

CATÓLICA

2014

GRADUATE LEGAL RESEARCH CONFERENCE

CONFERENCE PROCEEDINGS

September 19-20 | Lisbon, Portugal

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IS «LEGAL GLOBALIZATION» THE SOLUTION FOR THE DISORIENTATION OF HEALTH AND SAFETY AT THE WORKPLACE LAW?

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ABSTRACT

Occupational health and safety Law is a field of Law where the stagnation of European Social Law is most being felt. The European Union Strategic Framework on Health and Safety at Work 2014-2020 was approved in june 2014, and the fear of a throwback that dominated the legal doctrine was confirmed, as the paradigm of the adaptation of the work to the worker seems to be changing into the worker's adaptation to the work.

Moreover, new challenges are presented to the field of Occupational Health and Safety, due to emerging risk factors that create new occupational risks, such as psychosocial risks, nanomaterial risks, alcohol and drug dependence, among others.

In the meanwhile, the European Union is challenged to present instruments that guide the Members States in these issues and that offer concrete solutions to the problems that arise in each Member State.

The answer might be global, as the broader concept of health adopted by the World Health Organization seems to be most suitable to solve the worker's problems, as well as the International Labor Organization's Conventions.

But is it possible to transcend the European legal borders and seek for answers in those international organizations?

In any case, is it preferable, in this matter, to have a legislative or hard law model, or, on the contrary, a self-regulation or soft law model?

I. HISTORICAL FRAMEWORK OF OCCUPATIONAL HEALTH AND SAFETY LAW

The lack of attention to this field of Labour Law does not honor its origin, which had its grounds in the improvement of working conditions and of the working environment, in the mid-nineteenth century, with the development of the industrialization. The Occupational Safety and Health Law emerges with the recognition of the need to effectively regulate working conditions, which often brought situations of misery for workers and their families, and destroyed the workforce, essential for the economic development¹. Therefore, it was essential to ensure the survival of victims of occupational contingencies. Bismarks's Law of Social Insurance of 1884 would include this issue in the context of social security, which would cover, among other eventualities, the loss of earning capacity resulting from the professional contingency².

This theme has been subject of attention from the International Labour Organization (ILO) almost since its beginning, with the approval of several Conventions, being the Convention nr. 155 from 1981 one of the most important, demanding from the States the implementation of a national policy of occupational health and safety³. Besides the Conventions and Recommendations, ILO also organizes several Codes of Best practices and action plans.

In what concerns European Union (EU) Law, some legal doctrine describes the historical evolution of Occupational health and safety Law in four stages⁴, while others define it in two or three phases⁵.

At first, the EU legislation referred to the protection of occupational health and safety only as an instrumental goal, as the priority were economic purposes. At this stage, the only activities pursued were studies and statistics. The legislative instruments were reduced to Recommendations on a list of occupational diseases, on the conditions for

¹ MANUEL M. ROXO, *Direito da Segurança e Saúde no Trabalho. Da Prescrição do Seguro à Definição do Desempenho, uma Transição na Regulação*, Almedina, Coimbra, 2011, p. 15.

² We'll refer to "professional contingencies" as a concept that comprehends both work-related accidents and occupational diseases.

³ On the importance of ILO's Conventions to the theme of occupational health and safety, cfr. ANTONIO OJEDA AVILÉS, *Derecho Transnacional del Trabajo*, Tirant lo Blanch, Valencia, 2013, p. 128.

⁴ AAVV, *Lecciones de Derecho Social de la Unión Europea*, coord. Magdalena Nogueira Guastavino, Olga Fotinopoulou Basurko, José María Miranda Boto, Tirant lo Blanch, Valencia, 2012, p. 366.

⁵ The two phases would be one until the Framework Directive, and the other from that moment on, even though some legal doctrine considers that the first phase ends in 1987, with the entry into force of the Single European Act. Cfr. AAVV, *Manual de Derecho Social de la Unión Europea*, coord. Antonio Costa Reyes, Tecnos, 2011, p. 365. The scholars that define three phases divide them into the periods of 1971 until 1978 (first phase), 1978 until 1984 (second phase), and from this year on (third phase). BRUNO CARUSO; SILVANA SCIARRA; *Il lavoro subordinato*, G. Giappichelli Editorem, Turim, 2009, pp. 78-82.

compensation of victims of occupational diseases and on the medical surveillance of workers exposed to particular risks⁶.

A second phase began as politicians reached the conclusion that social progress was not possible if only sustained in economic integration. A program of social action was created to improve working conditions and to encourage progressive elimination of physical and psychological constrictions of jobs.

Several directives on specific issues such as chemical, physical and biological agents, among others, were approved. The European Foundation for the Improvement of Living and Working Conditions was created. In 1978, the first program of action of the European Communities on safety and health at work (78-82) is created, and the second program (84-88) insists on the same goals⁷.

The idea that the social partners should be involved in these matters was encouraged.

On a third phase, the Single European Act of 1986 brings the article (art.) 118-A, now art. 153 on the Treaty on the Functioning of EU (TFEU), which states that “*With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (...) (i) equality between men and women with regard to labour market opportunities and treatment at work; (...) 2. To this end, the European Parliament and the Council: (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States; (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. (...)*

” This provision seemed to allow flexibility in the decision-making procedure on this matter, as the qualified majority was enough to legislate, and no longer unanimity was demanded⁸.

Common minimum requirements that all Member States (MS) should follow were defined. The third program of social action harmonized various areas such as safety and ergonomics in the workplace, training for managers and workers, among others. Several Resolutions of the European Parliament were approved, in which it invited the Commission to create specific Directives on these matters.

⁶ AAVV, *Lecciones de Derecho Social...*, cit., p. 367.

⁷ *Ibidem*, p. 367. We will follow these authors in the next few paragraphs, corresponding to pp. 367- 375.

⁸ ANTONIO OJEDA AVILÉS, *op. cit.*, p. 202.

