THE LABOR REFORM IN CHILE: NEW WINE IN OLD WINESKINS

BY SERGIO GAMONAL C.•

I. INTRODUCTION

In 2016, the government of Chilean President Michelle Bachelet, a Socialist and leader of the center-left *Nueva Mayoría* (New Majority), led what at first blush appeared to have been deep labor law reforms. Since the dictatorship of Augusto Pinochet instituted the *Plan Laboral* (Labor Plan) in the late 1970s, critics have denounced the lack of substantial labor protections in Chile. After the early 1990s when democratic rule was restored, center-left politicians – who have won all but two elections – have promised deep labor law reforms, but have failed to significantly alter the central pillars of the *Plan Laboral.* While international observers, with skin-deep knowledge of Chilean law and politics, might be led to think that Bachelet's reforms finally eliminated the last vestiges of Pinochet, Chilean labor law scholars and others strongly disagree. The 2016 reforms changed little. They might even have amplified the negative aspects of Pinochet's neoliberal labor laws.

In light of the controversy surrounding the 2016 Chilean labor law reforms, this article describes the reforms of the Government of the New Majority coalition. Then, it explains why the reforms provide continuity to and consolidate the neoliberal model of labor law in Chile. Finally, it attempts to provide some lessons for comparative labor law.

Let us first specify the meaning of "neoliberalism" for the purposes of this work. As David Harvey points out, neoliberalism is an economic and political theory according to which the best way to provide welfare to people is to allow the free development of entrepreneurial capacities and freedoms within an institutional framework characterized by strong property rights, a free market, and freedom of commerce.[1] The role of the state is to create and preserve the necessary institutional framework for the

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1. DAVID HARVEY, BREVE HISTORIA DEL NEOLIBERALISMO 6 (Ana Varela Mateos trans. 2007).

development of these practices.[2] In areas where there is a lack of a proper market, such as education, health care, or social security, it is the duty of the state to create a market for these goods.[3] According to Harvey, Pinochet first attempted to create a neoliberal state in Chile after he was advised by Chilean economists trained at University of Chicago's department of economics (the "Chicago school").[4] These American-trained economists were later known as the "Chicago Boys."

Economist Ha-Joon Chang indicates that neoliberalism advocates a minimum state accompanied by a central bank that monopolizes the issuance of currency.[5]

The economic policy implemented during the Pinochet dictatorship meets the description of Harvey and Chang, and, in the words of Chilean law professor Fernando Atria, it was an inhuman and stark neoliberalism, characterized by promoting inequality when economically convenient.[6]

One of the key goals of neoliberal policies is to limit union power and collective bargaining, preventing unions' redistributive role, and limiting union action as much as possible because unions operate as monopolies that artificially increase the price of labor.[7] In the case of Chile, the labor legislation of Pinochet – known as the *Plan Laboral* – sought to concretize this negative view (based on Hayek's ideas)[8] of trade unionism.[9]

After twenty years of center-left governments, Professor Atria argues, the Chilean model had significant changes, configuring itself as "neoliberalism with a human face."[10] "Neoliberalism with a human face" is characterized by the line of argument of post-dictatorship democratic governments of the *Concertación*, which identifies inequality as problematic, while these governments simultaneously believing that governments could reduce inequalities without dismantling the neoliberal order of the dictatorship.[11]

As I will argue in this paper, "neoliberalism with a human face" has kept intact the heart of the *Plan Laboral* of the dictatorship that sought to limit collective bargaining and trade unionism in general.

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2. *Id.* at 6.
3. *Id.* at 6-7.
4. *Id.* at 14.
5. HA-JOON CHANG, ECONOMÍA PARA EL 99% DE LA POBLACIÓN 74 (Teresa Arijón trans. 2015).
6. FERNANDO ATRIA, VEINTE AÑOS DESPUÉS. NEOLIBERALISMO CON ROSTRO HUMANO 35 (2013).
7. HARVEY, *supra* note 1, at 14-18.
8. FRIEDRICH A. HAYEK, SINDICATOS, ¿PARA QUÉ? 86-103 (2009).
9. ATRIA, *supra* note 6, at 47.
10. *Id.* at 35.
11. *Id.* at 38.

The article is structured as follows. Part II describes the overall Latin American labor law context in which Chile exists. Part III describes the labor law system instituted by the dictatorship of Augusto Pinochet, the *Plan Laboral*. Part IV details the 2016 reforms. Part V describes the contradictions of the Chilean model. Part VI analyzes the lessons of the Chilean model. And finally, Part VII concludes that Chilean labor legislation maintains the restrictive neoliberal intervention model of union activity.

II. REGULATORY MODELS IN LATIN AMERICAN COLLECTIVE LABOR LAW

Labor law developed during the twentieth century through state laws and collective bargaining, generating a parallel regulatory regime for the contract of employment (heteronomous and autonomous). [12]

Unlike other regions, in Latin America, labor law has been characterized by abundant regulations for each and every aspect of union activity. This is why Uruguayan professor Óscar Ermida Uriarte has described Latin American labor law as a regulatory or controlling system based on law, where the state plays a key role in labor relations. Its state-centric model considerably reduces the role of social actors, whose collective action is restricted to the scope granted, delegated, or attributed by the state.[13]

Latin American law is usually a very good example of extensive regulation. The ideology behind this system regarding collective labor law can be summarized in the following expression: "every negotiation is a conflict and every conflict ends in a strike."[14]

In this system, the actions of unions, their autonomy, and the ways in which they interrelate are subordinated to the wishes of legislators, who regulate almost all aspects of unionism, collective bargaining, and strike, i.e., the who (which workers can be unionized), where (how and when and with what requirements), what for (list of union purposes), how (procedures to be followed, especially in the face of negotiation with employers), when (bargaining dates and deadlines), and what (matters to be

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12. SERGIO GAMONAL C., DERECHO COLECTIVO DEL TRABAJO 30 (2d ed. 2011).

13. ÓSCAR ERMIDA URIARTE, LAS RELACIONES DEL TRABAJO EN AMÉRICA LATINA 6-7 (1991); *see also* GRACIELA BENSUSÁN, INT'L LABOUR ORG., LA EFECTIVIDAD DE LA LEGISLACIÓN LABORAL EN AMÉRICA LATINA 12 (2007); ARTURO S. BRONSTEIN, INT'L LABOUR ORG., DERECHO INTERNACIONAL Y COMPARADO DEL TRABAJO. DESAFÍOS ACTUALES 268-74 (2010); Adrián Goldin, *Evolución y Opciones de Convergencia*, *in* LA NEGOCIACIÓN COLECTIVA EN AMÉRICA LATINA 149, 149 (Óscar Ermida Uriarte & Antonio Ojeda Avilés eds., 1993).

