THE FUTURE OF LABOR LAW: A VIEW FROM THE SOUTH*

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"…A notable example of the frenzied curiosity of our nature, which wastes its time anticipating future things, as if it did not have enough to do digesting the present".

*Montaigne****

Abstract

This paper addresses the future of labor law from a critical perspective. For these purposes, the question about the future is contextualized from the perspective of the *south*, thus confirming that labor law has undergone multiple crises since its consolidation in the 20th century. The permanent crisis of this field of law - both in developed and developing countries - makes it possible to properly asses the current situation, on the one hand, and to avoid dramatizing the future of this discipline, on the other. A narrative from the *south* enables us to see that individual labor law seems to be a key element in any type of capitalism. The global tendency regarding individual labor law is to slightly increase worker protection, unlike other alarmist approaches from Northern countries, who see the crisis of this field of law as a serious -if not terminal- decadence.

Key words: *Labor Law, crisis, capitalism, future, comparative legal dogmatics.*

I. INTRODUCTION

The question about the future is ambiguous. For instance, we could wonder about a child's future, a question that is certainly full of hope and expectations. We could also wonder about the future of a retiree, probably a question about the lack of future... about decadence. The question about the future may revolve around optimism or hopelessness, depending on the case.

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*** Montaigne, *The Complete Essays of Montaigne, translated by Donald M. Frame, Stanford, Stanford University Press, 1958, I-XI, p. 27.*

What does the question about the future of labor law revolve itself into? In many ways, it is a question about the lack of future, i.e., about its past glories and its current decadence as a consequence of the 21st century, Globalization, gig economy, etc. For the more optimistic, this question is essential to solve the current challenges of labor law.

Those who think the future is decadent are disappointed authors who believe that traditional labor law no longer exists, and that this field of law is currently nothing but a technical regulation -such as banking regulation- lacking the values on which it was formerly based.[1]

Some are less pessimistic and focus on the impossibility of labor law, since it is based on a type of work that is currently a minority compared to the current diversity and fragmentation thereof.[2]

Other approaches are rather vague and imprecise, i.e., they admit that labor law needs a new starting point, a different narrative open to the new reality of technological change and globalization. Nonetheless, this approach proposes seeking a road with no clear destination.[3]

Finally, we have the extreme approach provided by the most neoliberal view of law and economics (L&E). According to this perspective, labor law is both irrelevant and inefficient for the market and the need for deregulation,[4]. The popularity of this extreme thesis endorsed by politicians and regulators all over the world is striking, since economics is a social science and deregulation ideas of L&E are far from being an exact science: they seem to be more of a mere ideology favoring the wealthiest.[5]

Nonetheless, other more optimistic perspectives propose the need to focus on the protection of traditional and flexible workers. This approach clearly advocates for the traditional idea of protecting the weak during the 21st century, reinforcing the principles of labor law.[6] It also consolidates the idea that protecting workers -even in developed countries[7]- is essential, it promotes the idea that labor law must be more closely linked to the universal system of human rights, bearing in mind that the original aim of this field of law remains unchanged: encouraging workers to seek justice in their workplace and in the labor market.[8]

Bolder approaches suggest revitalizing the constitutional function of labor law (just like Hugo Sinzheimer proposed during the Weimar Republic) in order to

1 Hyde (2011), pp. 88-97.

2 Zatz (2011), pp. 234-255.

3 Languille (2006), pp. 13-36.

4 Epstein (2011), pp. 988-1011.

5 Gamonal (2018).

6 Gamonal and Rosado (2019), and Gamonal (2017a), pp. 255-275.

7 Davidov (2016).

8 Arthurs (2011),

increase economic democracy.[9] Others believe labor law must be renewed, pointing out that work is a fictitious commodity[10], and other approaches support the idea that this field of law and its foundations are still very much alive, and that it needs to be adapted to the new reality, keeping in mind its primary purpose.[11] Some have even emphasized the relevance of Kant' ideas about legality and citizenship in labor law.[12]