At least, we arrive the fourth phase, of the consolidation of legal rules and stimulation of social agents and collective bargaining. We shall recall that the art. 156 of the TFEU states that, to achieve the objectives of art. 151 of the TFEU, the Commission shall have a strengthened role and shall encourage consultation with social partners and adopt all necessary dialogue between them, cooperation between Member States and coordination of their actions⁹.

At this point, the Framework Directive (Directive nr. 89/391/CEE, hereinafter only referred to as Framework Directive) was approved, followed by its specific directives.

The Framework Directive would set the minimum standards that shall be followed by the Member States¹⁰, the general principles and rules that have to be incorporated in each national legislation and practices. The main ideas of the Framework Directive are the universality of its application and the harmonization of national legislation¹¹.

The specific Directives would regulate the workplace, the working equipments, and individual protection equipments, specific risks, specific activities, and specific groups of workers (young people, pregnant women, workers in temporary working companies, among others).

At the same time, the issuing of the Community Charter of Fundamental Social Rights (1989) would boost European social policy and was an important element in the development of an European soft law in this subject¹².

The fourth program of social action (94-2000) was developed, training was encouraged and priority was given to small and medium enterprises (SME's).

Another community program was approved for the period between 1996-2000 and the Community Strategy on Health and Safety at Work 2002-2006 was issued, establishing goals of physical, moral and social well-being at

⁹ VICENTE LAFUENTE PASTOR; RUTH VALLEJO DACOSTA, *Marco jurídico de la seguridad y salud en el trabajo*, Prensas Universitarias de Zaragoza, Zaragoza, 2010, p. 65.

¹⁰ SANTIAGO GONZÁLEZ ORTEGA stresses that the Framework Directive leaves such a broad margin to the Member States that one can hardly advocate that it has direct effect. «La aplicación en España de las Directivas Comunitarias en materia de salud laboral», *Temas Laborales*, nr. 27, 1993, p. 18.

¹¹ As states BRIAN BERCUSSON, “*the provision of the Framework Directive (...) demonstrate how health and safety law has been «Europeanised» by EU Law*” - *European Labour Law*, Cambridge University Press, Cambridge, 2009, p. 346. In fact, this “comunitarization” of the national systems in the field of occupational health and safety is based on the convergence that is intended by the EU legislation. Cfr. AAVV, *Manual de Derecho Social de la Unión Europea*, coord. Antonio Costa Reyes, Tecnos, 2011, p. 369.

In fact, in Portugal we depend so much of the EU instruments that we have no Occupational Health and Safety Strategy for the years of 2013-2014, as the previous ended in 2012 and the next one will be issued for the period of 2015-2020.

¹² This idea is developed by SARA BRIMO, *L'État et la protection de la santé des travailleurs*, Lextenso Éditions, Paris, 2012, pp. 160-163.

work, supporting best practices, social dialogue and corporate social responsibility. The idea that the well-being should not only be achieved by the absence of accidents or illnesses, but also through complementary measures, such as reducing such professional contingencies, preventing them, taking into account the aging of the population and the protection of young people at work, considering new forms of work organization and meeting the particular problems of SME's. It was then determined that Community law was necessary for the improvement of working conditions, and guides for the application of the Directives were created.

Later comes the Community strategy on health and safety at work for 2007-2012¹³, with the aim of improving the quality and productivity of work, intending to reduce accidents, and supporting the idea that health at work improves public health in general, increases the viability of social security systems, as it decreases work accidents and occupational diseases, but also improves the productivity and competitiveness of enterprises, reducing costs¹⁴. The six key issues were: creating modern and effective legislation, adapted to the evolution of the labour market; creating national strategies and coordinating occupational health policies with public health policies; promoting behavior changes through training and encouraging companies by reducing contributions or insurance payments; considering the emerging risks, such as depression, promoting health at work, preventing violence, moral harassment and stress; collecting statistical data; and, finally, promoting safety and health at the international level by strengthening cooperation with third countries and international organizations.

Due to the principle of subsidiarity, there are shared powers between the Member States and the EU, and it is up to the Member States to implement certain goals, and up to the EU to intervene when they are not sufficiently achieved. However, the diversity of social systems and the fear of Member States to give up on their sovereignty in the social issues have hindered the development of this field. There is, therefore, an intervention of the European Parliament and the European Council at a normative level, but also with non legislative instruments, aiming cooperation, development of exchanges of information and best practices, studies, statistics, initiatives for guidance and directions, and exchange of practices.

But the legal doctrine understands that the EU's legislation should be simplified in order for its contents to be better identified, interpreted and

¹³ European Parliament Resolution of 15-01-2008 on the Community strategy 2007-2012 on health and safety at work (2007/2146 (INI)), published in the *Official Journal C* 41E/03 of 19-02-2009.

¹⁴ MARÍA DEL MAR ALARCÓN CASTELLANOS, «Marco general de la estrategia comunitaria de salud y seguridad en el trabajo (2007-2012) y su protección en España», *Cuestiones actuales sobre Derecho Social Comunitario*, Ediciones Laborum, Murcia, 2009, p. 301. On the costs of occupational health standards and damages to the countries' economies, cfr. Jean-Michel SERVAIS, *International Labour Law*, Wolters Kluwer, Alphen aan den Rijn, 2011, pp. 219 and 220.

uniformly applied by the Member States, and better adapted to the changing the labour world, of forms of work organization and technical progress¹⁵.

At a national level, until the decade of 1990, the legislation excluded significant parts of the population (civil servants, agricultural workers, seafarers, craft work or independent workers) and was aimed at certain sectors or certain specific risk factors. Moreover, not all risks were identified, the differences between individuals were not considered (sex, age, physiological or psychosocial characteristics), the interactions between different risk factors were not recognized, and emerging risk factors were not foreseen¹⁶.

The regulation focused on the reparation, and only later on it focused on prevention and on the elimination or reduction of risk factors, influenced by international legal instruments.

