

## UNIT 2: SOURCES OF LABOUR LAW

*Dr. David Montoya*

### **Introduction.**

As it is known, the sources of the Spanish legal system are statutes (legislation), customs and general legal principles (art. 1.1 Civil Code). However, Labour Law also has its own sources list in art. 3.1 WS:

- a) Legal and regulatory provisions of the State.
- b) Collective bargaining agreements.
- c) The will of the parties expressed in the contract of employment.
- d) Local and professional practices and customs

The application of these sources of Labour law is ruled not only by the general principles determining the applicable standard, but also by specific application principles (more favourable rule –art. 3.3-, more beneficial condition –art. 3.1c)- and inalienability of rights –art. 3.5-).

Before facing the analysis of the sources of Labour Law and its application principles, it is necessary to refer to a classic Common Law distinction which is particularly relevant in Labour Law: "sources of Law" and "sources of obligations."

### **1 -. Sources of Law and sources of obligations.**

The word "source" means the origin or beginning of something. It is often referred to the causes operating before the thing itself comes into being. Scholars distinguish between "sources of Law" and "sources of obligations". Understanding that "Law" is a body of predetermined rules, and "obligation" of a specific duty imposed on a person, requiring them to give, to do or not do something, sources of Law are the legal instruments where the legal standards stem from and sources of obligations are the legal instruments which give rise to people legal duties.

#### **a) Sources of Law.**

Scholars refer to the sources of Law in two ways:

- Material Sources of Law: The authorities from which laws can spring and derive force and validity, i.e, the forces with legislative power (Parliament, the government, society itself, etc).

- Formal sources of Law: The formal channels through which law is shown, that is, the legal standards (Constitution, statutes, Royal-Decrees, Decree-laws, Legislative-Decrees, customs, collective agreements, etc.). That is precisely the way art. 1.1 CC refers to the sources of the Law when it mentions laws, customs and general principles of Law.

Labour Law counts on all the formal and material sources of the rest of the legal system. Nonetheless, Labour Law has an exclusive material source: the collective autonomy, attributed to workers' and employers' representatives normative power and, in turn, its own formal source, product of that regulatory power: collective agreements.

#### **b) Sources of obligations.**

In accordance with art. 1089 CC, "obligations arise from the law, from contracts and quasi-contracts, and from unlawful acts or omissions or involving any kind of fault or negligence".

The origin of the rights and obligations of the parties of the employment relationship is no exception to this rule: the rights and obligations of the parties may proceed both from a source of Law (ie, from legal standards) as well from a source of obligations (mainly from the parties' will expressed in the contract of employment).

It has to be remarked that in Labour law is not at all indifferent as to whether a particular right or obligation comes from a legislation (source of Law) or from the contract of employment (source of obligations). This is because the personal effectiveness, the binding force, and the modifying and extinction regime of any working condition will depend on whether it has been established by standards (source of law) or by the contract (source of the obligation).

In general terms, it can be asserted that labour rights have a tougher protection regime when they stem from the legal standards rather than the contract of employment. This difference in the legal regime of the working conditions is due mainly to two reasons:

1.- On the one hand, due to the special nature of labour standards. Most labour standards have a mandatory nature of either

absolute character (Absolute Mandatory Law<sup>1</sup>) or minimal character (Relative Mandatory Law<sup>2</sup>). The parties of the contract cannot at all waive or modify the rights which are recognised by standards of absolute mandatory nature. Nevertheless, when such rights are established by standards of a relative mandatory nature, the parties, through mutual agreement, can lawfully modify them but only in one way: extending employee rights (i.e involving more beneficial working conditions than under the standard). In the case concerning an absolute mandatory standard, an amending agreement is void no matter how favourable it is for the employee.

2.- On the other hand, due to the existence of the inalienability of labour rights principle (art. 3.5 WS), according to which the rights of workers arising from the standards are unwaivable (not those arising from the contract).

This being the case, it is clear that the legal regime of certain working conditions will depend on the source (the standard or the contract) where they have stemmed from. As it was said before, the possibilities of such conditions being waived or modified by the contractual parties or by employer's unilateral amending power will be completely different.

