129 - CHILD LABOUR IN SPORTING ACTIVITIES

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INTRODUCTION

"Principle 9. The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development. " (Declaration of Child's Rights, proclaimed by General Assembly resolution 1386 of 20 November 1959)

The quarrel concerning child labour is traditionally related to the use the children and adolescents' work in the farming and other activities of the agricultural and industrial segment. More recently, the dissemination of child labour in the urban centers have extended the limits of the debate.

Currently, child labour is present in the most diverse sectors of activities, many times disguised or not perceived. This article aims to demonstrate that the practice of sport by young athletes (children and adolescents), socially stimulated as a way to get formation and personal development, can consist in one of these forms of dissimulated child labour. To this, it makes an analysis of child labour in general, later verifying the legal hypotheses of regularity or irregularity of the sport practiced by young athletes.

THE CHILD LABOUR: CHARACTERISTICS AND REPERCUSSIONS

The Constitution of 1988, in its art. 7°, XXXIII, establishes the "prohibition of nocturnal, dangerous or unhealthy work for people less than eighteen and any work for people less than sixteen years old, except in the apprentice condition, since fourteen years old".

This norm, demonstrating an eminently protective character, is justified for reasons of hygienic and physiological character, as well as for grounds of moral, security and culture order. With regard to the first ones, it deserves consideration the fact of that the work, under determined circumstances and temporal regimes, can cause negative consequences on the normal development of the young, leading to the formation of ill, disabled or deficient adults. Moreover, certain types of activity can affect the moral formation of the young, bring high risks of accident, or occupy a period that would have to be destined for its instruction. (BARROS, 2001).

According to Anderson Cega, *"the great problem of the child labour is exactly that it deprives the child of enjoying all its infancy, because having the responsibility of the work, the child develops itself and grows up prematurely, behaving as adult, with responsibilities such as to help in home's sustenance"* (CÊGA, 2004).

Confirming this point of view, the positioning of the psychiatrist Luiz Renato Carazzai, interviewed by the Anamatra magazine: *"certainly these children will be more distanced from its full citizenship rights. They have given up living important phases of its lives, are demanded in responsibility and disciplines for adults, when still its attitudes function as children. This process eliminates stages of life development, generating higher probability of development of psychical problems, such as anxiety, depression, estresse and difficulties to social and emotional adaptation"* (in: MARTINS, 2002).

Several authors criticize the excessive legal protection against the child labour in Brazil, arguing that it disregards the Brazilian social reality, different from developed countries and Européia Union integrants reality, where the protective system reaches excellency levels. However, legislation cannot be used to legitimize forms of child labour exploration in Brazil. Its objective must be exactly to hinder enterprise interests from being harmful to this fragile beings.

Children and adolescents' precocious insertion in the work market is influenced by some factors. The the complementation of familiar income is an important question, especially considering the lack of jobs for the parents. Moreover, also contribute for the child labour the deficiency of public education and the expectation of some type of learning, the mentality according to which "it is better to work than being in the street", without greater concern on the resultant damages of this premature work.

This last argument is easily refutable, considering that if the child is removed of the environment of the streets, many times harmful, also is, almost ever, distanced from studies, what, in the end, causes a greater damage. In this sense, the lesson of Lutiana Nacur Lorentz, transcribed below:

"*A long time ago the UNICEF has clearly abandoned the old thought (which, unhappyly, great part of the Brazilian population believes), "or the child works, or goes for the streets", because the correct way is not one nor the another one, but one third way, that is the educational way. The precocious entering of child and adolescents in work market makes its education impracticable, owing to school evasion, time incompatibility, and because the physical fatigue, resulting from hours of working (formal, or informal), prevents having any positive school results"* (LORENTZ, 2005).

The author continues, evidencing the undesirable result of this exchange of the streets for the work, so that *"the consequence of this situation is evident: child and adolescent workers will become adults without a minimum professional qualification, therefore, serious candidates to the "negative status" of unemployeds and easy candidates for ingressing in beggary, crime and feminine or masculine prostitution"* (LORENTZ, 2005).

In the employer point of view, the child labour becomes especially interesting considering its low cost. According to Lutiana Nacur Lorentz, the companies practice a kind of "social dumping", *"using the child labour, also called "half forces" in countries in development, with the target to spend little, to reduce costs and to compete with other global companies, through lesser prices and higher profits"* (LORENTZ, 2005).

Beyond the factors above, the aggravation of the question of child labour has relation, as much in Brazil, as in the exterior, with the production system changes, leading to the increase of the service sector, the part-time jobs, and the precarious and flexible work.

After these brief considerations about the child labour, we may verify if the children and adolescents' sport practicing,

under certain conditions, corresponds to the aspects and characteristics pointed.