It should be noted that, in what concerns work-related accidents, in Portugal, the employers are obliged to assign an insurance for each worker, which is a particularity of our professional contingencies system, that does not exist in many other European legal systems. Respecting occupational diseases, the compensation is guaranteed by the Social Security System. Exception to the civil servants, who are protected by the Social Security System in both professional contingencies, as the insurances are not mandatory to the public entities¹⁷. It shall be noted that the countries which transferred responsibility to the Social Security system seemed to have earlier recognized the costs of insecurity, which encouraged a positive action, focused on the prevention of accidents, avoiding its consequences and restoring the working capacity, in case the accident still occurs.

Nowadays, we have several legal diplomas regulating this issue, but the legislation is changed at the same pace (or a litter later, actually) as the EU legislates on this issue. Neither new legislative projects are foreseen, neither the non-legislative instruments are implemented by the national authorities or signed by national collective entities such as employers' associations and trade unions.

II. EU STRATEGIC FRAMEWORK ON HEALTH AND SAFETY AT WORK 2014-2020

Occupational Health and Safety is a field of Law where the stagnation of European Social Law is most being felt, even though it is a substantial part of the social dimension of the Internal Market¹⁸.

¹⁵ AAVV, *Lecciones de Derecho Social...*, cit., p. 409.

¹⁶ MANUEL M. ROXO, *op. cit.*, p. 37.

¹⁷ Cfr. ours «Segurança e saúde no trabalho – particularidades e problemas no âmbito da Administração Pública», in *Estudos em Homenagem ao Professor Jorge Leite*, Coimbra Editora, Coimbra, 2014, 283-306, in press.

¹⁸ Occupational health and safety is one of the most important aspects of the European social policy. AAVV, *Lecciones de Derecho Social...*, cit., p. 409.

With the end of the programme of the Community strategy for 2007-2012 on health and safety at work, a new community Strategy was expected.

The European Health and Safety Strategy for the period of 2013-2020 was approved with delay – and, therefore, named EU Strategic Framework on Health and Safety at Work 2014-2020 –, as the priority was given to solving the economic and financial crisis. In fact, Portugal has one of the highest rates within the EU member states of expectations of major or some deterioration of health and safety, along with Latvia, Slovenia, Greece, Estonia and Sweden¹⁹.

Finally, the EU Strategic Framework on Health and Safety at Work 2014-2020 was approved in june 2014, and the fear of a throwback that dominated the legal doctrine was confirmed, as the paradigm of the adaptation of the work to the worker²⁰ seems to be changing into the worker's adaptation to the work.

The approach is now on the art. 145 of the TFEU, as the work force must adapt to the companies' needs. The occupational health and safety policies were at first diluted on the Strategy of Lisbon and its goals of growth and competitiveness of companies²¹ and later on positioned at a second place by the Strategy Europe 2020, that was given priority.

Nevertheless, the Strategy, presented on june 2014, concentrates on the concept of “healthy and safe working environment” and defines the following goals: further consolidate the national strategies; facilitate the compliance with occupational safety and health legislation, particularly by micro and small enterprises; encourage a better enforcement of occupational safety and health legislation by Member States; simplify existing legislation; address the ageing of the workforce, emerging new risks, prevention of work-related and occupational diseases; improve statistical data collection and develop the information base; and better coordinate EU and international efforts to address occupational safety and health and engage with international organizations.

¹⁹ Cfr. «Workers' health and safety exposed to crisis», available in http://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CFgQFjA#&url=http%3A%2F%2Fwww.etui.org%2Fcontent%2Fdownload%2F13835%2F113961%2Ffile%2FChapter%2B6%2BBenchmarking%2B2014.pdf&ei=w6z7U5j3EOzy7Ab74oH4D_A&usg=AFQjCNGZarGsS_5KhISZk-MdYa42sj5lg&sig2=chX7Pa1GRk0zFcqBRNV-Jw&bvm=bv.73612305,d.bGQ&cad=rja, consulted 25-08-2014.

²⁰ According to MATTHIEU BABIN, the logic underneath the principles of occupational health and safety is the adaptation of the work to the worker, understood as the protection of the health in the center of the work organization. *Santé et sécurité au travail*, Éditions Lamy, Rueil-Malmaison Cedex, 2011, p. 31.

²¹ Cfr. PATRIZIA TULLINI, «La sicurezza sul lavoro tra diritto comunitario e diritto interno», in AAVV, *Diritto privato comunitario*, coord. Pietro Perlingieri e Lucia Ruggeri, vol. II, Edizioni Scientifiche Italiane, Napoli, 2008, p. 242.

III. EMERGING RISKS

Charles Chaplin's "Modern Times", a movie from 1936, pointed out the risks that a worker, Little Tramp – played by the own Charles Chaplin – faces in an industrialized world. At a certain point, besides the physical consequences of his monotonous and repetitive work, he suffers a nervous breakdown and runs through the factory, driving it into chaos. Back then he probably didn't realize it, but Charles Chaplin couldn't be more accurate when defining the occupational risks.

The factors that may influence the emergence of new occupational risks are related to the physical environment, derived from the working conditions and organization (including the intensification of work, repetition and monotony, flexible working arrangements, remuneration, new forms of contracting and precarious contracts), factors related to the interaction of particular working demands with aspects not associated to work, social factors (such as the aging of the population, the existence or absence of social support and economic conditions), factors related to environmental or geographical working conditions, dynamic and not structural factors, personal factors (such as the articulation of professional life and family life and biological factors) and, finally, the factors related to gender.

In fact, due to these and other emerging risk factors, new occupational risks arise, such as psychosocial risks²², nanomaterial risks²³, alcohol and drug dependence, among others.

²² The existence of objective labour circumstances as the fragile economic situation of the company, a negative performance evaluation, work in shifts, among other risk factors, may cause psychosocial risks with the potential to cause physical, social or psychological damages in workers. Some of these are burn out, mobbing or moral harassment, karoshi, syndrome of post-traumatic stress, work addiction, tecnostress, or "mere" work stress.