Finally, some perspectives have defended labor law within the economic rationale, thus challenging the extreme approach of L&E. We are talking about the so called legal/institutional analysis of economics (AJIE, in Spanish)[13], supported by academics who question the neoliberal theory that protective labor standards negatively affect competitiveness. They tend to mention the case of Southeast Asian countries[14] or that of South Africa, where labor regulations have been essential to economic development.[15] They also believe free market violates human rights and that regulations favoring workers –however minimal- helps protect them, thus reconciling free market with social purposes and rendering its functioning more efficient.[16] In other words, regulations must guarantee that workers are actually autonomous in the market.[17] This same perspective suggests that labor law plays a key role in economic, social and environmental development, from a sustainable development point of view.[18]

The aim of this paper is to contextualize the question about the future from a Latin American perspective, from the *South*. We will first address this idea from a synchronic perspective, and then from a diachronic approach. Lastly, we will provide some brief conclusions on the Latin American narrative.

II. A TWO-SPEED NARRATIVE: DEVELOPED WORLD AND DEVELOPING WORLD

The question about the future of labor law, of law in general, or of civilization, or about the future of several other matters, requires understanding the origin and context within which this question is posed.

Therefore, this question will necessarily differ when it comes to developed countries, poverty-stricken countries or middle-income countries, since the question

9 Dukes (2014).

10 Fudge (2011), pp. 120-136.

11 Weiss (2011), pp. 43-56.

12 Rodgers (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403498.

13 See Gamonal (2017), pp. 1-44.

14 Deakin and Wilkinson (1994), pp. 289-310, p. 309. Also see Deakin and Wilkinson (2005).

15 Davies (2004), p. 167.

16 Lofaso (2007), pp. 2-3.

17 Lofaso (2007), pp. 39 *et seq*.

18 Novitz and Mangan (2011), pp. 1-15.

about the future changes depending on the context. There are countries where the minimum wage is about 2,000 Euros and unemployment benefits can be quite significant for several years. On the other hand, there are poor countries where the minimum wage is 10 dollars and there is no unemployment benefit system. There is a wide range of minimum wages and unemployment benefits between these two extremes. And there is yet another problem: the large informal economy in many Southern countries, which in some of them accounts for 90% of all economic activities, i.e. formal law protects only 10% of people.

Hence, and although it is obvious, we tend to forget that labor law operates in the midst of the asymmetries inherent to capitalism.

Most of the literature concerned with the future comes from scholars from developed countries, which are undergoing a serious crisis after more than 30 years of neoliberalism and Globalization. This is due to the fact that inequality has increased, workers feel they are worse off, unions have lost power and parents realize their children will probably have a lower standard of living.

By contrast, in developing countries -such as Latin-American countries- we have always wondered about the future with the precariousness of our workers in mind, and with the certainty that capitalism will always require the existence of underprivileged people in order for others to prosper, thus leading us to believe that our countries will never be able to overcome poverty.[19]

In this context, in Latin America, labor law always comes with the question about the future.[20]

The question then is, what is the future of labor law?

In advanced capitalist countries, the answer to this question is uncertain. Until the 1980s of the last century, they enjoyed the benefits of capitalism, with a strong middle class and low poverty rates. But with neoliberal hegemony, technological revolution and Globalization –which allow companies to go around the world choosing poor countries endorsing despicable working conditions (law shopping)–[21] some of their workers have been impoverished, losing their jobs and becoming disposable workers.[22] In other words, the center of power in these countries has changed, as any company can easily relocate to places offering better business environments… (a euphemism to describe deplorable working environments, child labor -sometimes

19 According to Losurdo, class struggle also takes place at the international level, between rich and poor countries. See, Losurdo (2014).

20 See, for instance, Plá (2016), pp. 7-15; Ermida (2013), pp. 35-56; Gamonal (2013), pp. 13-22; Bronstein (2010); Campana (2009), pp. 19-35; Pasco (2009), pp. 383-403; Ermida (2009), pp. 405-425; Barbagelata (2008), pp. 18-29; Sanguineti (2007), pp. 47-73; Barretto (2007), pp. 33-63; Ciudad (2005), pp. 48-70; Delgado (2005), pp. 282-302; Cook (2005), pp. 80-102; Ugarte (2004); López (2004); Genro (2003), pp. 93-156, Goldin (2003); Gamonal (1997), pp. 81 et seq. and Ackerman (1997), pp. 13-26.