THE QUESTION OF THE CHILD LABOUR IN THE SPORT

Commonly, the sporting clubs make the selection and contract boys and girls to integrate its young athletes staffs. Stimulated by dreams or hopeless of the future life possibilities, many youngs, supported by its parents, give up enjoying its infancy or adolescence to dedicate itself exhaustively to the practice of sport, aiming at professional and financial success.

This paper doesn't intends to condemn the practice of sports by young people, in general, in the schools, for pleasure, but only to verify if the practice of sports by children and adolescents, under given conditions, can consist in a form of disguised child labour, through the mobilization of these young athletes, with no concern about their school activities, for championships' dispute in the clubs' interest.

The configuration of Employment relationship: elements of employment relationship

The employment relationship is a kind of sociojuridical phenomenon and, as such, results from the synthesis of diverse factors considered in a social or interpersonal context.

There can be identified the presence of the five elements of employment relationship in these athletes activities. This elements are, according to Maurício Godinho Delgado: natural person work; personality; not-eventuality; subordination and being onerous. They are not legal construction, but factual elements that receive special treatment by the Law due to their sociojuridical importance, producing compatible effects. They are so called factual-legal elements (DELGADO, 2005).

The job is done by natural person, even in underage condition. It's a personal work, since the selection of the young athletes takes in consideration their specific physical development and talent characteristics.

Although the trainings period are shorter than a professional working day, in general the young people remain whole day at the club disposal, mainly when they come from small towns and live in dormitories offered by the employer. And it's known that in Labour Law the time spent at the employer disposal is computed as working time. The work is, therefore, done in an habitual way, under the hard direction of the trainers and coaches.

Moreover, the young athletes receive money for their work, and frequently become the main source of income of the family. They have a minimum infancy, taking the responsibility of outstanding and surpassing theirselves, in order to succeed in the sport and to support their families.

It's remarkable the fact of most of these young workers being born in low-income families, that see the talent in sports as a way to succeed in life, especially in soccer cases. This situation can occur too in middle and high-income families. However, in these cases young people do not have the strong responsibility of quickly outstanding in order to support the family, as the only hope of a better future. Furthermore, they generally receive parents support and instruction, not interrupting nor harming their studies.

Nullities in Labour Law

Verified the occurence of child labour, it cannot be simply stated the invalidity of such contracts, disregarding the already done effects. In Labour Law there is an specific nullities theory which, diferently from the civil law one, defends the preservation of the employment relationship already produced effects, keeping all the legal benefits to the worker.

Nullity, according to Maurício Godinho Delgado, is the “invalidation of the existence and/or the legal effect of an act or an acts component because it desagrees with the imperative juridical rule”. It's a consequence of the existence of defects or vices in the act or in one of its integrant elements, possibly having origin in subjective aspects, linked to the own contractual parts caracteristics, as the incapacity, or in objective aspects, tied with the own act or its elements.

In civil law, since verified the nullity, the act must be suppressed of the socio-juridical world, returning to the *status quo ante*, with the elimination of the already produced factual effects. It's commonly known as *ex tunc* effect. In Labour Law, differently, the general rule is that nullities stated by judges don't have retroactive effects, preserving the factual-legal situation already produced, what configures *ex nunc* effect.

In fact, after the work is made, the productive human force has already been expended by the worker, and its value is tranfered to the employer, in some way that is impossible to reestablish the *status quo ante*. Thus, the application of the civil theory of nullities would lead to the employer enrichment without reason. So, it would be inadequate to concede ex tunc effects to the nullity in the context of an employment relationship, since it would lead to a conflict with the national legal order principle that gives prevalence to the work-value and the labor rights.

Talking about the application of Labour Law theory of nullities, Maurício Godinho Delgado states that “considering the job done by people aged less than 16 (or 14, before EC N. 20, of 15.12.98), it's necessary to recognize all the juridical effects of the irregularly celebrated contract. It is truth that the judge must, at the same time, decree the nullity of the act, making impracticable the remaining of the nullity to the future (if the young is less than 16 years old - except for the apprentice - at the time of the judicial examination, evidently)” (DELGADO, 2005).

Therefore, all the labour rights acquired due to the already done work must be respected, with the worker registration and the accounting of service time for retirement, among others. The nullity will be declared in case of vices related to the legal element of capacity, but it will have only *ex nunc* effects, preventing from the production of new legal repercussions, and respecting the already lived factual-legal situation.

