THE REGULATION OF LABOR RELATIONS IN FEDERAL STATES

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Abstract: The federal state is a specific legal and political organization, separate from others organizations such as that of Governments of the Member States. From this point of view, the analysis of labor relations regulation in federal states is important, compared to unitary states, due to fact that the mechanism of regulation differs, as well as social dialogue between social partners (government, unions and employer associations) take specific forms.

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Born through the component states will, upon its own constitution, the federal state is a specific legal and political order, which includes relatively subordinate organizational and operational mechanisms of state government. He has a political organization, distinct from that of Member States governments, which involves a constitution, state organs and its own powers (legislative body, in principle two chambers, one chamber representing the people and the other one the federal states, executive and judicial organs), a purpose and its own assets, so it's a subject of law separate from its component states. From this point of view, analyzing the regulation of labor relations in federal states is important, compared to unitary states, because the mechanism of regulation differs, and also social dialogue between social partners (government, trade unions, and employers associations) takes specific forms.

Specific for federal states is that state functions are divided between the federal and Member States, placed on two different plans. Consequently, inside the federal state there is a parallelism between federal organs of power and rule of law and the national bodies of Member States. This separation between the three powers that are performed on different levels, both in the Federal State and the federated

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states – combines with the separation between the economic and political sphere, the regulatory process and procedures for labor relations and collective employment, dispute resolution becoming the more complicated. While the federal state is responsible for solving common problems and federal representation in international relations, Member States retain a relative autonomy in the sense that they have legislation, enforcement bodies and theirs own institutions, but these do not replace the ones of the federal state. Subject to compliance with the federal Constitution, each state has its own constitutional order, enshrined in its basic law – its Constitution.

Technically, right-to-work law as a branch of law is divided also into two branches, corresponding to individual and collective labor relations: Federal labor laws deal with employer-union relationships and Federal employment laws deal with employer-employee relationships.

The manner in which federal labor laws interact with state laws is important to understanding the procedure of regulating labor relations and the role of right-to-work laws. The "supremacy clause" stipulated by the U.S. Constitution means that "federal laws supersede any state law that might conflict with them"[1]. The U.S. Supreme Court has established that federal laws, through a pre-emption doctrine based on the supremacy clause, may render a state law inoperative: "A fundamental principle of the Constitution is that Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to 'occupy the field', state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. We will find preemption where it is impossible for a private party to comply with both state and federal law and where «under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress»"[2]. In the same way, according to a federal district court in Oklahoma[3], when and where the Congress is silent, "Rules of statutory construction dictate that the court should find the federal government exempt from the application of state statutes which

[1] U.S. Constitution, art. VI, § 2.

[2] Patrick J. Wright, *Federal Labor Law, State Labor Law and Right-to-Work*, http://www.mackinac.org/8966.

[3] Local 514, *Transport Workers Union of America v. Keating*, 212 F.Supp.2d 1319, 1325 (E.D. Ok. 2002), cited by Patrick J. Wright, *Federal Labor*.

attempt to regulate any collective bargaining agreement to which the federal government is a party"[4].

In Germany, article 31 of the Basic Law provides that federal law takes precedence over state law. According to art.70 (and following) of the Basic Law, Member States have the right to legislate, except on subjects for which the Federal State enjoys exclusive legislative power (e.g. in the field of foreign affairs and defense). Basic Law has left civil law, law of association and labor law under the concurrent legislative power of the Federal and State legislative institutions. Member States of the German federation thus have law making power to the extent that the Federal legislature has not exercised its right to legislate in that specific field. In Practice, civil law, law of association, employment and labor laws are entirely governed by Federal Law. The States nevertheless influence the adoption and amendment of the above-mentioned normative acts, because they take part in the legislative procedure. Member States are distinguished by the local administrative-territorial unit in the unitary state by the fact that they have own competence in legislative, executive and judicial field, set by the Federal Constitution, and will participate in the formation of the federal state (central) as the organization of the federal parliament comprises on the one hand, an assembly representing the whole population (the federation), and on the other, an assembly representing the Member States of the federation. The major sources of German labor law are Federal legislation, collective agreements, work agreements and case law: "The German system appears to be more corporatist than interventionist, resting on written and unwritten agreements between employers and trade unions about how the German labor market (...) should be regulated"[5]. Unlike other unitary states, there is not one consolidated Labor Code. Minimum labor standards are laid down in separate normative acts on various labor and employment related issues, which are supplemented by the government's ordinances. As we can observe, this is a similarity with the present situation of Romanian labor and employment laws.