21 Supiot (2011), pp. 67.

22 Harvey (2007), p. 185.

involving slavery-, very low or no taxes at all and no environmental requirements). The explosive growth of the power of entrepreneurs and transnational companies jeopardizes the former world order, which used to benefit those rich countries.[23] Nowadays, short-term finance-led capitalism (*capitalismo accionario cortoplacista*) has taken over the world, thanks to the free-market ideology that prevails in developed countries.[24]

From the perspective of the South, and in the framework of the impoverishment of the prosperous Northern societies, it seems that collective labor law has become weaker than individual labor law. In fact, collective labor law entails a countervailing power that unions in Northern countries have partially lost. On the contrary, individual labor law has become more flexible, yet there is no sign of it disappearing soon. Moreover, not so recent attempts to liberalize the labor market were reversed –at least partially– in the following years.[25]

There also several speeds in Southern countries. Few countries have a GDP per capita similar to that of the poorest countries in Europe. For instance, Uruguay and Chile have about the same GDP per capita as Croatia,[26] whereas GDP per capita in other countries is neither too low or high, and many of them are really poor. Hence, I shall generally speak about developing countries, understanding that there are significant and even far-reaching asymmetries among them.

Although it may seem counter-intuitive, the future of labor law looks better in the South than in the North.

Since the 1990s in South America, Labor law has oscillated between rigidity and flexibility, between protection and precariousness, showing significant progress in the theory of labor law and in the consensus reached by most labor lawyers that workers must be protected. An example of these approaches is the concept of the *Constitutional Block*, based on the new constitutions and on several international and regional human rights treaties. This notion brings all standards and principles concerning fundamental labor rights together in a block of the highest hierarchy and normative force.[27] Another important development against neoliberal laws has been the *technique of principles* of labor law, especially the principle of protection.[28] Moreover, Latin America has ventured into *transformative constitutionalism*, developing social and, of course, labor rights.[29]

23 Cohen (2007), pp. 23 *et seq*.

24 Chang (2012), pp. 25 *et seq*. and pp. 35 *et seq.*

25 Both New Zealand -in 1991- and Australia -in 2006- passed laws deregulating labor law, and then both countries restored worked protection, reversing most neoliberal reforms. See Anderson *et al.*, pp. 137 *et seq.*

26 Durán and Kremerman (2018), pp. 4 y 7.

27 Barbagelata (2009), pp. 219 *et seq.*

28 See Gamonal and Rosado (2019), pp. 31-62, and Gamonal and Rosado (2014), pp. 605-665.

29 See Klare (1998), pp. 146-188, and AAVV (2017).

In Chile, since the 1990s, laws have strengthened worker protection in the field of individual labor law.[30]

In other continents, developing countries seem to tend towards a mild regime of protection when it comes to individual labor law.

For instance, China has enacted new laws regarding employment contracts, mediation and arbitration, health and safety and minimum income.[31] Most of this protective regulation will probably not be applied, but its sole enactment is a first step, which must be supplemented with the actual enforcement of these standards. Other Asian countries wealthier than China, such as Taiwan and South Korea, also have worker protection laws.[32]

Since the 1990s, Africa, South Africa and other countries in southern Africa, such as Namibia, the United Republic of Tanzania, Swaziland and Lesotho, have enacted laws on termination of employment contracts and worker protection.[33]

Upon the fall of the Berlin Wall, Eastern European countries such as Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovakia and Slovenia adopted a labor law system based on the European model.[34] In other words, in these cases, the influence of the European Union and the possibility of joining the latter was a key factor in the adoption of this type of system.[35]