Apprenticeship agreements

A note must be made concerning the work in the apprentice condition. The 9,615 Act, of 1998, more known as “Pelé Act”, when establishing general norms on sport, states the possibility of agreement in a formal apprenticeship contract. By this kind of contract, the non-professional athlete still in formation, aged more than fourteen years and less than twenty years, can receive financial recompense from the sporting club, without the configuration of employment relationship. The norm, §4° of art. 29, was introduced by the 10,672 Act, of 2003, in accordance with the new text of the art. 7°, XXXIII, of the CF/88, as a result of EC N. 20, of 1998, and fixed the age limit for the adolescent work in sixteen years old. The contract of less aged athletes would be allowed only in the function of apprentice, since older than fourteen.

In this subject there is a quarrel about the possibility of the configuration of apprenticeship in the case of the young athlete who, contracted by a club, is submited to a hard and constant training.

In accordance with the Child and Adolescent Statute, the apprenticeship is a kind of technician-professional learning, teached according to principles and basis of the educational law. The art. 428 of CLT, furthermore, establishes that the apprenticeship agreement must be made in a written form and have a defined duration, creating the obligation to the employer of “assuring to those aged more than fourteen and less than twenty four years, inscribed in an apprenticeship program, technician-

professional education in compatibility with their physical, moral and psychological development".

The apprenticeship agreement content must consist of an specific work, leading to a methodical professional education through the practice of productive and learning activities, in order to provide the adolescent with general knowledges for the qualified work and specific ones of a profession or craft (LORENTZ, 2005).

In this sence the Alice Monteiro de Barros understanding, when defending that "the apprenticeship, in general, and of the child, in special, have successive phases, when new knowledge is assimilated. The apprenticeship made in an inadequate form affects the normal rhythm of knowledge acquisition, affecting the neurological and psychological systems of the young, who starts to have difficulty to face new abilities" (BARROS, 2001).

After a approach about the apprenticeship in general, and that one made in an inadequate form, some authors, as Anderson Êga, states that the apprenticeship legal requirements are not filled in the reality of child labour in the sport (CÊGA, 2004).

It's remarkable that the Child and Adolescent Statute forbids the work of any child or adolescent in unhealthy conditions, even at the age to work professionally or in the apprentice condition. According to Anderson Êga, unhealthy "are the conditions that may cause some damages to the body and the health of a person, in a short, medium or long lapse of time".

Part of the doctrine questions the fact that the system of training and competitions to which these young athletes are submitted does not present the necessary conditions of salubrity demanded by law. Many times, the severity and demanding of training exceed the limits of their weak bodies, still in formation, causing irreparable damages to their development. Football players who firmly train under rain or sun, athletes of gymnastics that surpasses bruises and physical limitations to train and to participate of competitions, several would be the examples of child labour in unhealthy conditions which ones the society accepts passively (CÊGA, 2004).

The Labour of people under fourteen years old

The Constitution forbids the work of adolescent lesser than sixteen years, except in the apprentice form, when is allowed the work with more than 14 years-old. In this point, it is confirmed by 9,615 Acts, of 1998, that, in its art. 44, forbids the practice of professional labour by people aged less than sixteen, allowing the apprenticeship labour when aged more than fourteen, in art. 29, §4°. However, the reality shows the occurrence of several situations in disrespect for the legal command.

Nowadays, there is a general trend to reduce the age of initiation in many sporting modalities, what is called "precocious specialization", defined as a predominantly competitive sporting activity, with high devotion to training, developed before the puberty. This trend is based on the current sporting system characteristics, in the persecution of successes and victories in short term and in the own parents attitudes relating to the children envolvement in sporting practice.

Studying the theme, Silva, Fernandes and Celani clarify that "the increasing social importance of the sporting phenomenon, together with an accentuated increase of competitions offerts in an even more specialized sporting picture, started to define new requirements in the preparation domain and determined the necessity of even more precocious participations and specializations".

Continuing, the authors have gotten, after an inquiry in specialized literature, the conclusion that there is a doctrinal convergence in recommending the age between 8 and 12 years for the sporting initiation. However, this ideal age, verified through bibliographical research, differs from the real age, found through empirical study where trainers of 10 great representation modalities have been interviewed. Between the interviewed ones, there is a predominance in the indication of 9-10 years old, but almost 50% of the interviewed ones affirmed to be initiating its pupils between 5-6 and 7-8 years old (SILVA, FERNANDES and CELANI, 2001).

CONCLUSION

The conclusion is that, if the national legislation forbids the professional labour of people under sixteen, only admitting the work of fourteen people in the apprentice condition, the young athlete could not be contracted or participate of concentrations and matches, except when sixteen or more.

Another conclusion is that since the child labour protective legislation aims at protecting these children and adolescents infancy, preventing them from assuming high responsibilities precociously and for losing their child naivety, it cannot normally accept those situations of children and adolescents dedicating theirselves to the sport looking for subsistence. "To start to practise sport in an integral form, to be contracted and or to be chosen to integrate a club, under the necessary minimum age, it will cause the same social dramas of infancy and youth loss, with a precociously developed sense of responsibility and possibly having negative influence in their character" (CÊGA, 2004).