14. Bruno Veneziani, *Negociación Colectiva y Disciplina Autónoma del Conflicto*, *in* LA NEGOCIACIÓN COLECTIVA EN AMÉRICA LATINA, *supra* note 13, at 33, 37.

bargained) of union activity,[15] including the extent of the coverage of collective instruments.[16] This excessive regulation can be organic, i.e., dealing with the organizational rules and structure of labor unions, or functional, i.e., their activities, especially those related to collective bargaining and strikes.[17]

On the other hand, a model that would be completely opposite to the law as it operates in Chile would permit full collective autonomy (collective *laissez-faire*)[18] based on the leading role of social actors with independence from the state. The state's legislation would be limited to establishing minimum standards in order to ensure certain levels of necessary compliance and avoid excesses or abuses.[19]

This system would be based on private collective autonomy as the regulating source of labor relations. There are several examples of this model. Latin American labor law and industrial relations scholars recognize three such autonomous systems. First, the English case, known for collective *laissez-faire*[20] until the Thatcher Government.[21] Second, the Uruguayan system of *legislative abstention and wage councils* that is still an exception in South America, and has been legally reinforced in recent years.[22] Finally, the Italian system, as described in the 1960s by Gino Giugni, with his theory of private collective autonomy.[23] The theory posits

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15. On excessive regulations in Latin America, see Alfredo Villavicencio Ríos, *Constitución, Estructura y Autonomía Sindical en América Latina: El Reino Espurio de la Ley*, *in* DERECHO A LA NEGOCIACIÓN COLECTIVA, LIBER AMICORUM PROFESOR ANTONIO OJEDA AVILÉS 561 (2014).

16. Explaining the meaning of excessive regulation is not easy. From a quantitative perspective, Chilean legislation devotes two books of its Labor Code (with a total of five books and 513 articles) and 199 articles (from article 212 to 411) to regulate the phenomenon of unions. If we observe it in terms of space, this paper has approximately 8000 words and 44,000 characters without counting spaces in Word format. The two books of the Chilean labor Code on the topic of unions comprise approximately 24,000 words and 131,000 characters without spaces in Word format. And from a qualitative perspective, I can affirm that no union activity has been left unregulated in this law.

17. GAMONAL, *supra* note 12, at 31-32.

18. *See* ANTONIO BAYLOS, DERECHO DEL TRABAJO: MODELO PARA ARMAR 39-44 (1991).

19. ERMIDA, *supra* note 13, at 6.

20. *See* PAUL DAVIES & MARK FREEDLAND, KAHN-FREUND'S LABOUR AND THE LAW 289 (3d ed. 1983); RUTH DUKES, THE LABOUR CONSTITUTION. THE ENDURING IDEA OF LABOUR LAW 69-72 (2014).

21. *See* BAYLOS, *supra* note 18, at 40; Lord Wedderburn, *Labour Law 2008: 40 Years On*, 36 INDUS. L.J. 397 (2007). On the British legal reforms of 2016, see Alan Bogg, *Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State*, 45 INDUS. L.J. 299 (2016).

22. NELSON E. LOUSTAUNAU, CONSEJOS DE SALARIOS 119 (2010).

23. *See generally* GINO GIUGNI, INTRODUCCIÓN AL ESTUDIO DE LA AUTONOMÍA COLECTIVA (2004); Silvana Sicarra, *The "Autonomy" of Private Governments. Building on Italian Labour Law Scholarship in a Transnational Perspective*, *in* NORMATIVE PATTERNS AND LEGAL DEVELOPMENTS IN THE SOCIAL DIMENSION OF THE EU 65 (Ann Numhauser-Henning & Mia Rönnmar eds., 2013).
Many of the critics of Giugni's theory argue a derivative pluralist conception, where the legitimacy of inter-union regulation arises from the recognition of the State order. In this context, inter-union regulation would be based on a delegation or State authorization to their social parties. *See* BAYLOS,

that private inter-union rules create an original and independent private legal order in contrast with those of the State.[24]

Between both extremes, and with different nuances and emphases, we find a mixed or hybrid model in the developed countries of the West, which harmonizes legal norms with those generated by the union's collective autonomy.[25] In other words, the State establishes a significant legal framework for union activity based on the principle of freedom of association, and the state's law regulates union representation, collective bargaining, strikes, and compliance with collective agreements.

Within mixed systems we find a great variety of nuances, for example France,[26] Germany,[27] or Sweden.[28] Their systems are not based on the amount of regulation, but rather on its purpose, i.e., whether or not it promotes union activity and its goals. France and Chile may be well known for having extensive union legislation, but France promotes a system of negotiation and extension of collective agreements by branch,[29] whereas in Chile union activity is limited as much as possible.[30]

In order to contextualize the labor reforms in Chile, we must bear in mind that restrictive and regulatory systems prevail in Latin America, with the aforementioned exception of Uruguay.[31] This predominance is explained by cultural, economic, legal, and political factors. From a cultural perspective, in many countries, citizens do not agree on how to demand their rights and express their opinions. Generally, these are paternalistic societies, in which there is a clear predominance of State favoritism regarding certain groups or sectors that influence the

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supra note 18, at 43; GIOVANNI TARELLO, TEORÍAS E IDEOLOGÍAS EN EL DERECHO SINDICAL 98-99 (2002); GAETANO VARDARO, CONTRATTAZIONE COLLETTIVA E SISTEMA GIURIDICO 103-05 (1984).

24. Inter-union regulation has remained in force in Italy, despite various vicissitudes and phases. *See* FULVIO CORSO, IL DIRITTO SINDACALE 147-82 (3d ed. 2017); Massimo Pallini, *Italia Industrial Relations: Towards a Strongly Decentralized Collective Bargaining?*, 38 COMP. LAB. L. & INDUS. POL'Y J. 1 (2016).

25. GAMONAL, *supra* note 12, at 40.

26. *See* MARIELLA MAGNANI, DIRITTO SINDACALE EUROPEO E COMPARATO 123-52 (2015).

27. *Id.* at 153-81.

28. *See* Andres Kjellberg, *Self-Regulation Versus State Regulation in Swedish Industrial Relations*, *in* FESTSKRIFT TILL ANN NUMHAUSER-HENNING 357 (Mia Rönnmar & Jenny Julén Votinius eds., 2017).

29. *See* MAGNANI, *supra* note 26, at 123-52. The changes currently being carried out by the neoliberal government of President Macron, however, are oriented towards the decentralization of collective bargaining. *See* Alain Supiot, *Cuando el Derecho Laboral es un "Obstáculo"*, LE MONDE DIPLOMATIQUE (Chile), Dec. 2017, at 16.

30. *See* ANN NUMHAUSER-HENNING, DEN NEOLIBERALA ARBETSRÄTTEN. EXEMPLET CHILE 191 (1996).

