Athanasiu, Al., Dima, L.,(2007): 12). The evolution of social relations of work conditions and the legislation adapting process to the EU norms and the conventions of the International Labour Organisation to issue, led to a movement of the labour law towards the private law branch, considered a "negotiated legislation having a conventional background".

In those conditions, a series of specific sources of employment law have developed, such as collective agreements, professional and disciplinary statutes, Rules and Regulations of organization and operation. According to art. 236, par.1 from the Romanian Labour Code, the collective labour contract is the agreement concluded in a written form between the employer or the employers' organisation, on the one hand, and the employees, represented by the trade unions or in any other manner stipulated by the law, on the other, by means of which clauses are set up concerning the work conditions, the wages, as well as other rights and liabilities deriving from the labour relationships. Collective agreements are specific sources of law, labor law part, not being issued by the legislature or other state body, but having a conventional nature, including legal negotiated rules.

ARNAUTU, L., TUDURACHI, C., (2010) APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

1. The Collective Labour Contract's juridical nature

As legal, the Collective Labour Contract is both a convention, therefore a bilateral legal act that establishes mutual rights and obligations for parties, and also a source of law, establishing the general rules applicable to all employees and employers, as appropriate having legal force of a legislative act (Tunsoiu, T. (2008): 5). Among the legal characters of the Collective Labour Contract we can remind thus, the of a rule of law, a legal source. The normative nature of this contract, is also provided by the art. 41, par. 5 of the Constitution, which states: "The right to negotiate in terms of employment and collective agreements are binding guaranteed. Thus, collective bargaining agreement appears to be a subsequence legislation law, but which is the main source of law to conclude, modification, suspension or termination of individual labour contracts, that are binding for the courts. For these reasons, the collective labour contract was considered in the literature as a "regular contract" created by rules of law (Stefanescu, I.T. (2007): 126). Like any legislation, collective agreement have some degree of generality, being the subject of regulatory measures for protection of a group of employees, so a mass of beneficiaries. At the same time, as a source of law, it is an abstract and impersonal, permanent and binding act, because the clauses inserted in individual employment contracts or inferior collective agreements that disobey superior collective agreements, are sanctioned by absolute nullity. Therefore, by the conclusion of collective labour contracts, the labour law becomes a "negotiated law, having a conventional background", created by the employers and employees, depending on their interests and their social and economic positions. The state intervention is limited to documents and initiatives aimed to guide the two parties at work, establishing a series of minimum limits of protection for employees. In this respect, labour law takes the form of three concentric circles, including: law, collective agreements and individual employment contracts. Thus, the law has the role to establish the general framework of the work relationships, collective agreements concluded at different levels develop laws, making it more precise, but with a certain degree of generality, while individual employment contracts customize these provisions for each employee. As an exception to the principle of relativity effect to contracts, the collective agreements are binding for all employees, regardless of the date of employment or membership of a trade union. Collective agreements may be concluded for the following levels: for all the national economy, at the branch level or at the unit or group of units. At each stage, it can be concluded only a single collective agreement. Clauses in collective agreements shall take effect, as follows:

- for all employees of the employer, where collective agreements concluded at this level;

ARNAUTU, L., TUDURACHI, C., (2010) APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

- for all employees assigned to employers who are part of the employers having concluded collective agreement at that level;
- for all employees assigned to all employers in the sector for which the collective agreement concluded at this level;
- for all employees assigned to all employers in the country, where for the contract collective bargained at national level.

2. The role and the content of the Collective Labour Contract

The essential role of the collective agreement is to replace individuals by groups in order to determine working conditions and wages. The purpose of the national collective agreements concluding is the promotion of equitable employment relations, such as to ensure social protection of employees, prevent or limit conflicts of interest and, especially, to avoid triggering strikes (Stefanescu, IT (2007): 130). Collective agreements may not provide clauses that establish rights to a level below that established by collective labour agreements concluded at a superior level. Also, individual employment contracts may not provide clauses that establish rights to a level below that established by collective bargaining agreements. In principle, in the collective labour contract, the provisions regarding the rights of employees already legally established have a minimal character. According to art. 236, par.1 from the Romanian Labour Code, the collective negotiation is mandatory, except when the employer has less than 21 employees. ILO Convention no. 154 of 1981 on the promotion of collective bargaining, ratified by the Romanian Parliament by Law no. 112/1992, provides that the term applies to all collective bargaining negotiations taking place between a person who hire people, a group of persons who hire people or an organization of employers, on the one hand and one or several workers' organizations, on the other hand, in order:

- to fixing the conditions of work and employment and / or
- regulate work relations between those who employ and / or
- regulate work relations between employers or their organizations and one or more organizations of workers.

In the literature, the authors said that the legal status of employees can be developed only through collective bargaining, which either extends the legal limits of the rights granted to employees or, as the rightful source of the legal relationship of employment, create new rights in their favour (Romandas, N., Boisteanu Ed, (2007): 119).