The interaction between federal labor laws and state laws is complicated because, unlike unitary state where is a single law system, in a federal state, labor and employment laws represent a heterogeneous collection of state and federal law which not only sets the standards that

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[4] *Crosby v. Nat'l Foreign Trade Council*, 530 US 363, 372-73 (2000), cited by Patrick J. Wright, *Federal Labor*.

[5] Jack Eaton, *Comparative Employment Relations. An Introduction*, Polity Press, Cambridge, 2000, p. 85.

govern workers' right to organize in the private sector, but overrides most local laws that attempt to regulate this area[6]. For example, in USA, federal law also provides more limited rights for employees of the federal government. These federal laws do not, on the other hand, apply to employees of local governments, agricultural workers or domestic employees; any statutory protections those workers have derived from state law.

Although the United States Constitution stipulates the rights to freedom of speech and freedom of association, federal law does not provide employees of state and local governments with the right to organize or engage in union activities. The Constitution provides even less protection for the right to engage in collective bargaining in case of governmental employees: while it bars public employers from retaliating against employees for forming a union, it does not require those employers to recognize that union, much less bargain with it. That's why the situation is different from one state to another. While most states laws provide public employees with limited statutory protections, a few recognize to the public employees the right to strike in support of their demands in some circumstances and some state laws make it illegal for a governmental entity to enter into a collective bargaining agreement with a union.

According to the US Department of Labor, when federal and state labor laws conflict, the law that most benefits the employee is the law that should be applied to the circumstances. That means that whenever both federal law and state law address the same issue, whichever law provides the employee the most protection is the one that will be applied to the situation. In other words, it is applied the law which is more favorable to employees.

Structuring on two levels – federal state and state (national) government – is even more obvious in the area of working conditions. Federal law establishes only minimum wages and overtime rights for most workers in the private and public sectors while state and local laws may provide such rights in a higher amount. Similarly, federal law provides minimum workplace safety standards, but allows the states to take over those responsibilities and to provide more stringent standards of worker's safety and security. In other words, state and local laws can not establish rights to a level below that set by federal law. The relation between federal law and state government law is similar to that existing

[6] Greg Patmore, *The Origins of Federal Industrial Relations Systems: Australia, Canada and the USA*, in Journal of Industrial Relations, no. 51/2009, p. 151.

between the collective and individual employment contracts in unitary states. Thus, individual employment contracts can not contain clauses that establish rights to a level below that established by collective bargaining agreements (principle applies also to Romania).

The specifics of the federal states, which operates by its own principles – the principle of separation, the principle of superposition, the principle of autonomy[7] – has created "tensions in federal political systems over whether the central government or the states/provinces are the most suitable jurisdictions for dealing with the relationship between employers and unions"[8]. According to the principle of autonomy, local communities have competences in the field of education, regulation of labor relations, issues related to social security, public health system etc[9]. As economies grow and face a number of problems / crises, there are growing pressures on federal governments to intervene in the regulation of industrial relations. But to be effective, federal law should take account of economic and social conditions prevailing in each Member State. These tensions are opposed by the American new trend called "new federalism" having at its core the concept of "state sovereignty," which, through a number of constitutional provisions, seeks to preserve the "immunity" rights of states, protecting them from unnecessary or unwarranted intrusion by the federal government[10].

As with Australia and Canada, the tension over states rights to legislate labor relations was an important issue in the development of a national labor relations jurisdiction. Like USA, these two countries shared a federal system, but the president and state governors in USA have significant executive powers compared to the largely ceremonial role played by the Queen's representatives in Australia and Canada[11]. The legislative power was enhanced in Australia and Canada by their common law courts following the English tradition of parliamentary supremacy.

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[7] Claude Leclercq, *L'Etat federal*, Dalloz, Paris, 1997, p. 95.

[8] D.H. Rosenbloom, *Fuzzy law from the high court*, in Public Administration Review, no. 54/1994, pp. 503-506; Idem, *Public employees' liability for "constitutional torts"*, in C. Ban, N. M. Riccucci (eds.), *Public personnel management: Current concerns, future challenges*, Longman, New York, 1997, p. 237-252.

[9] Norma M. Riccucci, "The U.S. Supreme Court's New Federalism and Its Impact on Antidiscrimination Legislation", in *Review of Public Personnel Administration*, vol. 23, no. 1/2003, p. 3.

[10] Greg Patmore, *The Origins*, p. 154.

[11] R. Archer, *Why is there no Labor Party in the United States?*,University Press, Princeton, 2007, p. 92, 97.