²³ "(...) Many organisations coincide in their definition of nanomaterials on the fact that they are materials containing particles with one or more external dimensions between 1-100 nanometres (nm). Up to 10 000 times smaller than a human hair, nanomaterials are at a size comparable to atoms or molecules and take their name from their minute structures (a nanometre is 10-9 of one metre). Not only because of their tiny size but also because of other physical or chemical characteristics that include, amongst others, their shape and surface area, nanomaterials differ in their properties from the same materials at larger scale.

Because of these differences nanomaterials offer new and exciting opportunities in areas such as engineering, information and communication technology, medicine and pharmaceuticals, to name but a few. However, these same characteristics that confer their unique properties to nanomaterials are also responsible for their effects on human health and the environment. (...) What are the health and safety concerns associated with nanomaterials? There are significant concerns regarding the health effects of nanomaterials. The Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) found that there were proven health hazards associated with a number of manufactured nanomaterials. Not all nanomaterials necessarily have a toxic effect, however, and a case-by-case approach is necessary while ongoing research continues. The most important effects of nanomaterials have been found in the lungs and include among others inflammation and tissue damage, fibrosis and tumour generation. The cardiovascular system may also be affected. Some types of carbon nanotubes can lead to asbestos-like effects. As well as the lungs, nanomaterials have been found to reach other organs and tissues including the liver, kidneys, heart, brain, skeleton and soft tissues. As a result of their small size and large surface area, particulate nanomaterials in powder form may present risks of explosion, whereas their respective coarse materials may not. (...)

The EU Strategic framework for 2014-2020 defines these emerging risks as a challenge and states that “*The industrial application of new technologies leads to new products and processes, which need to be sufficiently tested and checked in order to ensure that they are safe and do not represent major hazards for consumers and workers. Nanomaterials are one example, as they may possess unique properties which may require new toxicity testing methods and risk prediction tools from the product development phase onwards, to properly consider safety aspects. Other emerging risks linked to the development of biotechnologies and green technologies need to be addressed too.*”

In what concerns psychosocial risks, it shall be noted that, at a time when the economic component is widely debated, job dissatisfaction and the resulting costs have a severe impact on employers and on workers – directly (on their health) and indirectly (on their productivity and the well-being of colleagues and family²⁴). Example of this are the high rates of absenteeism²⁵, demands for changing current working conditions, early retirements²⁶, lower levels of productivity and performance, deterioration and greater hostility at the workplace and negative behaviours towards health and safety issues, all factors contributing to higher accident rates and higher costs for the health and safety management system²⁷.

Exposure may therefore occur in a variety of occupational settings where nanomaterials are used, handled or processed and consequently become airborne and can be inhaled, or come into contact with the skin; for example, in contexts from healthcare or laboratory work, to maintenance or construction work. (...). Available in https://osha.europa.eu/en/topics/nanomaterials/index_html, consulted in 30-08-2014.

²⁴ On the consequences of workers' suicide, see ALBERTO VALDÉS ALONSO, «Informe sobre la valoración de los comportamientos autolesivos y el suicidio como accidente de trabajo», Gabinete Jurídico de UGT, Convenio de asesoramiento entre la Confederación de la UGT y la UCM, january 2008, p. 2, available in http://www.ugtcantabria.org/saludlaboral/informe_comportamiento.pdf, consulted 31-10-2010. The cost for the relatives may be called as “préjudice par ricochet”, cfr. ANNE-SOPHIE GINON and FREDERIC GUIOMARD, «Le suicide peut-il constituer un risque professionnel?», *Le Droit Ouvrier*, july 2008, p. 367.

²⁵ According to the Portuguese Public Institution for the Working Conditions (*Autoridade para as Condições do Trabalho*), psychosocial risks will be the main cause for absenteeism in 2014. Cfr. http://www.ionline.pt/portugal/stress-violencia-assedio-serao-principais-fatores-absentismo-laboral-partir-2014?quicktabs_sidebar_tabs=1, consult. 12-03-2012.

²⁶ A study concluded in Portugal in 2004 in the banking sector found that the main consequences of mobbing on workers were: long-term illnesses (11,8%), early retirement (17,6%), disability pensions (5,9%), change of company (23,5%) and work-related stress (5,9 %). PAULO PEREIRA DE ALMEIDA, «Assédio Moral no Trabalho. Resultados de um Estudo», *Dirigir*, nr. 98, april-may-june 2007, Lisboa, p. 45.

²⁷ M.^a CARMEN DÍAZ DESCALZO, «Los riesgos psicosociales en el trabajo: el estrés laboral, el síndrome del quemado y el acoso laboral. Su consideración como accidente de trabajo», *Revista de Derecho Social*, nr. 17, 2002, p. 184. The World Health Organization estimates that by 2020, depression will be the main cause of disability at work. García Viña, «El Moobing [sic] en las Relaciones Laborales en España», *Tribuna Social – Revista de Seguridad Social y Laboral*, nr. 223, 2009, p. 15.

Among us, Portuguese Health authorities changed the National Mental Health Programme for 2007-2016²⁸, as they figured that the number of mental diseases and suicides would increase with the financial crises that the country is facing. Therefore, the Plan envisages the need for coordination between different institutions on prevention and promotion initiatives, mostly “employment policies and the promotion of mental health care in the workplace, in order to reduce and manage the stressors related to work and unemployment, and leave due to psychological illnesses”, increasing “awareness and information in various areas, such as (...) the workplace”.

In 2012, the Portuguese Public Institution for the Working Conditions (*Autoridade para as Condições do Trabalho*) concluded the European Survey on psychosocial risks at the workplace, which allowed us to have some reports and numbers on these emerging risks. However, the phenomenon tends to hide within the walls of the companies, and the workers do not seem to be coping with these risks.

In fact, as happens with other European jurisdictions, the Portuguese law sanctions moral harassment, one of the most debated psychosocial risk, in the context of the labour law, and provides the worker a right to be compensated in the civil terms, for the pecuniary and moral damages suffered. However, the injuries that cause a disability for work due to a phenomenon of mobbing in the workplace are not yet considered as pathologies compensated in the same terms as occupational contingencies (workplace accidents or occupational diseases). Indeed, although the Portuguese legal doctrine has been studying the phenomenon of mobbing for the past years, the case law is still unwilling to accept the compensation and sanction of these conducts in the same terms as the other EU jurisdictions have been allowing.