Even collective labor law has made some progress in developing countries. In fact, for some years now, China has been adopting incipient regulations on collective bargaining, including bargaining by branch since 2008.[36] In Uruguay, collective bargaining at the national level and by sectoral level has grown stronger thanks to the Wage Councils.[37]

The question then is, what is the future of labor law? Unlike the narrative of scholars from Northern countries, the future of labor law looks better for Southern countries. There is a different narrative, imprinted by the precariousness of poverty, with governments that move back and forth between lower and greater protection, with doctrine and judges who are quite committed to the application of treaties on labor human rights signed by their countries38, even though lawmakers try to eliminate them with neoliberal reforms, as happens in Latin America[39] and currently in Brazil.[40]

30 Gamonal (2011), pp. 85-94.

31 Brown (2012), pp. 410 et seq.

32 Brown (2012) pp. 368 et seq.

33 Bronstein (2010) pp. 286 et seq.

34 Bronstein (2010) pp. 254 et seq.

35 Bronstein (2010) p. 256.

36 Wu (2008), pp. 603 et seq.

37 Loustaunau (2010), pp. 31 et seq.

38 As happens in South American countries.

39 On this matter, see Gamonal and Rosado (2014), pp. 612-613

40 See Santos (2018); Paixão (2018) and de Oliveira (2017).

However, this increased worker protection concerns the field of individual labor law, since collective labor law is not easily developed in poor countries, who have democracies that are rather formal than substantial, or dictatorships with different ideologies.

Although we need further and more detailed analyses on the convergences or divergences between the North and the South, between countries and between civil law and common law[41], contrary to what we may think, some studies have found a slight tendency towards convergence, which does not necessarily imply less worker protection. Case studies included Australia, France, Germany, India, the United Kingdom and the United States of America.[42]

A recent study of 117 countries from 1970 to 2013 suggests that there are high levels of regional and global convergence in the formal content of those laws governing different types of employment and worker protection. These laws will tend to become more protective over time, and increased worker protection resulting from this type of laws is usually related to employment growth, lower unemployment and increased labor force participation, although these connections are relatively small when compared to broader economic trends.[43]

For the time being, and especially since 2008, we can see that European countries have lower protection compared to their previous high standards, and that worker protection has slightly increased in several non-European continents and in poor countries.[44] In other words, worker protection seems to swing like a pendulum, from rich countries with greater worker protection to poor and developing countries with less protection. I.e., there is a convergence –however slight– between rich and poor countries.[45]

It is also worth bearing in mind that recent studies suggest that this lower protection in developed countries is minor compared to the increase in their protective standards since the 1970s.[46] On the other hand, the increase in fix-term and part-time employment contracts and in labor intermediation in Northern countries has been accompanied by standards aimed at protecting workers who are in a more

41 A study of this nature obviously faces different methodological difficulties, which range from the definition of "convergence" to the definition of protection or deregulation, considering that convergence may be weak or strong, formal or functional, simple, bipolar or hybrid. See Gahan *et al.* (2012), pp. 708-712.

42 Gahan et al. (2012) pp. 703-741. This study is based on a few countries, 2 civil law and 4 common law, all of which are large and developed countries, except for India in this latter aspect. According to the authors, this work -covering 35 years (1970-2005)- should include more countries in order to reach a more accurate conclusion on global trends in labor law, despite the value of such an empirical research. See Gahan et al. (2012) pp. 733-734.

43 See Adams *et al.* (2019)

44 Adams *et al.* (2019).

45 Gamonal (2014), pp. 11-18.

46 Adams *et al.* (2018).

precarious situation, especially since the late 1990s47. Likewise, some studies show that the disappearance of standardized hiring processes (full-time and indefinite jobs) in European countries seems to be nothing but a myth.[48]

As for collective labor law, it is clear that Northern countries tend to a lower protection, in an attempt to encourage collective bargaining at company level rather than collective bargaining by activity, for instance, with recent reforms in Italy,[49] Spain[50] and France.[51] However, these countries still recognize the right to strike action as a fundamental right and a collective bargaining coverage rate of more than 70% of the workers.