Federal systems are also characterized by the principle of participation. This principle implies that Member States participates in the federal decision-making process. Federal entities must participate, through voting, to the delegation of powers within the federation (the second room in the federal Parliament). Thus, U.S. Senate is elected by direct universal suffrage. Evidently, there are different degrees of Member States participation, the degree to which institutions held to manage the common interest let this interest form in a natural way: “Federal systems of government have been described as weak states because they involve compromise between different levels of government”[12]. Participation may be made to the constituent, legislative and executive power: “A weak federal government may exacerbate problems at the state or provincial level where economic competition between states may undermine attempts to establish minimum national labor standards. On the other hand, while centralizing power at the federal level may reduce checks and balances about issues relating to labor organization and management prerogative, it can ensure efficiency through greater coordination of the national economy”[13].

While there are similarities between the USA and other federal states – notably, a federal political and juridical order and the same principles of organization – the size and scale of the US economy dwarfs them. In USA, the National Labor Relations Act (NLRA) or the “Wagner Act” is a 1935 United States federal law which provides the employees with “the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection” (section 7). In the same time, the act limits the means with which employers may react to private sector workers that create labor unions, engage in collective bargaining, and take part in strikes and other forms of concerted activity in support of their demands[14]. The Wagner Act” does not apply to workers who are covered by the Railway Labor Act, agricultural employees, domestic employees, supervisors, federal, state or local government workers, independent contractors and some close relatives of individual employers. The Railway Labor Act recognize the right of employees to form unions and engage in collective bargaining and

[12] Greg Patmore, *The Origins*, p. 152.
[13] A. Cox, “Federalism in the Law of Labor Relations”, in *Harvard Law Review* no. 67(8)/1954, p. 348.
[14] Greg Patmore, *The Origins*, pp. 164-165.

creates a different procedure for resolving labor disputes, requiring bargaining under indirect governmental supervision and permitting strikes only in limited circumstances. The NLRA establishes the National Labor Relations Board (NLRB) which has exclusive jurisdiction to determine whether an employer has engaged in an unfair labor practice and to decide what legal remedies should be provided. States and local governments can, on the other hand, impose requirements when acting as market participants (public sector employers or parts in lease contracts), such as requiring that all contractors sign a labor agreement to avoid strikes when building a public works project, that they could not if they were attempting to regulate those employers' labor relations directly[15].

The Taft-Hartley Act was a major revision of the "Wagner Act" of 1935, the most important labor law in American history. This new normative act allowed the president of USA, when he believed that a strike would be a danger for national health or safety, to appoint a board of inquiry to investigate the dispute (the so-called "procedure of investigation"). After receiving the final report on the investigation, the president could ask the Attorney General to seek a federal court injunction to block or prevent the continuation of the strike. If the court found that the strike was endangering the nation's health or safety, it would grant the injunction, requiring the parties in the dispute to amicably settle the conflict within the next sixty days. A procedure for settling collective labor disputes specific for USA is high-level mediation which requires that disputes (conflicts) on the important branches of national economy are subject to ad hoc mediation by the President or members of the Executive, while conflicts concerning the issues of local interest are subject to mediation by the Governors. Most times, these leaders have no direct authority to impose a solution but have the ability to direct potential conflict to a swift and effective resolution.

To the Wagner Act's list of prohibited employer's practices, the Taft-Hartley Act added a list of prohibited labor union practices: secondary boycotts (when a union induces employees to strike against their employer to get him to stop doing business with another employer with whom the real dispute exists); sympathy strikes or boycotts (attempting to compel an employer, other than one's own, to recognize or bargain with an unrecognized union – this is a practice often called "blackmail picketing" by anti-labor groups); and jurisdictional strikes and boycotts (attempting to force an employer to give work to members

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[15] *Ibid*, p. 166.

of one particular union instead of another). The act allowed union shops as long as state law did not forbid them.

Between the evolution of collective bargaining in USA and the stability of employment contract is a direct relation. While most state and federal laws start from the presumption that workers who are not covered by a collective bargaining agreement or an individual employment agreement are "at will" employees who can be fired without notice and for no stated reason (with no employer's liability), state and federal laws prohibiting discrimination modified that rule by providing that discharge or other forms of discrimination were illegal if undertaken on grounds specifically prohibited by law. The contract at will means "absolute managerial discretion": "If the contract is at will, no legal limits are set on the authority of the employer, especially on the key issue of dismissal. The employer is free to hire and fire unrestrained by the legal requirement that he have just cause for rescinding a contract not yet expired. Moreover, the contract at will is not a device for framing agreed-upon conditions to govern day-to-day activities. Since there is no definite duration, the terms of the contract are not binding for the future. The employer is free to modify them at any time, without notice. The main economic significance of the contract at will was the contribution it made to easy lay-off of employees in response to business fluctuations. But it also strengthened managerial authority. By the end of the nineteenth century, the employment contract had become a very special kind of contract – in large part a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion"[16].