Moreover, besides mobbing, there are different events that the legal doctrine considers to be psychosocial risks in the workplace, such as stress, burn out and violence, but the case law is not always willing to recognize them and compensate their damages to the worker, as a legal framework is still missing. In the author's opinion, the Portuguese legal system has adequate instruments to align itself to other EU countries and compensate for the consequences of psychosocial risks. However, an examination of case law shows that some resistance still exists in this matter, and Portugal still struggles to keep up with the rest of Europe.

Therefore, new challenges are presented to the field of Occupational Health and Safety, especially in what concerns emerging risks such as psychosocial risks, as the case law shall decide whether they will look at the concrete case and decide regardless of the legal framework, or if this is mandatory. In the meanwhile, the EU is challenged to present instruments

²⁸ Resolution of the Ministers Counsel nr. 49/2008, published on the *Diário da República*, 1st series, nr. 47, from 06-03.

that guide the Members States in these issues and that offer concrete solutions to these problems that arise in each Member State.

In what concerns emerging risks, the Strategic Framework for 2014-2020 was a disappointment (for those who still expected some good news).

It referred to the prevention of emerging risks as a challenge, stating that “*While many new technologies and innovations in work organisation have substantially improved well-being at work and working conditions, effective prevention of work-related diseases requires anticipating potential negative effects of new technologies on workers' health and safety. (...) Changes in work organisation brought about by information technology developments, in particular those that allow for constant connectivity, open up enormous possibilities for flexible and interactive work processes. There is also increasing workforce diversity, as reflected in new atypical contractual arrangements and work patterns, and a higher job turnover associated with shorter job assignments, especially for younger workers. However, according to a recent Eurobarometer survey, workers consider stress to be one of the main occupational risks (53%), followed by ergonomic risks (repetitive movements or tiring or painful positions (28%)) and lifting carrying or moving loads on a daily basis (24%). Specific attention should be given to addressing the impact of changes in work organisation in terms of physical and mental health. (...)*”.

But when it comes to setting goals to react to these challenges, the document defines the following “*changing technologies, new products and the marketing of new chemicals make it necessary to gather and evaluate sound scientific evidence, to identify how emerging new risks can best be addressed. The EU institutions, particularly the Commission, should mobilise the highest quality expertise available to work on this. (...) The assessment of new emerging risks, based on scientific evidence, and dissemination of the results will be crucial parts of the ex post evaluation of current OSH legislation*”.

In what concerns the concrete actions that will be executed, it predicts, among others, the establishment of “*a network of OSH professionals and scientists and ascertain the need to set up an independent scientific consultation body that would channel their recommendations into the work of the Commission; support the dissemination of the findings of the European Risk Observatory among the relevant actors → Commission in cooperation with EU-OSHA; (...) identify and disseminate good practice on preventing mental health problems at work → EU-OSHA*”.

Therefore, even though studies are predicted, what seems to fail is the execution of the conclusions which are reached in the meanwhile, the prediction of plans of action, the creation of legislation or other instruments that encompass the conclusions that are reached. In fact, in our opinion, even though it is a very important step in order to eliminate the problem, it is not sufficient to recognize it, identify its sources and causes and share the findings which were reached.

IV. BROADER CONCEPTS

At first, the concept of “health” was defined as the state of the person whose functions are in normal state or undisturbed by any disease; the condition of person who is sound, or the absence of disease; the individual's ability to carry out its normal functions²⁹.

However, nowadays, there was a redefinition of the term, which has a much broader meaning.

In fact, the World Health Organisation defines “health” as a state of complete physical, mental and social well-being³⁰.

The ILO Convention nr. 155 defines it not only as the absence of disease, but also refers to physical and mental elements that may affect health and are directly related to safety and hygiene at work (art. 3. subp. e)). Therefore, “occupational health” not only includes the medical surveillance, targeting the absence of disease or infirmity, but also includes promoting and maintaining the highest degree of physical, mental and social well-being³¹ of workers in all occupations.

The International Pact on economic, social and cultural rights, adopted in December 16th 1966 by the UN, recognises at art. 12 the right of every person to benefit from the best state of physic and mental health that is possible.

GONZALEZ ORTEGA states that the concept has a dynamic character, complex and comprehensive, encompassing the safeguard of life and physical and moral integrity of the worker³².

The broader concepts of health adopted by the World Health Organization, as well as the ILO's Conventions, seem to be most suitable to solve the worker's problems and enables a wider comprehension of occupational health and safety.

In fact, nowadays, new concepts are presented, such as “working environment”³³, “decent work”³⁴, “healthy working environment”³⁵, concepts

²⁹ MARÍA TERESA IGARTÚA MIRÓ, *Sistema de Prevención de Riesgos Laborales*, 2^a ed., Tecnos, Madrid, 2011.

³⁰ Cfr. the World Health Organization report “The World health report 2001. Mental Health: new understanding, new hope”, published october 4th 2001, available in http://www.who.int/whr/2001/en/whr01_en.pdf, consulted 15-12-2014.

³¹ Stressing the importance of protection of the worker's well-being in the productive environment, cfr. PATRIZIA TULLINI, *op. cit.*, p. 246.

³² SANTIAGO GONZÁLEZ ORTEGA, «Seguridad y salud en el trabajo», in *E/ Estatuto de los trabajadores veinte años después*, Edición especial del número 100 de Revista Española de Derecho del Trabajo, Civitas - Revista Española de Derecho del Trabajo, 2000, 555-573.

³³ As happens in the EU Strategic Framework on Health and Safety at Work 2014-2020, presented by the Communication from the European commission to the European Parliament to the European Council and to the European Economic and Social Committee and the Committee of the Regions.

³⁴ Which, as states MARÍA AMPARO BALLESTER PASTOR, is a less complete concept than the one of “dignified work” («La política de la OIT y de la Unión

that were primarily presented by the ILO Convention nr. 155, but were accepted by the EU Framework Directive³⁶ and recently renewed by the EU Strategic Framework on Health and Safety at the workplace 2014-2010.