31. *See* AMAURI MASCARO NASCIMENTO, TEORÍA GENERAL DEL DERECHO DEL TRABAJO 167 (Jaime Marín Villegas trans., 1999).

government.[32] In addition, this system is based on weak economies with little industrial and productive development (unlike the situation in which the European Union movement was born) that prevents the growth of unionism, promoting the disorganization of workers and their defenselessness before employers. This explains why in many cases the legislator must start from scratch, so instead of regulating a consolidated social movement, it "grants" a framework for its future development, which generally recognizes rights, but at the same time limits them broadly.[33]

On the other hand, the political world does not favor the emergence of intermediate powers of a union nature. Countries fear conflict, which results in political elites controlling the union movement excessively.[34]

Regulatory systems are characteristic of countries that claim to be democracies without meeting democratic standards, or more authoritarian than pluralistic nations. In these countries, the prospective respect and promotion of unionism goes hand in hand with the necessary development of their democratic system.[35]

The effects of having such an extensive regulation are quite ambiguous. On one hand, it is an important restriction on union autonomy, preventing the development of more modern collective relationships, but on the other hand, it provides significant support to weaker unions.[36]

Collective bargaining is at the company level in almost all Latin American countries (with the exception of Argentina and Uruguay), and the coverage rate is particularly low, although many countries have extensive and detailed legislation on unions, bargaining, and strikes.[37]

In Chile, the restrictive regulatory system has predominated since the beginning of the twentieth century,[38] reaching its peak during the

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32. For some authors, the lack of influence of collective bargaining in the Chilean system prior to 1973 can be partly explained by the way Chilean society was organized. The state was the principal subject of social claims, and, therefore, the most useful way to conquer labor rights was through legal means, which resulted in unions pushing for labor rights through legislation. *See* Irene Rojas Miño, *Las Contradicciones entre el Modelo Normativo de Negociación Colectiva y el Principio de Libertad Sindical*, *in* ANUARIO DE DERECHO DEL TRABAJO & SEGURIDAD SOCIAL 119 (2000).

33. GAMONAL, *supra* note 12, at 32.

34. Emilio Morgado, *Objetivos de la Intervención y Fines del Estado*, *in* LA NEGOCIACIÓN COLECTIVA EN AMÉRICA LATINA, *supra* note 13, at 127, 129-30.

35. BRONSTEIN, *supra* note 13, at 268.

36. *See* Massimo D'Antona, *Las cláusulas obligacionales*, *in* LA NEGOCIACIÓN COLECTIVA EN AMÉRICA LATINA, *supra* note 13, at 59, 62.

37. Latin America had a modest average of 9 percent of collective bargaining coverage in year 2010. *See* Martín Carrillo Calle, *La mejora de la cobertura de la negociación colectiva en América Latina*, REVISTA LATINOAMERICANA DE DERECHO SOCIAL, July-Dec. 2015, at 5.

38. ALFREDO GAETE BERRÍOS, PRINCIPALES MODIFICACIONES QUE HA INTRODUCIDO EL DERECHO SOCIAL AL DERECHO CIVIL EN MATERIA DE CONTRATOS Y OBLIGACIONES 48 (1936).

Neoliberal Era.[39]

III. PINOCHET'S NEOLIBERAL COLLECTIVE LABOR LAW

The first Labor Code of Chile, enacted in 1931, recognized strong state intervention in labor relationships. This was a great improvement at the time, as it organically and fully regulated all individual and collective rights, procedures, and courts responsible for labor cases.[40] This legislation maintained its basic structure until June 15, 1978 despite numerous amendments.

Since 1978, the new labor regime established by Pinochet's dictatorship has completely modified Chilean labor law regarding employment contracts and other labor relations between employers and workers:[41] matters of union organization,[42] collective bargaining, and strikes.[43] This legislation is better known as the dictatorship's *Plan Laboral*. In 1987, the government of Pinochet unified this legislation and some subsequent amendments in a new Labor Code.[44]

To properly weigh the scope of these amendments, I will make a brief reference to the philosophy that inspired the *Plan Laboral*, then detail the scope of its regulations.

In terms of its philosophy, the *Plan Laboral* was inspired by a concept that was totally different from concepts used in previous legislations, by means of a significant deregulation that granted more space for individual private autonomy and established relevant limits to the autonomy of unions.[45]

José Piñera, ideologist, author of the *Plan Laboral*, one of Pinochet's most trusted economists, and considered one of the most prominent Chicago Boys, believed that the *Plan Laboral* sought the following

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39. *See* NUMHAUSER-HENNING, *supra* note 30, at 191-97. This author states:
When the neo-liberal model was introduced in Chile, reforms pertaining to the rules of collective labour law played a key role. Contrary to the deregulation usually associated with neo-liberalism, these reforms may be said to have entailed massive state intervention. It was a matter of establishing compelling collective "rules of the game," rules serving the purposes of guaranteeing the freedom of the individual in relations to trade unions and of decentralising trade union activity to the level of the individual company, thereby contributing to a liberation of market forces. Other rules – such as the rules of the employer's prerogative and of non-negotiable issues – were intended to create the ideal background against which the market was to operate.
Id. at 191-92.

40. INT'L LABOUR ORG., INFORME RELASUR: LAS RELACIONES LABORALES EN CHILE 27 (1994).

41. Exec. Order (*Decreto ley*) No. 2,200 of 1978 (Chile).

42. Exec. Order (*Decreto ley*) No. 2,756 of 1979 (Chile).

43. Exec. Order (*Decreto ley*) No. 2,758 of 1979 (Chile).

44. Law No. 18.620, Julio 31, 2002, DIARIO OFICIAL [D.O.] (Chile).

45. INT'L LABOUR ORG., *supra* note 40, at 27.

objectives for collective labor law:[46]

1. Freedom of association: Workers are free to form trade unions, without government approval, and every important decision must be decided by secret vote.
2. Fortified union democracy: Everyone is free to work without the need to belong to a trade union ("open shop" provision) or to acquire a "*carnet*" or license to perform some jobs.
3. Decentralized collective bargaining: Trade unions have the right to bargain at the company level and employers must answer such demands. Since productivity and markets are unique for each company – even in the same industry – collective bargaining at sector level or national level is not protected by law.
4. Right to strike governed by the market: The right of workers to strike consists of their liberty to refuse to work without being fired. The right of employers to manage their own property consists of their liberty to hire replacement workers only during a strike to avoid a company closure (once the legal strike is over, the strikers must be reinstated in their job). The strike is legal only as the final stage of the collective bargaining. The law does not protect strikes convened at any other time or for political reasons.
5. State neutrality: Government officials and politicians cannot participate in collective bargaining processes or strikes. The government cannot set industry-wide wages.