III. A FIELD OF LAW IN CONSTANT CRISIS

Throughout the course of its history and since its consolidation, labor law has experienced many crises, i.e., an abiding tension between the expectations of workers and their organizations and the interests of lawmakers and regulation agencies. As we will discuss below, these crises are cyclical and regular.

If we imagine a timeline, and consider that the 1917 Mexican constitution, the 1919 Weimar constitution and the creation of the ILO in 1919 consolidated labor law, we will notice that the 1929 crash was a major crisis. Another critical event occurred with the oil crisis of 1973 and a new crisis occurred during the 1990s with the spread of hegemonic neoliberalism until today.

Only 10 years after its consolidation in northern countries, labor law faced its first crisis after the economic recession of 1929.

We only have to recall the words of Hugo Sinzheimer, one of the first labor law professors:

> The massive storm hitting the whole world organization hit Labor Law harder than any other field of Law. This is not surprising if we take a look at its rules and foundation upon which it is based. Such a foundation is economy, of which dependent work is part.[52]

He also stated:

> But the system of this economy no longer works. Workforce is idle in nations and its impact is hardly felt. A large fraction of the productive apparatus is at a standstill, while many people slowly die by starvation

47 Adams *et al.* (2019).

48 See Buelens and Pearson (2013), pp. 225-231.

49 It is worth mentioning that Italian trade union confederations have said that they will not apply this legal reform. See Mariucci (2011) and Bellardi (2014).

50 Baylos (2012), pp. 10 and 11, and Cruz (2012), pp. 231 and 232.

51 See Lyon-Caen (2018) and Jeammaud (2018), pp. 7-37.

52 Sinzheimer (1984), p. 89.

> and entire generations are destroyed, goods rot in warehouses and vital items are annihilated, since there are not sufficient buyers and capital strikes against their use.[53]

Years later, due to both the May 1968 movement and the 1973 oil crisis, labor law once again came into tension, between claims for greater protection and more entrepreneurial freedom in certain capitalist economies.[54]

Nonetheless, since the 1990s, labor law has undergone perhaps its worst crisis. Indeed, the neoliberal revolution (Thatcher and Reagan) led to market fundamentalism, i.e., the ideology that advocates that the law should let the "spontaneous order of the market" operate, and that there should be no interferences limiting its efficiency.[55] In this context, lawmakers and regulation agencies must go for flexibility and deregulation, since individual labor law affects competitiveness and market freedom, and trade unions are monopolies that push the price of labor up in an artificial way.[56]

The much-hyped labor flexibility is a propagandistic notion used as a rhetorical and ideological device[57] which after 30 years, has been unable to fulfil its greatest promise: being a tool in reducing unemployment.

For northern countries, Company relocations and the need to be competitive have cast doubts on post-war labor law and on the Welfare State, thus leading the European Union to adopt neoliberal and other labor policies aimed at weathering the 2008 crisis.

Consequently, post-war hegemonic narrative has been attacked in Northern countries and has been challenged by neoliberal narrative.

As for southern countries, labor law has always been in crisis.

Upon its foundation in 1919, the ILO faced the dilemma of whether international conventions would govern both metropolitan territories and colonies, protectorates and territories under trusteeship.

This was sort of a genetic crisis, and we can see how the ILO chose to protect dignity at two speeds: a higher standard in metropolitan territories and a lower one in the colonies.[58]

53 Sinzheimer (1984), pp. 89-90.

54 This is the case of Italy, for example. See Baglioni (1982), pp. 36-37. In this country, economic crises have led to informal trade union flexibility agreements since the 1970s. See Imberti (2013), pp. 268-269.