Athletes who practise high level sports do not have time for other recreational or social activities; limiting their social contacts and relations to the training group (SAMULSKI, 2002).

In general, when selected by clubs, these youngs sign contracts, represented by their genitors or other legal representatives. These contracts are not illegal, however, there is not an specific regulation for this special kind of labour, carried through athletes under eighteen, which would have to develop another parallel activity different from the sport.

In fact, they dedicate theirselves exclusively to the sport, as a way to survival. Since the legislation imposes as landmark for the entrance in the work market the minimum age of sixteen, there is not reason for a different treatment in cases of sporting activities. The damages of the precocious insertion are the same.

In conclusion, it can be affirmed that children and adolescents practical of sport, in exhausting regime, through several hours a day, without the necessary break time, constitutes a dissimulated form of child labour, a typical employment relationship, in opposition to the protecting system of Labour Law, which is guided by the defense of the young physical, mental and moral development. It must be considered in such a way, and the society cannot remain inert when confronted with these situations of abuse and exploration of child labour force, but must demand on the government its recognition and protection, through an intense fiscalization that assure these activities to be carried through in compatible way with the infancy necessities, without forcing the child to skip an important developing stage in life, by assuming precociously the responsibilities of the adult life.

The question is serious, has an essentially ethical base, and must be dealt with severity and attention also in the field of the Physical Education, with the involvement of the academic community, the physical education professionals, sporting companies e, especially, with the creation of adequate discipline and fiscalization politics by the CREF-CONFEF system.

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ABSTRACT

This article aims at demonstrating that the sport with young athletes (children and adolescents) may consist in a form of dissimulated child labour, and, as such, is forbidden by the national legal system. In this regard, it undertakes an analysis of the child labour in general, concluding that the sporting practice by young athletes can be fit as one of its forms, since there can be pointed the five essential elements of the employment relationship: natural person, non-eventuality, personality, being onerous, subordination. It concludes by the application of the specific nullities theory of Labour Law, preserving the already produced effects, and by the necessity of recognizing and monitoring this job modality, in order to protect the physical, mental and moral development of these young athletes.

Keywords: child labour; sports; nullities

RÉSUMÉ

Cet article vise à démontrer que le sport pratiqué pour jeunes athlètes (enfants et adolescents) peut dissimuler une forme de travail infantile, interdit por le droit brésilien. Donc, il analyse le travail infantile en général, en verifiant que les jeunes athlètes peut se caractériser comme un employer puisque les cinq éléments du rapport d'emploi sont présents: personne physique, non-éventualité, personnifié, onéreusité, subordination. La conclusion defende l'application de la théorie de las nullités en Droit du Travail, dans lequel il garde les effets déjà produits au cours du temps, au delà de la nécessité d'inspection pour se protéger le développement physique, mental et moral des ces jeunes athlètes.

Mots-clés: travail infantile; sport; nullités.

RESUMEN

Este artículo tiene por objetivo demostrar que el deporte con los atletas jóvenes (los niños y los adolescentes) puede consistir en una forma de disimular el trabajo infantil, y, como tal, es prohibido por el sistema legislativo nacional. Para esto, lleva con un análisis del trabajo infantil en general, verificando al final que el deporte con los atletas jóvenes pueda encuardrarse como una de sus formas, una vez que presentes los cinco elementos esenciales de la relación del empleo: persona natural, no-eventualidad, pessoalidad, gravamen, subordinación. Concluye por el uso de la teoría de trabajo de las nulidades, con la preservación de los efectos ya producidos, y por la necesidad del reconocimiento y el fiscalización de esta modalidad del trabajo, para proteger el desarrollo físico, mental y moral de estos atletas jóvenes.

RESUMO

Este artigo visa a demonstrar que o esporte com jovens atletas (crianças e adolescentes) pode se constituir numa forma de trabalho infantil dissimulado, e, como tal, é vedado pelo ordenamento jurídico nacional. Para tanto, realiza uma análise do trabalho infantil em geral, verificando ao final que o esporte com jovens atletas pode se enquadrar como uma de suas formas, uma vez que presentes os cinco elementos essenciais da relação de emprego: pessoa física, não-eventualidade, pessoalidade, onerosidade, subordinação. Conclui pela aplicação da teoria trabalhista das nulidades, com a preservação dos efeitos já produzidos, e pela necessidade de reconhecimento e fiscalização desta modalidade de trabalho, de modo a resguardar o desenvolvimento físico, mental e moral destes jovens atletas.

Palavras-chave: trabalho infantil; esporte; nulidades