Under the *Plan Laboral*, collective bargaining had to be limited to being a channel by which a group of workers negotiated their wages with the employer, based on the value of their contributions to the company. It could not be a mechanism for redistributing the wealth of a country, a situation that would only generate perverse effects on the performance of its economy by establishing remunerations exceeding the levels of productivity.[47]

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46. JOSÉ PIÑERA, LA REVOLUCIÓN LABORAL EN CHILE 33-34 (1990). These objectives can be summarized in the so-called "four pillars" of the *Plan Laboral*, i.e., (I) collective bargaining at a company level, (II) strike that does not paralyze the activities of the company, (III) union parallelism, and (IV) union depoliticization which implied limiting its action only to the wage area. *See* KARINA NARBONA, FUNDACIÓN SOL, ANTECEDENTES DEL MODELO DE RELACIONES LABORALES CHILENO 20 (2015), <http://www.fundacionsol.cl/wp-content/uploads/2016/03/Modelo-Laboral-Chileno2.pdf>.

47. PIÑERA, *supra* note 46, at 106.

The collective bargaining process had to ensure equivalence between wages and productivity.[48] Because of this, the negotiation could only be achieved between the employer and its workers, with the law contemplating a way out in cases of disagreement.[49] In this context, the strike was limited to being an instrument by which the workers could clearly demonstrate the impact they, as a team, had on the productivity of the company.[50]

The *Plan Laboral* meant a reduction in worker protection in Chilean labor law by making the rules of individual labor law more flexible, restricting the union's collective autonomy, and creating a structure of labor relations that was oriented towards a more personal dimension.[51] Due to this ideology, inspired by Hayek's ideas,[52] Pinochet's labor legislation is more authoritarian than libertarian.

The scope of the regulation established by the *Plan Laboral* will be analyzed from the triangular vision of collective labor law and the perspective of the ILO, which is commonly used by Latin American labor law professors.

Latin American law usually sees freedom of association as having three essential elements: the union (organization), collective bargaining (action), and the strike (self-defense). This perspective, outlined by Mario de la Cueva since the eighties, is known as the "triangular vision of collective labor law."[53] In other words, freedom of association can be represented as an equilateral triangle whose angles are all identical. These angles would be the union, collective bargaining, and strike; which means none of the three parts of the trilogy can be missing, or the triangle would disappear.[54] The *Plan Laboral* regulated and limited the sides of the triangle in all its details.[55]

From the perspective of the ILO, we can distinguish several

48. *Id.*

49. *Id.*

50. *Id.* at 110.

51. FRANCISCO TAPIA GUERRERO, SINDICATOS. EN EL DERECHO CHILENO DEL TRABAJO 167-69 (2005).

52. Hayek's ideas fully inspire the *Plan Laboral*: (I) Unions only benefit their associates, harming other workers. This thesis is better known as insiders / outsiders, (II) trade unions artificially raise wages by acting as a monopoly, (III) unions are a threat to a free society, (IV) unions are the cause of unemployment. *See* HAYEK, *supra* note 8, at 86-103.

53. *See* Mario de la Cueva, *La Situación Laboral de los Trabajadores Públicos*, *in* EL HUMANISMO JURÍDICO DE MARIO DE LA CUEVA 653, 675-76 (Ana Luisa Izquierdo y de la Cueva ed., 1994).

54. *Id.* at 679.

55. GAMONAL, *supra* note 12, at 103-445.

complementary aspects within the concept of freedom of association.[56]

1. Freedom of constitution: It consists of the ability of workers and employers to freely establish the labor union organizations that best suit them, notwithstanding the limits the legislator may establish regarding armed and police forces, which may be excluded from these rights for reasons of general interest.
2. Freedom of affiliation: Workers and employers are free to join the organization or organizations they prefer.
3. Negative freedom of association: Workers and employers are free to disaffiliate from the organization or organizations to which they belong. They are also free not to belong to any organization, which can be guaranteed at a legal level.
4. Collective freedom of regulation: It consists in unions' autonomy to enact their own internal laws. National laws may only establish formal requirements for these rules, but they cannot regulate their content. Union rules cannot be subject to prior approval.
5. Collective freedom of representation: Unions are free to choose their representatives without State interference and with the sole limitation of respecting the principle of democracy.
6. Collective freedom of dissolution: Unions can only be dissolved or their activity suspended by the agreement of their members or by judicial decision. They may never be dissolved or suspended by a government decision.
7. Collective freedom of union action: It consists in unions' right to structure their own plans of action aimed at directly supporting unions' objectives of promoting the economic and social interests of workers. Union action is preferably expressed through collective bargaining and the right to strike.

Points 1 to 6 are linked to the base of Mario de la Cueva's triangular vision, i.e., the organizational aspect of unions. On the other hand, point 7 is related to the other two sides of the triangle: collective bargaining and strike.

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56. *See generally* ÓSCAR ERMIDA URIARTE, SINDICATOS EN LIBERTAD SINDICAL (4th ed. 2012); ALFREDO VILLAVICENCIO RÍOS, LA LIBERTAD SINDICAL EN LAS NORMAS Y PRONUNCIAMIENTOS DE LA OIT: SINDICACIÓN, NEGOCIACIÓN COLECTIVA Y HUELGA (2007).

The *Plan Laboral* regulated and limited every detail without exception. Regarding freedom of constitution, affiliation, and disaffiliation (negative freedom), the law regulated the existing types of unions, how to create a new union, and how workers could affiliate and disaffiliate from one, among many other details.[57] Concerning collective freedom of regulation and representation, the *Plan Laboral* regulated the number of union leaders, their faculties and prohibitions, and the content of the statutes or internal laws of the union.[58] In matters of collective freedom of dissolution, the law specified how and why a union could be dissolved.[59] It also regulated union federations and confederations.[60] Finally, regarding collective freedom of action, the *Plan Laboral* regulated in detail unions' financial management, the prohibition of lucrative activities to collect funds, union assemblies, etc.[61] Furthermore, this regulation allowed workers to bargain through a *de facto* coalition, which was not a permanent union but rather an informal and temporary organization created for the sole purpose of negotiating with the employer while competing with existing unions.[62] Likewise, workers could form several unions in the same company, promoting extreme union pluralism at the plant or employer level.[63]

On the other hand, collective bargaining was only permitted at a company level (there was an express prohibition against negotiating with two or more companies), and the law regulated bargaining in all its details and at all its different stages. This included the presentation of the demands by unions or groups of workers, the company's response, potential claims to the administrative authority, negotiations, cases of agreement, and, once all the legal deadlines had been exhausted, the possibility of resorting to the strike as a final stage in case of disagreement.[64]

Negotiating issues of managerial prerogative, i.e., limits to the power of command and organization of the employer, was expressly forbidden. In other words, collective bargaining dealt exclusively with salary issues.[65]

The employer was allowed to hire replacement workers during a strike.[66] A strike could not last more than sixty days. If the union

57. GUIDO MACCHIAVELLO, DERECHO COLECTIVO DEL TRABAJO 303-12, 356-73 (1989).
58. *Id.* at 313-56.
59. *Id.* at 383-86.
60. *Id.* at 373-80.
61. *Id.* at 345-56.
62. *Id.* at 510.
63. *Id.* at 365-73.
64. *Id.* at 503-17.
65. *Id.* at 418-20.
66. *Id.* at 465.