55 Supiot (2011), pp. 31 et seq., and Gamonal (2018).

56 Gamonal (2017c), pp. 295-326.

57 Pollert (1994), pp. 45-50 and Hyman (1994), p. 408

58 For example, ILO Convention No. 1, adopted in 1919, on Hours of Work (Industry), with special rules for colonies (Art. 16) and for India (Art. 10), China, Persia and Siam (Art. 11). Those rules were exceptions to the 48-hour weekly limit, allowing for longer working hours.
Another case is ILO Convention No. 3, on Maternity Protection, adopted in 1919, whose Article 6

Consequently, once labor law and the notion of protection were consolidated in the North, labor law lost strength in the South –and especially in European colonies- due to political realism and the influences of colonial powers in the newly formed ILO.[59]

The Declaration of Philadelphia (annexed to ILO's Constitution) was adopted in 1944, and the Universal Human Rights Declaration –containing several labor human rights- was approved when the 1948 war ended.[60]

However, this process –which led to the recognition of workers' rights- was slower –if not inexistent- in some southern countries and colonies.

We only need to look at three crucial moments of the Universal Declaration.

Firstly, in 1948, a "declaration" rather than an "international treaty" was approved, due to the veto of the United States of America, who wanted to include a "constitutional clause" that would suspend the application of this new treaty to the constitutional standards of each specific country.[61] This veto was obviously based on the exclusion of black people (*separate but equal*), which the Supreme Court considered constitutional since *Plessy v. Ferguson* (1896).[62] Anyway, the UN's Economic and Social Council mandate was pretty clear: preparing an international human rights tool.[63] Finally, the United States failed to impose the "constitutional clause", but this veto led to a totally different thing: a Declaration of Rights. As Bartolomé Clavero said, it was a new type of international standard, characterized for not being one.[64]

Secondly, for the Universal Declaration to be approved, the United Kingdom demanded that a "colonial clause" recognizing the legitimacy of colonial territories

contained exceptions to colonies and protectorates.

This is also the case of ILO Convention No. 4, on Night Work (Women), adopted in 1919, in its Art.5 on India and Siam and Article 9 on colonies.

Similarly, ILO Convention No. 5, on Minimum Age in Industry, adopted in 1919, ¡Article 6 on India and Article 8 on colonies.

Also, ILO Convention No. 6, on Night Work of Young Persons (Industry), adopted in 1919, Article 6 on India and Article 9 on colonies.

Lastly, ILO Convention No. 29, on Forced Labor, adopted in 1930, whose Article 26 excludes colonies and whose Articles 8 through 19 regulates forced labor.

59 This outcome obviously does not affect the important work of ILO since inception. As Mereminskaya pointed out, its officials - under the leadership of the Secretariat (International Labor Office) - took their mission much more seriously than the countries controlling it, including novel issues and practices in the agenda, such as the protection of indigenous rights. This explains, for instance, the drafting and approval by the ILO of Convention 169 on indigenous peoples, even though it goes beyond its formal competencies. Finally, the UN gave its approval for the ILO to regulate this issue. See Mereminskaya (2011), pp. 217-222.

60 Gamonal (2017a), pp. 268-269.

61 Clavero (2014), pp. 57 and 58.

62 Eleonor Roosevelt's intervention by the United States was key in blocking the possibility of an international treaty. See Clavero (2014), p. 58.

63 Clavero (2014), p. 31.

64 Clavero (2014), p. 30.

(despite the spirit of the Declaration) be included.[65] Unlike the preceding case, the "colonial clause" did succeed and can still be found in paragraph 2 of current art. 2 of the Declaration,[66] which in fact is anything but "universal".[67]

Thirdly, thanks to the jurist Rene Cassin, the French pressure was successful and "forced labor" was removed from art. 4, on Prohibition of Slavery. This way, said country maintained forced labor in Algeria. Cassin was then awarded the Nobel Peace Prize....[68] Therefore, the Universal declaration does not prohibit forced labor.

Since the middle of the last century to date, labor law has been in constant crisis in the South, due to poverty, informality, exploitation, wars, dictatorships, ideologies, etc.

Notwithstanding this, the picture is not entirely bleak: due to this constant crisis, we the labor lawyers from the South have become resistant. Despite these difficulties, Latin-American countries do have a labor law aimed at protecting workers, and this part of the planet has much to say about the future of labor law.