As we can observe, in the absence of a collective agreement, "management had absolute discretion in the hiring, firing and the organization and direction of the working forces, subject only to such limitations as may be imposed by law"[17]. That's why, in order to offset employer's discretionary power, a number of states have modified the general rule that employment is at will by holding that employees may, under that state's common law, have implied contract rights to fair treatment by their employers. US employees in private-sector thus do not have the indefinite contracts traditionally common in many European countries.

In federal states, laws regulating the labor and employment

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[16] P. Selznick, *Law, Society and Industrial Justice*, second edition, Russell Sage Foundation, New York, 1980, cited by Jack Eaton, *Comparative Employment Relations*, pp. 97-98.

[17] *Ibid*, p. 98.

relationship can come from different federal, state, or local sources and it can be confusing to figure out which ones are applicable to a certain situation. Which ones apply depends on factors such as the location of the employer, the total number of employees, annual revenue and the minimum number of employees specified in the particular employment law statute. Each law contains its own scope of coverage requirements. For example, federal laws such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act apply to all private employers, state and local governments, and educational institutions with 15 or more employees. They also apply to private and public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training. Other federal laws, like the Age Discrimination in Employment Act, apply to all private employers with 20 or more employees, state and local governments (including school districts), employment agencies, and labor organizations.

The federal Equal Pay Act applies to all employers who are subject to the federal Fair Labor and Standards Act (FLSA) of 1938. FLSA establishes minimum wage and overtime rights for most private sector workers, with a number of exemptions and exceptions but Congress amended the Act in 1974 to cover almost all employers, including governmental employees. In particular, in the private sector FLSA generally applies to any company/ organization with annual dollar volume of sales or receipts in the amount of $500.000 or more. The FLSA does not preempt state and local governments from providing greater protections under their own national laws. A number of states have enacted higher minimum wages and extended their laws to cover workers who are excluded under the FLSA or to provide rights ignored by federal law. Local governments have also adopted a number of “living wage” laws that require those employers that conclude contracts with them to pay higher minimum wages and benefits to their employees. The federal government, along with many state governments, likewise requires employers to pay the prevailing wage, which typically reflects the standards established by unions’ collective bargaining agreements in the area, to workers on public works projects.

As with most other federal laws, there are exceptions to the minimum wage regulations. There are situations in which an employer may pay less than the minimum wage such as: when vocational education students (also known as “student-learners”) are employed; when full-time students are hired in retail, service establishments, agriculture or

institutions of higher education; when individuals are hired whose earning or productive capacity is impaired by a physical or a mental disability (including those related to age or injury). In order for an employer to pay its workers less than the federally mandated minimum wage, he must first apply for a certificate through the Wage and Hour division of their local FLSA office. There are also employees who are exempted from both the minimum wage and overtime pay rules: any professional, executive or administrative employees; teachers and academic administrative personnel in elementary and secondary schools; outside sales employees; employees in certain computer-related occupations.

While the FLSA does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are a number of employment practices that it does not regulate: vacation, holiday, severance or sick pay; meal or rest periods, holidays off or vacations; premium pay for weekend or holiday work; pay raises or fringe benefits; a discharge notice, reason for discharge or immediate payment of final wages to terminated employees.

Complicating matters even further, employers based in the United States and employers based outside the USA that operate in the United States also are covered by different laws. For example, employers that are incorporated or based in the USA or are controlled by US companies and that employ American citizens outside the United States or its territories must comply with Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act with regard to all US citizens in foreign offices. Multinational employers that operate in the United States (or its territories) must comply with certain federal equal employment opportunity laws to the same extent as US employers, unless a bilateral treaty or other binding international agreement applicable to that employer limits the applicability of the laws.

State anti-discrimination laws have their own eligibility requirements and application area. For example, in California, the Fair Employment and Housing Act applies to employers who regularly hire more than five persons (with some exceptions for religious and nonprofit organizations). The California Family Rights Act applies to employers who do business in California and employ 50 or more full-time or part-time employees. California has its own wage and hour laws regulating minimum and overtime requirements which are applicable to virtually all employers; different rules are applicable depending on the employer's industry.