maintained the strike when it reached into its sixty-first day, the workers would be deemed to have voluntarily resigned.[67] Any delay or union setback, such as failing to call a strike or being unable to stage it within the legal deadline, led to the legal presumption that the workers had accepted the employer's last offer, even if abusive.[68]

Initially, individual employees and employers could modify collective agreements. However, this rule was amended during the eighties, stating that individual workers and their employers could modify collective bargaining agreements but only to improve the terms of the agreement.[69]

IV. THE LABOR REFORMS OF THE YEAR 2016

With the return to democracy in March 1990, the new governments made several amendments to Chilean labor law. Those regarding employment law aimed at increasing worker protection.[70] Those regarding collective labor law, although numerous, maintained the essence of the *Plan Laboral*, i.e., the five pillars explained in the previous section (especially decentralized collective bargaining and submitting the right to strike to the market).[71]

An example of this was Law No. 19,069 of 1991. This law substantially amended union matters but, regardless of the progress made by this regulation, the DNA of the *Plan Laboral* remained intact, and Chilean law continued to violate the ILO's standards of freedom of association.[72] Years later, Law No. 19,759 of 2001 once again introduced significant amendments to Chilean union regulation. Yet again, despite certain progress, especially by liberalizing the organizational aspects of the union, the essence of the *Plan Laboral* remained unchanged.[73] Modest progress in these laws included the suppression of the sixty-day strike period, granting legal protection to unionized workers, and, in certain

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67. *Id.* at 443-80.

68. *Id.*

69. *Id.* at 425-27.

70. In recent years, Chilean courts have interpreted employment law on the basis of the protective principles of Latin American Labor Law. *See* Sergio Gamonal C. & César F. Rosado Marzán, *Protecting Workers as a Matter of Principle: A Latin American View of U.S. Work Law*, 13 WASH. U. GLOBAL STUD. L. REV. 605 (2014).

71. *See* Sergio Gamonal C., *Chilean Labour Law 1990-2010: Twenty Years of Both Flexibility and Protection*, 27 INT'L J. COMP. LAB. L. & INDUS. REL. 85 (2011).

72. SERGIO GAMONAL C., LA LIBERTAD SINDICAL EN EL ORDENAMIENTO LABORAL CHILENO Y LOS CONVENIOS 87 Y 98 DE LA OIT (2000); Sergio Gamonal C., *Perspectivas futuras del derecho sindical chileno. Desafíos de nuestro derecho sindical*, REVISTA DERECHO Y HUMANIDADES, No. 5, 1997, at 93.

73. Sergio Gamonal C., *La reforma laboral y la libertad sindical*, REVISTA LABORAL CHILENA, May 2002, at 72.

cases, limiting the hiring of replacement workers during the strike.[74]

The ILO made visible the great number of breaches of Chilean labor legislation to the principle of freedom of association.[75] Most Chilean legal scholars have criticized the futility of the reforms, as they have kept the essence of the *Plan Laboral*.[76]

In this context, the center-left government of the New Majority (the center-left coalition referred to as the *Concertación*, which emerged from the agreement of different political parties and governed Chile for twenty years, after the return to democracy), led by the second government of President Michelle Bachelet, promised to amend Chilean legislation in order for it to meet the ILO's standards,[77] among other social reforms to the neoliberal model.

Nonetheless, the reform (embodied in the new law, No. 20,940[78]) once again preserved all pillars of the *Plan Laboral*.[79] This new law maintains the aforementioned design that weakens workers' power by keeping bargaining at the company level. The strike remains a last-resort weapon in the regulated processes of collective bargaining negotiation.[80] In other words, under the last reform, there is still an excessively regulated union scheme with collective bargaining at a company level only, with one or more small unions competing within the workplace and partially representing workers (Chile does not have a mechanism to determine the most representative union at a company level). The right to strike is limited: it only applies at the end of a negotiation regulated by law, in the absence of an agreement.[81] There are several mechanisms to mitigate the strength of the strike, and it provides for minimum operational services in all strikes, whether or not they are essential services.[82]

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74. *Id.* at 75.

75. *See generally* EDUARDO CAAMAÑO ROJO & JOSÉ LUIS UGARTE CATALDO, NEGOCIACIÓN COLECTIVA Y LIBERTAD SINDICAL, UN ENFOQUE CRÍTICO (2008).

76. *See generally id.* In 2013, several labor law professors signed a *Labor Manifesto* demanding strong legal amendments, for Chile to respect the ILO's standards in matters of Freedom of Association. *See* MANIFESTO LABORAL: POR UN NUEVO MODELO DE RELACIONES LABORALES (2013), <http://www.fundacionsol.cl/wp-content/uploads/2013/10/Manifiesto-por-un-Nuevo-Modelo-de-Relaciones-Laborales.pdf>.

77. *See* IRENE ROJAS MIÑO, DERECHO DEL TRABAJO EN CHILE 177-84 (2016); Sergio Gamonal C., *La Reforma Laboral, la Constitución y la Libertad Sindical*, *in* REFORMA AL DERECHO COLECTIVO DEL TRABAJO. EXAMEN CRÍTICO DE LA LEY NO. 20.940, at 31 (Pablo Arellano Ortiz et al. eds., 2016).

78. It fully replaces Book IV of the Labor Code by articles 303 to 411 on collective bargaining.

79. JOSÉ LUIS UGARTE CATALDO, HUELGA Y DERECHO 119-238 (2016).

80. Eduardo Caamaño Rojo, *La Reforma Laboral y el Fortalecimiento del Derecho de Huelga: Un puente demasiado lejos*, *in* REFORMA AL DERECHO COLECTIVO DEL TRABAJO, *supra* note 77, at 237.

81. *See* CÓDIGO DEL TRABAJO [CÓD. TRAB.] arts. 345-52.

82. *See id.* arts. 359-63.

Originally, the bill proposed by Bachelet had significant improvements. In order to support gender equity, the bill provided that women had to be included in bargaining committees. It also extended the scope of unions' rights to information.[83] It limited non-union negotiating committees, as they could only be created in the absence of unions. It also stated that non-union workers could join an existing collective agreement if they also joined the union.[84] However, the majoritarian, right-wing Constitutional Court[85] declared some of these provisions to be unconstitutional, including those limiting non-union negotiating committees and *ex post* attempts to join unions in order to be covered by the collective contracts. Although often amended since the return to democracy, the 1980 Chilean Constitution still embodies the neoliberal ideology of the Chicago Boys, and thus, according to the Constitutional Court, the law cannot provide for exclusive union representation (not even at the company level) or ban workers from being represented by transitory coalitions other than unions in negotiations with the employer, as these requirements and prohibitions would violate the individual freedom of each worker.[86]

Thus, these amendments that would have benefitted workers were deleted and never became law.[87]

The list of setbacks is broad.[88] For example, it:

1. Increases the number of workers required to form a union;
2. Allows the employer to request the Labor Inspectorate to dissolve a union;[89]
3. Limits strike activity by contractors' employees;
4. Establishes new, detailed, and restrictive rules for collective

83. Caamaño, *supra* note 80.

84. Gamonal, *supra* note 77 at 35.

85. *See* Sergio Gamonal C., *La Libertad Sindical en su Laberinto: ¿Cómo interpretar la Ley N° 20.940?*, REVISTA DE DERECHO LABORAL Y SEGURIDAD SOCIAL, No. 4, 2016, at 19.