The law provides only an obligation to negotiate, and not to conclude the collective bargaining agreement. Thus, in literature it was considered that the obligation to negotiate is a duty of care, and its performance is assessed in terms of diligence exercised by the employer in relation to negotiation while the

ARNAUTU, L., TUDURACHI, C., (2010) APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

conclusion of collective labour contract is therefore non-compulsory (Athanasiu, al., Dima, L. (2007): 269).

In these circumstances, under the principle of free will, in units with more than 21 employees, for which the legal obligation to negotiate is provided, the parties may agree not to enter a collective agreement. In this case, the individual employment contracts shall be ruled by the collective agreements concluded at a higher level. As noted, the law imposes an obligation to negotiate only at a company level. Thus, in order to negotiate the collective agreements at branch or national level, the parties must express their will to negotiate. Under these conditions, at branch or national level, the parties are free to conclude or not labour collective agreements. When negotiating the clauses and concluding the collective labour contracts, the parties are equal and free. Under the principle of *pacta sunt servanda*, established by art. 969 of the Romanian Civil Code, collective bargaining agreements, concluded by observing the laws becomes the law of parties. Issues regarding the parties, their representation and the negotiation and conclusion of labour collective agreements are legally provided according to Law no. 130 of 1996 on the collective agreement.

The clauses provided in the collective agreements can cover both: situations directly related to labour relations, such as those relating to wages, working time and rest periods, working conditions, protection of trade union representatives or employees and also, indirect related aspects, such as those regarding the additional rights granted to employees, service housing, medical facilities or transport facilities, or vouchers meant to purchase various products. In any case, the clauses of labour collective agreements can only be established within the labour law. Thus, collective agreements cannot provide rights at an inferior level, below the one established by collective agreements concluded at a higher level. Nevertheless, the individual employment contracts may not contain clauses that establish rights to a level below that established by collective bargaining agreements. In the collective labour contract, the legal provisions concerning the rights of employees are therfore minimal. Clauses contained in collective agreements concluded in violation of the above principles are void. Invalidity of contractual clauses shall be decided by the court, at the request of the interested party. Further, if the Court decides upon the invalidity of one clause, the interested party may request the renegotiation of rights. Until the renegotiation of the referred rights, the clauses which had been found invalid are replaced by more favourable provisions contained in the law or contract work co concluded at a superior level, as appropriate. However, if the clause is considered essential, it is possible to trigger a conflict of interest. If at the employer level, the group of employers or industry level, there is no collective agreement concluded, the collective agreement concluded at a higher level shall apply accordingly. Conflicts can conduct to collective rights conflicts if the employees and employers have a misunderstanding about a certain clause in the collective agreement, which is not well set out and makes place for

ARNAUTU, L., TUDURACHI, C., (2010) APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

interpretation regarding its alplicability (Voiculescu N., (2007): 207-208). The terms should be expressed clearly and referred to as in order to produce legal consequences. Therefore, in practice, it was determined that although the wording of his contract uses the phrase "the unit may provide monetary compensation to persons dismissed from the payroll", the Court considered that this is an assumed and compulsory obligation, as otherwise, if the employer would have the right to chose by itself, such a provision which has been negotiated and accepted by the collective, would be devoid of any purpose and goal. The decision was rendered by the Court of Appeal, Civil Division VII, labor disputes and social security, civil order no. 4403 / R 19/12/2007 (Uta, L., Rotaru, Fl, Cristescu, S., (2009): 414). The execution of collective labour agreement is binding. The failure to fulfill its obligations under the collective bargaining agreement may conduct to personal liability for the guilty parties.

3. Conditions regarding the form, registration and entry into force of The Collective Labour Contract

The labour contract must be concluded in a written form, legally required for its validity, signed by the both parties, filed and registered with the Directorate General for Employment and Social Solidarity, where appropriate. Collective agreements concluded in the group of units of industries or national level shall be filed and registered with the Ministry of Labour and Social Solidarity. Collective bargaining agreements shall apply from the date of their registration. The parties may agree that the contract shall be brought to force later, at another date, after the registration of the contract. Collective agreements concluded at enterprise level should be brought to the attention of all employees, usually through the display. Collective agreements concluded at national and branch level must be published in the Official Gazette of Romania, Part V, within 30 days of their registration. The procedure for publication in Part V, and not in Part IV, does not refers to the enforcement on third parties, because the contract is brought to force from the recording date and not from the date of publication.

ARNAUTU, L., TUDURACHI, C., (2010) APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010

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ARNAUTU, L., TUDURACHI, C., (2010) APPLICATIONS OF THE NORMATIVE CONTRACT IN THE LABOR LAW: THE COLLECTIVE LABOUR CONTRACT in Jurnalul de Studii Juridice, Anul V, Nr. 3-4/2010