To put forward a simple example, is not indifferent whether the right to a third extra pay<sup>3</sup> is recognised in the collective agreement or in the individual employment contract because its personal effectiveness, its binding force, and its modification and extinction regime will be different in one case and in another.

If that third pay is recognised in a collective agreement, since its content constitutes a standard, such working condition should be applied by all employers under the scope of the collective agreement (e.g all the employers of the production sector). In addition, it can only be amended or eliminated by a subsequent collective agreement with the same scope and it can not be individually waived by the employee.

If, instead, that third pay is recognised in the employment contract, it only will bind the employer with respect to the worker who has individually signed it. Besides that, such working condition may be modified or extinguished by a later agreement of the parties and it can be waived by the employee as well.

---

<sup>1</sup> Also called "absolute mandatory standards".

<sup>2</sup> Also called "mínimum standards".

<sup>3</sup> According, art. 31 WS, workers have the right to perceive two extra pays.

## **2.- Labour Law sources list.**

The Labour Law sources list is described in the art. 3.1 WS before mentioned:

- 1) Legal and regulatory provisions of the State.
- 2) Collective bargaining agreements.
- 3) The will of the parties expressed in the contract of the employment.
- 4) Local and professional practices and customs

There are two aspects that deserve to be remarked on this WS article:

1<sup>st</sup> The list of sources of Labour Law is incomplete. The list doesn't include other sources of Labour Law such as the Spanish Constitution and the International Conventions (e.g ILO Conventions and EU standards).

2<sup>nd</sup> It can be appreciated in the art. 3.1 WE certain systematic defect when listing the sources, because it gathers sources of Law (Laws, regulations, collective agreements, customs) and the main source of obligations: the contract of employment.

Anyway, Labour Law sources system is complex and presents certain particularities that make necessary a single analysis and make impossible to refer its study to the general theory of Law. There are several reasons behind complexity.

1<sup>st</sup> The large number of labour standards and its remarkable dispersion.

2<sup>nd</sup> Their high mobility, as they succeed each other very quickly, given the changing social reality in which they operate.

3<sup>rd</sup> The coexistence of rules of different nature and origin in Labour Law. Besides the standards which are common to the whole legal system (acts, Royal-Decrees, etc), Labour Law has its own sources of regulation (collective agreements). On the other hand, there are also common sources of Law that are subjected to special requirements to have binding effect in Labour Law. That is the case of the customs that must be local and professional (art. 3.1 d) WS) to be applied.

4<sup>th</sup> Finally, the existence of specific application principles such as more beneficial condition (art. 3.1 c) WS), more favourable rule (art. 3.3 WS), and the principle of inalienability of rights (art. 3.5 WS).

### **3.- The legislative power of the Autonomous Regions.**

Do the Autonomous Regions have legislative power to regulate dependent and hand-hired work?

The answer must be negative. According to art. 149.1.7 of the Spanish Constitution (SP), the State shall have exclusive competence over "labour legislation, without prejudice to its execution by bodies of the Autonomous Regions".

The Constitutional Court in several rulings from the eighties has construed the scope of this rule and has specified what is meant by "*legislation*" for "*labour*" and for "*execution*".

The term "*legislation*" has been construed by the Constitutional Court broadly, i.e, referred to both laws and implementing regulations. Consequently, the State shall have exclusive legislative competence over enacting labour statutes and their implementing regulations. The Constitutional Court has argued that such interpretation tends to create uniformity in the regulation of labour matters in the country.

The term "*labour*", however, has to be construed strictly, meaning not everything concerning the world of work and employment, but only regarding the regulation of dependent work under employment contract. This restrictive interpretation has enabled the Autonomous Regions to assume competences over some work matters (but not strictly related to dependent work under employment contract) such as cooperatives societies, self-employment, employment promotion, vocational training, shops' opening and closing timetable, rules governing civil servants, etc.

Finally, the Constitutional Court said that the term "*execution*" must not be construed as implementing State laws through regulations, but the Autonomous Regions' power to issue administrative acts applying State' laws. Thus, it has been understood that Autonomous Regions can lawfully execute within their territory matters related to the Labour Administration (e.g., Public Employment Services; Conciliation and Mediation Services, Administrative acts of registration and publication of collective agreements; Administrative acts of extension of collective agreements; Minimum services maintaining in case of strikes affecting essential services, etc.).