86. *See* Gamonal, *supra* note 77.

87. Tribunal Constitucional [T.C.] [Constitutional Court], 9 Mayo 2016, Rol de la causa: 3016, <http://www.tribunalconstitucional.cl/expediente?rol=3016wsdefrtg> (scroll down to "Descargar Sentencia" and select). In this judgment, the Chilean TC considers that the interpretation of the Constitution should not be neutral if not in defense of the neoliberal order. *Id.* at 49. It also fails to mention the international human rights treaties in force in Chile that grant freedom of association to workers, *id.* at 73 and 86, and it does not understand the meaning of ILO Conventions 135 and 154, evidencing the alarming ignorance of a court that is supposed to be made up of jurists. *Id.* at 80). *See* Gamonal, *supra* note 85.

88. Gamonal, *supra* note 77, at 35-36.

89. The Labor Inspectorate is an administrative body in charge of supervising compliance with labor law, similar to the National Labor Relations Board (NLRB) in the United States.

bargaining;

5. Provides the Labor Inspectorate with new rights to participate in the collective bargaining process;
6. Forces unions to provide a minimum shift of workers during strikes in all activities where strikes may cause economic damage to the employer (in previous laws, this limit was aimed at preventing a "current and irreparable damage");[90]
7. Grants the employer a new power to make all "necessary adjustments" to the schedule of those workers that did not join the strike, so that they can continue working – this is a form of concealed internal replacement of strikers, despite the fact that the law allegedly prohibits hiring replacement workers;[91]
8. Prohibits workers providing "essential services" (those affecting the public interest, health, the economy, the provision of goods and services to the population, and national security[92]) from striking;
9. Creates new fines for unions;[93]
10. Provides that collective bargaining disputes may also be resolved in court. In this case, the employer is entitled to file an action with the court, and, as a result, negotiations with employees could be suspended for months or even years.[94]

The neoliberal principles of the dictatorship[95] have prevailed in the project approved by the National Congress and supported by the Government of the New Majority. Even worse, unlike previous reforms involving minor improvements (Law No. 19,069 and No. 19,759), thanks to this reform, the *Plan Laboral* has become unhealthier and far more

90. Pablo Arellano Ortiz, *Servicios Mínimos y Servicios Esenciales: Historia de una confusión en tres actos*, *in* REFORMA AL DERECHO COLECTIVO DEL TRABAJO, *supra* note 77, at 267.

91. Gamonal, *supra* note 77, at 35. In the *Promolinks* case, the Chilean Supreme Court ruled that the internal replacement of striking workers was illegal, based on a broad and progressive interpretation of the 1980 Constitution. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 4 diciembre 2014, "Promolinks," Rol de la causa: 3514. It considered that the strike is a fundamental right and that the regulation of the freedom of association was enough to be considered as an existing norm.

92. Before the reform, the law could prohibit the strike if the company involved either affected a significant part of the country's activity, or that its paralysis prevented a sector of the population from receiving a fundamental service. The reform eliminates these requirements and, therefore, widens the number of strikes that may be prohibited.

93. Gamonal, *supra* note 77, at 35-36.

94. *See generally* Daniela Marzi Muñoz, *Observaciones sobre la Judicialización de las Relaciones Colectivas: En las antípodas de la autonomía*, REVISTA DE DERECHO LABORAL Y SEGURIDAD SOCIAL, No. 3, 2016, at 41; Valeria Zúñiga Aravena, *Judicialización de los Conflictos Colectivos*, *in* REFORMA AL DERECHO COLECTIVO DEL TRABAJO, *supra* note 77, at 353.

95. Gamonal, *supra* note 77, at 37.

intricate.

The neoliberalism of the *Plan Laboral* has been efficient in the destruction of unionism. Collective bargaining coverage remained below 20 percent in 2015,[96] which is quite low compared to the OECD countries, where almost all of them have coverage over 20 percent, except the United States, Mexico, and New Zealand.[97]

Likewise, the rate of union membership is greater than the rate of collective bargaining coverage.[98] This means that there are workers who participate in their relevant labor unions but are not covered by collective bargaining agreements.

Moreover, anti-union practices that allow for the destruction of labor unions are common. Although the law bans these anti-union practices, it is an open secret that, in many cases, unions only exist in Chile when the employer allows their existence.[99]

This issue has been discussed for years by specialized literature, as Chile is a good example of the durability of neoliberalism, imposed by a dictatorship and carefully managed by center-left governments. Paul Posner, Adriela Fernández, Marisol Vera,[100] and María Lorena Cook[101] have all studied Latin America and the Chilean case in particular, since it differs from other countries in the region such as Argentina or Uruguay, as we will explain below in Part VI.

For most Chilean workers, conflicts with their employers are solved at the individual level. This is based on the usual economic supremacy of employers.[102]

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96. *See* OECD, COLLECTIVE BARGAINING IN OECD AND OTHER ACCESSION COUNTRIES: CHILE (2017), <http://www.oecd.org/employment/emp/collective-bargaining-Chile.pdf>.

97. *See* GONZALO DURÁN & MARCO KREMEMAN, FUNDACIÓN SOL, SINDICATOS Y NEGOCIACIÓN COLECTIVA, PANORAMA ESTADÍSTICO Y NACIONAL Y EVIDENCIA COMPARADA (2015), <http://www.fundacionsol.cl/wp-content/uploads/2016/05/Sindicatos-y-Negociaci%C3%B3n-Colectiva.pdf>.

98. *Id.*

99. Concerning unfair (anti-union) practices in Chile, see generally CÉSAR TOLEDO CORSI, TUTELA DE LA LIBERTAD SINDICAL (2013).

100. *See* Adriela Fernández & Marisol Vera, *Introduction. The Bachelet Presidency and the End of Chile's Concertación Era*, LATIN AMERICAN PERSPECTIVES, July 2012, at 5, 5; Paul Posner, *Bachelet and the Chilean Model*, GEO. J. INT'L AFF. (July 12, 2016), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/bachelet-and-the-chilean-model>.

101. *See* Maria Lorena Cook & Joseph C. Bazler, *Bringing Unions Back In: Labour and Left Governments in Latin America* (Cornell Univ. ILR Sch., Working Paper No. 4-2013); *see also* Diego Barría Traverso et al., *Removed from the Bargaining Table: The CUT during the Bachelet Administration*, LATIN AMERICAN PERSPECTIVES, July 2012, at 85, 93-97.