The 1917 Mexican Constitution and social rights were a significant contribution, since they had a direct influence on ILO's Constitution.[69]

Furthermore, our law has integrated labor human rights, creating a constitutional block that brings every standard and principle of fundamental labor rights together in a block of the highest hierarchy and normative force.[70]

Finally, the technique of principles (*técnica de los principios*) developed in Américo Plá's[71] work may also be a perspective facilitating judges to protect workers.[72]

65 Clavero (2014), pp. 23 et seq.

Article 21.3 of the Universal Declaration states: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

66 Article 2.2 of the Universal Declaration states: "Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

In this way, this Article recognizes the existence of colonies, failing to notice the contradiction with the provisions of Art. 21.3 (see previous note).

67 Clavero (2014), pp. 23 *et seq.*

68 Clavero (2014), pp. 35 and 36.

69 See Palacio (2018), p. 24.

70 Barbagelata (2009), pp. 219 *et seq.*

71 Plá (1998).

72 Gamonal and Rosado (2019), pp. 31-62, and Gamonal and Rosado (2014), pp. 605-665.

THE FUTURE FROM THE LATIN AMERICAN PERSPECTIVE: A NARRATIVE FROM THE SOUTH

Nothing is more global than law. Roman law is the basis of *civil law* and *common law.*[73] And European law is present around the world thanks to the numerous European colonization processes: Spanish, Portuguese, British, French, etc.

Labor law has fast expanded around the world due to many political,[74] technological,[75] international,[76] economic[77] and social[78] factors.

Although laws and circumstances differ in each country, the principles, problems and solutions are essentially the same. For instance, almost every country has a minimum wage regulation and Labor Inspectorates. Agreement regulation techniques were intuitively developed by the English and we owe much of the progress in anti-discrimination laws and the protection of fundamental rights to the United States of America. And these techniques have expanded across all continents. Seen from this perspective, labor law has a transnational development, despite the differences between the South and the North. And crises tend to be transnational as well.

Moreover, labor law originates and develops as a capitalist evolution and, to some extent, the question about its future is also a question about the future of global capitalism.

In the unlikely event that human beings evolve towards a system other than capitalism, more humane and respectful of the environment, labor law would probably not be necessary. But as long as we remain in the capitalist system, labor law will always be necessary in order to give the system a minimum stability, to make it viable.

The crisis of capitalism has had a profound impact throughout the world, with increased inequalities at the national level in the Northern countries, the resurgence of practices such as slavery, forced labor or child labor -even in European countries-, the increasingly common economic crises, disappearance of employment stability,

73 Zimmermann (2009), pp. 56 to 60

74 Various streams of thinking in the 19th century helped to generate a common sensitivity to the abuses of workers, namely utopian socialists, including MARX and the socialists, also the social democratic streams, as well as the social doctrine of the Catholic Church.

75 The invention of the telegraph in the mid-19th century revolutionized communications and helped spread the legal advances of different countries and workers' demands. See Chang (2012), pp. 62 and 63.

76 Beyond its limitations, for 100 years now, labor law has an international body which has sought a lowest common denominator in labor regulation.

77 The consolidation of the Industrial Revolution implied the propagation of a capitalist system, of management *techniques*, of production machinery and, of course, of how to relate with workers.

78 Workers' struggles and solidarity between movements helps everyone get acquainted with labor defeats and victories beyond boundaries.

high levels of youth unemployment, etc., which spread pessimism. Many believe the capitalist system was already saved once with the emergence of the Welfare State, where labor law and trade unions played a crucial role.[79] In other words, labor law has been a victim of its own success,[80] and now, amnesiac capitalism thinks that it can tension inequalities with no major setbacks.

What does the South have to say?

Although the crisis is real, we are not facing the death of labor law. Individual labor law has proved to resist even neoliberalism. And, although much more affected -especially due to the democratic deficit affecting today's societies[81]- collective labor law has not disappeared, and it is the most sophisticated ideal of labor law,[82] allowing to avert -at least partially- the power gap between employers and workers.