The European Court of Justice (ECJ) case law is clear stating that the concepts of “working conditions”, “safety” and “health” should not be construed narrowly. In the case C-84/94, United Kingdom of Great Britain and Northern Ireland vs Council of the EU, the Court concluded that “*There is nothing in the wording of Article 118a to indicate that the concepts of "working environment", "safety" and "health" as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organization of working time. On the contrary, the words "especially in the working environment" militate in favour of a broad interpretation of the powers which Article 118a confers upon the Council for the protection of the health and safety of workers. Moreover, such an interpretation of the words "safety" and "health" derives support in particular from the preamble to the Constitution of the World Health Organization to which all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity*”³⁷. According to NICOLE MAGGI-GERMAIN, this broad concept that results from the EU case law is transversal, and may be used in several thematic areas³⁸.

In fact, the concept of “working environment” might be nowadays close to the concept as it is foreseen in Danish law, as encompassing not only “*classic measures relating to safety and health at work in the strict sense, but also measures concerning working hours, psychological factors, the way worked is performed, training in hygiene and safety, and the protection of young workers and worker representation with regard to security against dismissal or any other attempt to undermine their working conditions. The concept of «working environment» is not immutable, but reflects the social and technical evolution of society*”³⁹. The Advocate General in the

Europea sobre salud y riesgos psicosociales», in AAVV, *Violencia, riesgos psicosociales y salud en el trabajo. Estudios desde el derecho internacional y comparado*, dir. Lourdes Mella Méndez, Adapt, 2014, p. 330).

³⁵ Cfr. ILO Convention nr. 187 concerning the Promotional Framework for Occupational Safety and Health, adopted in 2006.

³⁶ Cfr. SUSANA DE LA CASA QUESADA; MANUEL GARCÍA JIMÉNEZ; CRISTÓBAL MOLINA NAVARRETE, *Regulación de los riesgos psicosociales en los ambientes de trabajo: panorama comparado de modelos y experiencias en Europa y América*, Editorial Bomarzo, Albacete, 2011, p. 166.

³⁷ All ECJ decisions referred to hereinafter may be consulted in www.curia.eu.

³⁸ NICOLE MAGGI-GERMAIN, «Travail et santé: le point de vue d'une juriste», *Droit Social*, nr. 5, may 2002, p. 488.

³⁹ Advocate General in the case C-84/94, United Kingdom vs Council of the EU, *apud* ROGER BLANPAIN, *European Labour Law*, Kluwer Law International, The Hague, 2006, p. 577.

case C-84/94, United Kingdom vs Council of the EU, states that the terms “safety and health” shall, in consequence, be given a broad interpretation⁴⁰.

In what concerns the concept of “risks”, the ECJ already clarified that the obligations under the Framework Directive are not fulfilled when the national legislation does not establish the obligation of the employer to assess all risks in the workplace. On the case C-49/2000, Commission vs Italy, the ECJ concluded that “*It must be noted, at the outset, that it follows both from the purpose of the directive, which, according to the 15th recital, applies to all risks, and from the wording of Article 6(3)(a) thereof, that employers are obliged to evaluate all risks to the safety and health of workers. (...) It should also be noted that the occupational risks which are to be evaluated by employers are not fixed once and for all, but are continually changing in relation, particularly, to the progressive development of working conditions and scientific research concerning such risks*”.

Especially in what concerns psychosocial risks, “suffering at work”⁴¹ or “mental health at work”⁴² are considered by the legal doctrine to be more appropriate to define this phenomenon.

The truth is that the difficulty to categorize brings problems to legislate, as it is hard to regulate a phenomenon that one cannot define and which borders are not precise⁴³.

This problem is not new in the field of occupational health and safety. In fact, many national systems are mixed in what concerns occupational diseases: some diseases are listed in a legally prescribed and periodically reviewed table (at this point, in Portugal, the *Regulamentar Decree nr. 6/2001, 05-05*, republished by the *Regulamentar Decree nr. 76/2007, 17-07*), where a presumption of causation works (between catching the disease and the nature of the work), and shall be referred to as typical occupational diseases, while those not listed shall be entitled work diseases or atypical occupational diseases, and are the ones which are proven to have a causal link – exclusive, in the case of the Portuguese legislation – to the working activity (in Portugal, para. 2 of art. 94th of the Law nr. 98/2009, 04-09, that regulates the regime for the compensation of the work-related accidents and occupational diseases and para. 3 of art. 283rd of the Labour Code). This means that the national legislators recognise that not all occupational diseases may be predicted, and that there shall exist a broader concept that may embrace pathologies that were not predicted by the legislator.

Thus, it seems that in this field of Law the interpretation of the concepts must be broad, in order to embrace all (unpredictable) changes in the labour world.

⁴⁰ *Ibidem*.

⁴¹ According to PIERRE-YVES VERKINDT, the suffering at work is the worker’s individual situation placed in working conditions (material, psychological and relational) that cause him a permanent degradation of his self-image. «Un nouveau droit des conditions de travail», *Droit Social*, nr. 6, june 2008, p. 642.

⁴² LOÏC LEROUGE, «Les "risques psychosociaux" en droit: retour sur un terme controversé», *Droit social*, nr. 2, february 2014, p. 155.

⁴³ *Ibidem*, p. 156.

V. LEGISLATIVE OR HARD LAW MODEL OR A SELF-REGULATION OR SOFT LAW MODEL?

Art. 156 of the TFEU encourages cooperation and coordination of the Member States' policies in what concerns social security, working conditions, safety at work, protection against accidents at work and occupational diseases. It demands a proactive role of the Commission and a shared competence between the EU and the Member States, hence, the application of the principle of subsidiarity. As the initiatives are supposed to be completed by the Member States, it is an expression of soft law, an open method of coordination⁴⁴.

In any case, is it preferable, in this matter, to have a legislative or hard law model, or, on the contrary, a self-regulation or soft law model⁴⁵?