102. Working is vital for the subsistence and self-realization of human beings, and the employment contract is probably outlined as the most relevant relationship of power between private individuals. Even classical and twentieth century economists, such as Adam Smith and Ronald Coase, highlighted

In certain sectors such as mining, shipping, and forestry, permanent workers and subcontractors manage to organize and negotiate benefits outside the legal framework, often achieved by extralegal strikes.[103]

Therefore, on the one hand, there are many workers without union protection, and on the other hand, a few workers in strategic sectors negotiate through extralegal mechanisms. In other words, a two-tiered collective bargaining system has been created, with a high level of insecurity for the labor market and Chilean society.[104]

Comparing the case of workers in strategic sectors (who in some cases do manage to bargain collectively) with an incipient form of autonomous unionism or a system of full collective autonomy, as described in Part II of this article, is unrealistic. This, since in those systems (Great Britain until the Thatcher Government, Uruguay, and Italy) autonomy exists because the state sets minimum standards in order to ensure certain levels of compliance and avoid excesses or abuses.[105] On the contrary, and although successful, negotiations through extralegal channels in Chile have a very limited impact (only strategic workers),[106] high costs (many union leaders dismissed),[107] and no legal basis. Ordinary courts, however, usually interpret and apply the Constitution (interpreted broadly and not literally) and human rights treaties to emphasize that the strike is a constitutional right broader than that contemplated in the *Plan Laboral*.[108] In these cases

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these characteristics. *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 387-88 (1937); ADAM SMITH, 1 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 100 (9th ed. 1799).

103. *See* ALBERTO J. ARMSTRONG & RAFAEL A. ÁGUILA, EVOLUCIÓN DEL CONFLICTO LABORAL EN CHILE 1961-2002, at 209-53 (2006); , Rodrigo M. Medel et al., *Huelgas con adjetivo: Hacia una diferenciación conceptual de la nueva estructura de conflictividad laboral*, *in* HUELGAS LABORALES EN CHILE 35 (Omar Aguilar et al. eds., 2016); Domingo Pérez et al., *El desarrollo de la huelga ilegal en el chile contemporáneo* (1990-2009) (LASA Int'l Congress 2015, Working Paper).

104. *See* Pablo Arellano Ortiz & Sergio Gamonal C., *Flexibilidad y Desigualdad en Chile: El Derecho Social en un Contexto Neoliberal*, 50 BOLETÍN MEXICANO DE DERECHO COMPARADO 555 (2017).

105. ERMIDA, *supra* note 13, at 6.

106. In Uruguay, coverage exceeds 90 percent. *La cobertura de la negociación colectiva ha disminuido como consecuencia de la crisis financiera mundial*, INT'L LABOUR ORG. (Oct. 19, 2015), <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_415628/lang--es/index.htm>. And in Italy, it exceeds 80 percent. *Trends in Collective Bargaining Coverage: Stability, Erosion or Decline?*, INT'L LABOUR ORG. (Feb. 2017), <//www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_409422.pdf>.

107. Many anti-union practices try to repress workers intending to form a union. Examples of this range from harassment and persecution to threats and mass dismissals. *See* PABLO BALTERA SANTANDER, LA LIBERTAD SINDICAL: INCERTIDUMBRE DE UN DERECHO DE LOS TRABAJADORES 19-20 (2016).

108. On the broad notion of "constitutional strike" adopted by the Chilean Supreme Court, see José Luis Ugarte Cataldo, *La Huelga en el Derecho Laboral Chileno: Superando el Espejismo*, REVISTA DE DERECHO LABORAL Y SEGURIDAD SOCIAL, No. 4, 2014, at 63.

of dismissal due to extralegal strikes, workers generally agree to a higher severance payment (for unjustified dismissal) in consideration for not being returned reinstated, which means that workers inevitably lose their jobs.

The new law No. 20,940 will also probably lead to numerous cases with uncertain results. The judicial system led by the Supreme Court, including its Fourth Chamber engaged in labor issues, tends to interpret the law in favor of workers and freedom of association. However, a conservative majority of the Constitutional Court applies the so-called "originalist" interpretation of Pinochet's Constitution, advocating for a neoliberal vision.[109] Therefore, there is a tension in the Chilean judiciary, arising from the application of litigation strategies depending on whether lawyers defend employers or unions.

More than a decade ago, the Chilean labor market was characterized by a void or lack of unions,[110] which gave flexibility to employers, as all conflicts were usually solved at an individual level. This scenario has worsened in recent years. The new law No. 20,940 has not changed this prospect, but has rather intensified it.[111]

V. THE CONTRADICTIONS OF THE CHILEAN MODEL

The Chilean case is one of the best examples of a neoliberal revolution in all areas as it privatized the entire Chilean society.[112] Chile has one of the most open market economies. A large part of its economy is privatized and, more than twenty years after the end of the dictatorship, neoliberal ideas are gaining an almost absolute hegemony in this country.[113]

Likewise, income taxes were lowered, foreign exploitation of natural resources without tax payments was allowed, and State companies were

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109. *See* Fernando Atria & Constanza Salgado, *El TC como tercera Cámara: la continuación de la política por otros medios*, EL MOSTRADOR (Mar. 9, 2015), <http://www.elmostrador.cl/noticias/opinion/2015/03/09/el-tc-como-tercera-camara-la-continuacion-de-la-politica-por-otros-medios/>.

110. *See* SERGIO GAMONAL C., CIUDADANÍA EN LA EMPRESA O LOS DERECHOS FUNDAMENTALES INESPECÍFICOS 70 (2004).

111. As I have already pointed out, the new law increases the intervention of the Labor Inspectorate in the negotiation process. In March 2018, Sebastián Piñera – brother of José Piñera, the ideologist of the *Plan Laboral* – took over the Presidency for the second time, representing both liberal rights and those based on Pinochet's ideals. He has already announced that he will instruct the Labor Inspectorate to reinterpret the new law restricting the right to strike and allowing informal groups of workers. *See* Pia Toro, *Reforma Laboral: Gobierno presentará hoy proyecto que flexibiliza jornada de trabajo*, LT PULSO (May 2, 2019), <https://www.latercera.com/pulso/noticia/reforma-laboral-gobierno-presentara-hoy-proyecto-flexibiliza-jornada-trabajo/638219/>.

112. Barría et al., *supra* note 101, at 89.

113. ATRIA, *supra* note 6, at 220-21.

sold to private investors at shamefully low prices; they were practically given away to those close to Pinochet.[114]

On the other hand, even though the country has grown economically, the enormous inequalities,[115] the productive matrix of an underdeveloped country and exporter of commodities that has not been overcome, the consolidation of mega-monopolies made up of a few families that practically own the country and dominate most media (written press, TV, radio, etc.), and think tanks make us wonder whether Chile can become a developed country in the future.[116] Chile is what Ben Ross Schneider, political science professor at MIT, calls a hierarchical capitalism[117] that tends towards monopoly and low productivity.