Regarding Social Security, according to art. 149.1.17 of the SC the State shall have exclusive competence over “basic legislation and financial system of Social Security, without prejudice to implementation of its services by the Autonomous Regions”.

Some time ago, a problem concerning this constitutional article arose because the Andalusian Autonomous Region enacted in 1998 a Decree (Decree 284/1998, of 29 of December) through which retirement and disability non-contributory pensioners were granted with a temporary economic benefit. The State government brought constitutional appeal against that Andalusian Decree and the Constitutional Court, in case 239/2002, concluded that the regional standard did not affect the exclusive competence of the State over Social Security as the regional aid was a scarce amount benefit, was temporary because was planned to be paid just for 1999 and, eventually, could be regarded as a social assistance benefit, taking into account that art. 148.1.20 enables Autonomous Regions to assume competences over social assistance.

#### **4.- Specific sources of Labour law: collective agreements (reference to unit 3).**

As it is known, collective agreements constitute a typical Labour Law source. They are stemmed from the collective autonomy recognised to the social partners by art. 37.1 of the SC.

Their study is submitted to the next lesson (Lesson 3), in which the main manifestations of the collective autonomy in our legal system will be discussed (collective agreements and other manifestations of the social partners' collective autonomy).

#### **5. - Sources presenting special features: labour customs.**

Customs are one of the Law sources mentioned by art. 1.1 of the Civil Code and also a Labour Law source (art. 3.1 d) WS). It has three defining characteristics: it is an unwritten rule, it shall be applied only in case of the absence of legal standards, and has been created and enforced by the social use.

To be enforced in labour relations, customs must meet certain requirements. Some are common to the whole legal system and others are required only by Labour Law.

The common requirements are the following: a) the absence of written law; b) the need to be proven in Courts, as evidence, by the party interested in its enforcement and, finally, c) must be lawful, that

is, not contrary to law, morals or public order. Meanwhile, in Labour Law, customs must be local (stemmed from a particular locality) and professional (coming from a particular production sector) to be enforced.

In Labour Law there is also another special feature concerning customs. There are cases where custom does not act just in case of the absence of a written standard but as a direct source of Law. It is the case of the so-called "called custom" or "reference custom" (*costumbre llamada o por remisión*). It emerges when a written statute refers a specific regulation to the custom. Examples of called custom can be found in arts. 29.1 WS (the payment of the wages shall be made at the place and date agreed on or in accordance with practices and customs) and art. 49.1 d) WS (the advance notice for voluntary resignation of the contract shall be established in collective agreements or in practices and customs).

In all these cases, the custom is a direct source of law and also occupy the hierarchical position of the written rule which mentions it.

## **6. - General principles of law. Principles of Labour Law**

We already know that the general principles of law are sources of law (art. 1.1 CC) which are applied in the absence of law or custom (art. 1.4 CC) and that their main function is to inform the rest of the legal system (art. 1.4 CC).

Some of the broadly known general principles of law are "the good faith", "the obligation to respond from damages", "the principle of equality", "the principle of not going against our own acts", etc.

Although the general principles of law constitute a source of law, neither scholars nor case law claim for their autonomous character. Consequently, they only are enforceable when they appear in a written statute or Court ruling that constitute jurisprudence. In any case, the fact is that most of these principles appear explicitly recognised in the Constitution or other written rules, so they can be enforced in a particular case.

Labour standards, along with the general principles of law, are governed by specific principles whose study will be faced in lesson 4. A classic construing principle in Labour Law is the so-called "*in dubio pro operario*" (which means that among two or more possible interpretations of the same rule, the most beneficial to the employee must be chosen). Yet, such principle nowadays has almost fallen into disuse. On the other hand, the specific Labour Law application principles are the principle of more favourable rule (art. 3.3 ET), the principle of more

beneficial condition (section 3.1 c) ET) and the principle of inalienability of rights (art. 3.5 ET).