While Venezuela, Colombia, Chile⁴⁶, Sweden, Finland, Belgium, France and Canada rely on specific legislation to the development of prevention and reparation of the psychosocial risks, and on the contrary, EU (with the specifications already referred) and Australia are based on self-regulation (codes of conduct, formative policies, no tolerance compromises, among others), and Argentina and Brasil have decentralized regulation, varying according to each territory, as a global national consensus could not be reached⁴⁷.

Even though the risks have emerged at the same time in most of the referred countries, and although they have a generic common legislative system, nationally they have different occupational risks management policies, especially in what concerns psychosocial risks. While in some case the regulation is specific (especially regarding moral harassment), in others it is quite generic (especially referring to other psychosocial risks); moreover, on one hand, some regulation focuses on prevention, whilst other emphasizes the reparation⁴⁸.

The discussion is on how specific legislation is capable of adaptation to the new risks and risk factors, or whether a model of auto-

⁴⁴ AAVV, *Tratado de Lisboa. Anotado e comentado*, coord. Manuel Lopes Porto, Gonçalo Anastácio, Almedina, 2012, p 679.

⁴⁵ About both the models on the subject of psychosocial risks, see SUSANA DE LA CASA QUESADA; MANUEL GARCÍA JIMENEZ; CRISTÓBAL MOLINA NAVARRETE, *op. cit.*, pp. 127 a 140.

⁴⁶ It shall be pointed out that there is an agreement named "Iberoamerican Strategy of health and safety at work" for the period of 2010-2013, that applies not only to the Latin America and Caribbean countries, but also to Spain and Portugal. Cfr. JOAQUÍN NIETO SÁINZ, «La salud y seguridad en el trabajo desde la perspectiva de la OIT», in AAVV, *Salud en el trabajo y riesgos laborales emergentes*, coord. María del Carmen Grau Pineda, Editorial Bomarzo, Albacete, 2013, p. 174.

⁴⁷ SUSANA DE LA CASA QUESADA; MANUEL GARCÍA JIMENEZ; CRISTÓBAL MOLINA NAVARRETE, *op. cit.*, p. 8.

⁴⁸ *Ibidem*, pp. 8 and 9.

regulation, based in the regulation and management through the social actors, is more favorable to that adaptation, corresponding to the pretended model of “flexisecurity”. We shall recognize that the labour relationships are usually open to instruments of self-regulation (in this case, regulation by the actors to the labour relationship: employer and employee), which are inclusively highly encouraged by the national Constitutional legislator. In fact, collective bargaining instruments allow a better updating and adjustment of preventive measures to the changes in the production system, technology innovations and emergence of new risks, as well as a more efficient adaptation to the particularities of the specific business activity or the concrete company⁴⁹.

As one may assume, the collective bargaining is an important way of regulating labour relationships, even though in Portugal its importance has been decreasing recently⁵⁰, and has never had an important relevance in what concerns occupational health and safety⁵¹. In any case, it is important to debate the role of collective and individual bargaining, discussing whether we are facing a phase of evolution for a system of Codes of conduct and Best Practice Codes system⁵², or the prediction of general duties of care. In any case, this system could be mitigated by the definition of minimum national standards and limits.

In fact, in what concerns emerging risks, there are already some expressions in the European instruments: the European framework agreement on work-related stress, of October 8th 2004, signed by the social partners (trade unions and employers), defining work related stress and with the aim “*to increase awareness and understanding of work-related stress amongst employers, workers and their representatives*”⁵³, and the European framework agreement on harassment and violence at work, of april 26th 2007, suggesting that companies should stipulate the procedures to follow in case there is one of such hypotheses, and determining what principles should underlie those procedures.

However, there was no follow up from the EU to those agreements, and most of the Member States did not implement them

⁴⁹ MANUEL ROXO, op. Cit., pp. 135 and 136.

⁵⁰ Cfr. the opinion of Professor JORGE LEITE available in <http://www.ionline.pt/artigos/portugal/jorge-leite-considera-alteracoes-ao-codigo-trabalho-nao-respeitam-constituicao>, consulted 01-09-2014.

⁵¹ PAULO MARQUES ALVES, LUÍS GONÇALVES; «A negociação colectiva e a regulação das matérias relativas à segurança e saúde no trabalho (SST)», in IV Conferência Investigação e Intervenção em Recursos Humanos – os novos contextos da Gestão de Recursos Humanos, Escola Superior de Ciências Empresariais do Instituto Politécnico de Setúbal, january 28-29th 2013, p. 5, available in https://repositorio.iscte-iul.pt/bitstream/10071/5338/1/Com_Paulo_Marques_Alves_A_negociacao_colectiva_e_a_regula%c3%a7%c3%a3o_da_SST.pdf, consulted in 13-09-2014.

⁵² CLAUDE-EMMANUEL TRIOMPHE, «I paradossi dell’Europa sociale attraverso la regolazione dei rischi psico-sociali», *Lavoro e Diritto*, XXVI, nr. 2, 2012, p. 197.

⁵³ ROGER BLANPAIN, *op. cit.*, p. 585.

nationally, either by a legislative way or by a collective bargaining instrument⁵⁴.

Furthermore, it is not possible to assess whether the EU has not regulated, as it had predicted⁵⁵, because it was not possible to reach a consensus, or as a deliberate option not to legislate.

Besides that, the courts tend to refuse to apply any instruments that are not legally binding and concepts that are not sufficiently defined.

The EU Strategic Framework on Health and Safety at Work 2014-2020 defines as a strategic goal the simplification of the existing legislation, eliminating unnecessary administrative burden, especially for micro and small enterprises. However, even though the paperwork and administrative demands may be loosened and the financial duties may be lighter, that does not mean that the requirements for health and safety are less demanding (art. 9, parag. 2 Framework Directive). The ECJ case law already determined that the Member States may adopt different rules for the different enterprises, but may not exempt them from the documentation obligation – cfr. Case C-5/00, European Commission vs Germany. The same happened in the case C-428/04, between the Commission and Austria, as the ECJ stated that the exemption of companies with less than five workers from the obligation of designating a worker responsible for first aid, fire-fighting and evacuation of workers. The Court clarified that the measures can be adapted to the dimension of the company, but the designation of a worker is mandatory (art. 8 nrs 1 and 2 of the Framework Directive).