We shall not underestimate human rights as a civilizing stride, despite the difficulties and intrigues involved in the adoption of the relevant treaties and declarations and in their entry into force.[83] These declarations and treaties have been signed by almost every country, and comparative studies lead to conclude that basic human rights of workers arising from international treaties are generally recognized, despite national differences.[84]

Latin America and its jurists played a relevant role when adopting human rights treaties[85] and, faced with neoliberal reforms, the technique of principles of labor law –essentially the principle of protection and the *in dubio pro operario* rule– leads to judicial interpretations that are more favorable to workers.[86]

79 Bauman (2011), pp. 48-50.

80 Gamonal (2018).

81 The political process is captured by economic interests in the global world. See Ewing (2010), pp. vii-xv, and Hacker and Pierson (2011), p. 74.

82 Differences between individual and collective labor law are not only quantitative, in terms that unions are on a better footing to get wages raises and income redistribution. But they are also qualitative. In other words, though trade unions, collective bargaining processes and the right to strike, collective labor law raises the status of workers in qualitative terms, through industrial democracy (right to speak) and by increasing economic efficiency, in addition to the political function of trade unionism and its supervisory role.

In this regard see: Davidov (2016), p. 90 (on the redistributive role); Hirschman (1970), p. 4 and Windmuller (1987), pp. 23-24 (on industrial democracy); Western and Rosenfeld (2012), p. 93. Visser (2016), p. 3 and Wright (2015), pp. 79-80 (on economic efficiency); Martinet (1991), p. 80 (on political function) and Kahn-Freund (1987), pp. 54-55 (on the supervisory role of unions in the workplace).

83 Sikkink (2017). A counterpoint to Sikkink's optimism is given by Samuel Moyn, who denounces the serious consequences of human rights spreading in the stream of social rights on a minimum of subsistence, abandoning the concern for increased inequalities at the national and global level. See Moyn (2018), pp. 11, 119 *et seq*. and 212-220.

84 Fenwick and Novitz (2010), pp. 585-615.

85 Sikkink (2017), pp. 59 *et seq.*

86 Gamonal and Rosado (2019), pp. 40-41, and Gamonal and Rosado (2014).
For example, concerning Brazil's reform aimed at flexibility, some authors have already mentioned that

Similarly, the *constitutional block* that brings together constitutional standards and international human rights treaties in a block of the highest hierarchy, may also be useful to face anti-worker reforms.[87]

Hence, faced with the challenges of neoliberalism and with lawmakers who exclusively serve corporate interests, labor law scholars must defend themselves with their highest ideal, using the technique of principles and labor human rights, reporting serious violations thereof and advocating for an interpretation that favors the weak.

These are complex times for those of us engaged in labor law. But not more complex than those faced by Hugo Sinzheimer in 1933. Labor law itself is a subversive field of law, which removes those abstractions of modern law that are blind to power asymmetries and to abuses in the workplace. Therefore, it will always be attacked by the powerful ones.

What we should never do is give up and proclaim the death of labor law. Language is performative and it creates realities. Hence, as long as specialists advocate for the relevance of labor law and its importance for the very survival of capitalism, there will be a possibility of reversing unfavorable winds.

Latin American labor law and its struggle to defend the weak is linked to a bicentennial tradition in Latin America, which defends and promotes democracy,[88] defends sovereignty and non-intervention (especially regarding the United States of America),[89] promotes economic and social rights,[90] and the protection of human rights.[91]

Perhaps this is Latin America's greatest contribution to the future of labor law. Hope and a narrative that helps criticize neoliberal law, but that at the same time does not cease to insist on the validity and importance of worker protection. This is what we could call an epic reading and narrative of labor law.

the principles of labor law remain in force. Therefore, courts are still struggling for the protection of workers to actually be real. See Paixão (2018), p. 13.

87 Barbagelata (2009), p. 219 *et seq*. For example, in the current case of Brazil, some authors have been quick to point out that the recent reform is unconstitutional and affects ILO conventions. See Santos (2018), pp. 14-22.

88 Sikkink (2017), pp. 59-60.

89 Sikkink (2017), p. 60.

90 Sikkink (2017), p. 59.

91 Sikkink (2017), p. 61.

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