A curious situation met in federal states is that even some localities also have living wage requirements for employers who contract with the local government. Some localities have minimum wage requirements regardless of whether the employer has a local government contract or not. Other localities, like New York City, have their own discrimination laws that apply to certain employers depending on their size.

Employers cannot pick and choose which laws to follow, even if federal, state, and/or local law requirements overlap. Employers must comply with all federal, state and local laws that are applicable, even if the laws have different legal standards. That means that applicable law is the most favorable to the employees. Companies based in several states face particular challenges because it must also be determined whether to apply the federal, state and local laws specific to each location or whether to combine the laws of all the jurisdictions and apply them uniformly across the board. Sometimes, it may be easier and more consistent with the corporate culture to apply the broader protections of some state and local discrimination laws in all locations in which the company does business rather than applying different employment standards to employees based on geographic limits.

Collective bargaining and the concluding of collective agreements (contracts) are equally important for federal and unitary states. In all federal countries, collective bargaining is subject to a double coordination. First, confederations unified federal claims, and then the branches which are considered to be the most important are conducting basic negotiations. The fundamental principle of this system is that negotiation results are imposed to both employers and employees, members of organizations that participate at negotiation. The result is a set of industry agreements which no company can avoid.

In Germany, collective agreements (Tarifverträge), usually concluded at the branch level by the appropriate trade union and employers' association, are legally binding as long as they keep in line with the statutory minimum standards[18]. A particularity of German law system is that there is no trade union law. Even though trade unions are generally defined as associations with no legal capacity, they are legally entitled to collectively bargain as well as to take legal action or to be taken to court[19]. The duties and rights of trade union members are laid

[18] Gunter Halbach, Norbert Poland, Rolf Schwedes, *Labor Law in Germany*, published by the Federal Ministry for Labor and Social Affairs, Bonn, 1991, pp. 303-304.
[19] Sec. 2 paragraph 1 of the Act on Collective Agreements and sec. 10 of the Labor Court Act.

down in the relevant trade union's status (constitution act). Even though the statuses may vary between different trade unions, they traditionally establish similar essential duties and rights. There are also written agreements concluded between the employer and the works council (a body representing the employees of the establishment) because "the relationship between the industrial unions and work councils in Germany seems to have been highly significant. Pressures for the decentralization of collective bargaining have been deflected onto the works councils. The works council system and its linkage with industry-wide bargaining have endowed the German economy with a unique capacity for what K. Thelen called «negotiated adjustment»[20]. Far from weakening unions, co-determination provides an institutional underpinning for a wide variety of union policies intervening in the organization and operation of the economy"[21].

Negotiations are based on a written text on which the parties agree, containing a clause of social peace, which restricts the possibility of conflicts to the (re)negotiation period (as long as the collective agreement remains in force, new demands and labor disputes about included topics are absolutely banned). In this way, social peace at both enterprise and industry level is ensured for the entire period of agreement's validity. Collective bargaining can also take place at the enterprise level but companies are not obliged to negotiate, because they are covered by branch agreements (this does not mean that enterprise-level bargaining is prohibited).

German government has a discrete role in employment relations. Its contribution is notable in two aspects: first, sets the legal framework of negotiation and conflict; second, government can intervene when there is an extension of a collective agreement, its role being to convince companies that are not members of employers' organizations to meet agreement's conditions. A collective agreement may be declared as generally applicable to all employment relationships within its geographical scope, whether or not the employer or the employee are members of the parties to the agreement. This declaration is done by the Ministry of Labor; if at least 50% of the employees who come under the agreement's geographical area are hired by employers already bound by the agreement (it also requires the accordance of both industrial partners and must be of public interest).

[20] K. Thelen, *Union of Parts: Labor Politics in Post-war Germany*, Cornell University Press, Ithaca, New York, 1993, cited by Jack Eaton, *cit. work*, p. 54.
[21] *Ibid*, p. 53-54.

In USA, as well as in Canada, there is a long-established practice of "bargaining in good faith" (since 1935). This fact means that employers and employees' representatives have to approach bargaining with an open mind and with the aim of reaching agreement but there is no obligation to make concessions or conclude an agreement. Employees are often represented in bargaining with the employer by a union or other labor organization. Collective bargaining is governed by federal and state statutory laws, administrative agency regulations, and judicial decisions. In areas where federal and state law overlap, state laws are preempted[22].

In conclusion, we can say that the regulation of labor relations is a much more complex process in federal states in comparison with the unitary states but their experience can suggest a series of key lessons for the Romanian democracy in which the principle of negotiation of working conditions, the freedom of labor, the right to strike and freedom of association have a recent history.

[22] See Article VI of US Constitution.