Therefore, the example given by this case law clarifies that the challenge is to conclude whether the simplification of the legislation will bring a higher level of protection – because it will encompass non predicted situations – or if it will, on the contrary, lead to a feeling of absence of regulation and impunity, and therefore, to different regulations in each Member States, as it corresponds to an absence of regulation and supervision by the EU and, therefore, a reflex of the crisis of the Social State⁵⁶.

⁵⁴ ANTONIO OJEDA AVILÉS states that the effort that the companies would have to do to implement those agreements may have hazarded their support from the community authorities. *Op. cit.*, p. 213.

⁵⁵ At a certain point, the discussion was on the extension of the Framework Directive to the phenomena like harassment, or the creation of a new Framework Directive. Cfr. BIANCA MARIA ORCIANI, «La tutela della salute e della sicurezza nei luoghi di lavoro: uno sguardo di genere alle fonti dell'UE», *Rivista Italiana di Diritto del Lavoro*, LXIV, 2013, I, p. 450.

⁵⁶ SUSANA DE LA CASA QUESADA; MANUEL GARCÍA JIMENEZ; CRISTÓBAL MOLINA NAVARRETE, *op. cit.*, p. 128.

VI. CONCLUSION: IS «LEGAL GLOBALIZATION» THE SOLUTION FOR THE DISORIENTATION OF OCCUPATIONAL HEALTH AND SAFETY LAW?

Even though the broader concepts of the ILO's Conventions shall be adopted, and although the international organizations such as the EU have followed paths of soft law, which could help us conclude that the answer to the disorientation of occupational health and safety law might be global, there are yet some points to analyze and doubts to clarify.

In fact, even though there are common legislative instruments in what concerns professional risks, the legal doctrine wonders why there are so many differences among the different countries in the regulation and execution of the health and safety issues, especially in what concerns emerging occupational risks⁵⁷.

The problems which we have been referring to have yet no solution pointed by the legal doctrine or defined by the political authorities and legislators. The truth is that the EU's strategy of creating a Framework Directive and subsequent specific Directives has not been able to create an unique model to face the emerging risks, and specially to applicate and execute the national plans and strategies.

Therefore, a transnational model that was intended to be a guide, an orientation with the indication of the common principles that were supposed to be accomplished and implemented by the Member States, has been constantly challenged and not yet been executed, as the ECJ's case law may evidence.

The central point is the following: to take a step forward won't we have to take a step back? *Ie*, even though the existing legislation seems sufficient in what concerns prevention, the legislative forecast – or, at least, its interpretation by the executors of law - does not seem to be satisfactory in what refers to execution of the prevention measures and reparation.

And the "step back" we appeal to is in fact a return to the historical origins of the law of occupational health and safety: the specific regulation, the regulation under the perspective of repairing the consequences of the occupational risks to the ability to work and gain of the workers, the prevision of concrete sanctions in case of breach.

Our work will continue to try to answer the following questions: is the national legal framework sufficient to protect emerging occupational risks? If so, does it protect them properly and sufficiently? Does it meet the transnational demands in this regard? Have the courts and social partners been able to meet the challenges that are being placed in this area? Is it possible and desirable to continue to rely on transnational regulation? Is it necessary to transcend the European legal boarders and seek for answers in the international organizations such as ILO?

The EU Strategic Framework on Health and Safety at Work 2014-2020 defines the *better coordination of EU and international efforts to address*

⁵⁷ *Ibidem*, p. 7.

occupational safety and health and engage with international organisations as a strategic goal. This document refers to “*cooperation with the competent international bodies*”, and development of bilateral cooperation, recognising ILO’s role, such as the Organisation for Economic Cooperation and Development and the World Health Organisation’s.

However, we seem to be witnessing a transformation that leads to a certain leadership of the society and companies⁵⁸ to the detriment of the role of the State and the EU⁵⁹, institutions which are resigning from their role as guarantors of occupational health and safety.

Therefore, are we facing a certain convergence of both systems into a system of limited autoregulation or social autoregulation, *i.e.*, a system where the autoregulation is limited by the transnational legal principles, which permits the desired adaptation and flexibility that is demanded by economical rationality, and the minimum social standards required by the society as a whole, represented by the legislator, as a manifestation of the ethical rationality (expression of social values of justice) and the social rationality (compromise with traditions and daily needs)⁶⁰? Or do we need a third model, one that legal doctrine denominates as “promotional regulative model”⁶¹, as a recognition that the mere indication of general principles is not sufficient, but the technical and specific procedures must be defined by the private parties?

In any case, the author’s opinion is that legal globalization – at least as it has been implemented – is not the solution for the disorientation of Occupational Health and Safety Law, as the concept of global law is still unable to encompass the national singularities.

⁵⁸ Actually, this seemed to be the path followed by Robbens in the Report he wrote in 1972 that would be the basis for *Health and Safety at Work Act*, of 1974 and as well to some EU such as the Framework Directive. Cfr. FERRÁN CAMAS RODA, *La normativa internacional y comunitaria de seguridad y salud en el trabajo*, Tirant lo Blanch, Valencia, 2003, p. 58.

⁵⁹ Cfr. the criticism of CLAUDE-EMMANUELTRIOMPHE, stating that *soft law* presents limitations and, therefore, the project of a Directive regulating ergonomics and stress could bring an important contribute, as well as European Strategy for occupational health and safety 2013-2017. *Vd. «I paradossi...»*, *op. cit.*, p. 197.

⁶⁰ SUSANA DE LA CASA QUESADA; MANUEL GARCÍA JIMÉNEZ; CRISTÓBAL MOLINA NAVARRETE, *op. cit.*, p. 132.

⁶¹ *Ibidem*, pp. 179 e ss².