It is in this context that a labor reform proposed by a center-left government is consolidated (Law No. 20.940), although economically speaking, it basically adheres to neoliberal policies. For this reason, in practice, unions are deemed nefarious monopolies that must be limited at any cost.[118]

Pinochet's *Plan Laboral* has had a long life and good health. The legacy of the dictatorship has survived since 1990.[119] It survived the four governments of the *Concertación* (center-left coalition), the right-wing government of Sebastián Piñera, and the Government of the New Majority, which approved a reform that will probably increase unions' difficulties.

This reform differs from previous ones. Law No. 19,069 and Law No. 19,759 included little improvement for unions, even though the essence of the *Plan Laboral* was preserved. On the contrary, this reform is a step backwards that strengthens the legacy of the dictatorship.

It is difficult to accurately determine the causes of this setback. At the moment, we can preliminarily mention three possible factors that have influenced this situation.

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114. *See* José Gabriel Palma, *¿Cuánto habrá que esperar para que los Chicago Boys & Asociados respondan por el botín que algunos se llevaron?*, CIPER CHILE (Sept. 12, 2013), <http://ciperchile.cl/2013/09/12/%c2%bfcuanto-habra-que-esperar-para-que-los-chicago-boys-asociados-respondan-por-el-botin-que-algunos-se-llevaron/>.

115. Chile is one of the most unequal countries in the world. *See* Posner, *supra* note 100.

116. *See* José Gabriel Palma, *Cómo fue que nos graduamos de "país de ingreso alto" sin salir del subdesarrollo*, CIPER CHILE (July 15, 2013), <http://ciperchile.cl/2013/07/15/como-fue-que-nos-graduamos-de-pais-de-%e2%80%9cingreso-alto%e2%80%9d-sin-salir-del-subdesarrollo/>.

117. *See* Juan Andrés Guzmán, *El capitalismo jerárquico de Chile difícilmente puede ser defendido por los partidarios del libre mercado*, CIPER CHILE (May 04, 2016), <http://ciperchile.cl/2016/05/04/el-capitalismo-jerarquico-de-chile-dificilmente-puede-ser-defendido-por-los-partidarios-del-libre-mercado/>.

118. *See* HAYEK, *supra* note 8, at 89-91.

119. *See* Volker Frank, *Living in the Past or Living With the Past? Reflections on Chilean Labor Unions Twenty Years into Democracy*, *in* WORKING THROUGH THE PAST: LABOR & AUTHORITARIAN LEGACIES IN COMPARATIVE PERSPECTIVES 179 (Teri L. Caraway et al. eds., 2015).

The first factor is the particularities of the Chilean transition and the institutional setting. We should bear in mind the conditions under which democracy was restored in Chile. In the nineties, the *Concertación* felt it was necessary to control social movements in order not to threaten the recently recovered democracy. Even the *Central Unitaria de Trabajadores* (CUT), the main Chilean labor union confederation, collaborated with the government in agreement with this idea, although during the fourth *Concertación* government under President Bachelet (first period), the CUT was somehow pushed back by technocratic commissions.[120] Despite the CUT's cooperation with governments of the *Concertación*, this coalition was never interested in promoting social dialogue in Chile. Its management could even be considered center-right-wing rather than center-left, despite the alleged political orientation of this coalition.[121]

Another element we should not forget is the institutional setting. The *Concertación* had to rule the country under Pinochet's Constitution, which limits the scope of action of representatives of the majority through different anti-majority mechanisms, such as the binominal electoral system, supermajorities required to approve important laws, a constitutional court, designated senators, etc. The electoral system and the supermajorities are currently still in force, which makes it difficult to carry out fundamental reforms to Chilean neoliberalism. As Professor Atria suggests, institutions under Pinochet were explicitly designed to neutralize and prevent channeling the political demands of the people.[122]

Second, a paradox occurs when the defense of human rights is focused only on the scope of civil and political rights, leaving aside social rights and the necessary empowerment of workers. In the case of Chile, human rights activists focused their criticism on the terrible cases of labor union leaders and other civilians killed, tortured, and exiled during Pinochet's dictatorship. Nonetheless, upon the return to democracy and the end of these persecutory measures, the fight for social rights has apparently been forgotten.[123]

Third, another relevant factor is that neoliberalism has politically and

120. Barría et al., *supra* note 101, at 85-101.

121. Fernández & Vera, *supra* note 100, at 15.

122. ATRIA, *supra* note 6.

123. *See* César Rosado Marzán, *The Limits of Human Rights for Labour Rights: A Retrospective Look at the Case of Chile*, *in* THE ILO FROM GENEVA TO THE PACIFIC RIM 206 (Jill M. Jensen & Nelson Lichtenstein eds., 2016). As Harvey points out, the neoliberal emphasis on individual rights has promoted activism for these rights and facilitated the privatization of state functions through NGOs, which are not essentially democratic institutions and whose legitimacy remains in doubt in many cases. *See* HARVEY, *supra* note 1, at 194-95.

ideologically transformed Chilean society[124] by privatizing it. The transition to democracy was marked by a highly elitist type of government,[125] a center-left coalition that adopted a neoliberal model for its economy, and finally, the hegemony of business groups constantly threatening this new model by stating that any labor reform would imply a decrease in economic growth.[126] As suggested, the program presented by the *Concertación* reflects the agreement among the Chilean elite to preserve the neoliberal model imposed by Pinochet.[127] In this context, it is worth pointing out that labor legislation only requires a simple majority, and even though the *Concertación* had a slight majority in the National Congress (Senate and Chamber of Deputies), no fundamental amendments to Pinochet's *Plan Laboral* were passed.

The fourth and final factor is perhaps the widespread corruption of the political system. Journalists have unveiled an illegal system of political finance and tax fraud. This system practically remains unpunished to date. Extreme-right wing economic groups have financed right-wing and left-wing politicians. Politicians of the New Majority (as well as Sebastián Piñera during his first term) have been financed by this system.[128] Undoubtedly, if large corporations illegally finance all politicians, democracy is nullified. It does not matter who wins the election.

Perhaps factors other than those described in this article have influenced the political evolution of Chile. However, I believe that those explained above give an important account of the reasons for maintaining the *Plan Laboral* and other institutions of the dictatorship, such as the private pension system or the private health system. Both have undergone several amendments that have not altered their essence.

The question is, can unions and their allies revert this adverse situation? We believe this is not possible for the moment, both for political and economic factors.

From a political perspective, during the seventeen years of dictatorship in Chile, union activity was repressed and collective bargaining was banned in the early years.

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124. Barría et al., *supra* note 101, at 85-101.

125. *See* Posner, *supra* note 100.

126. *See* Rosado, *supra* note 123, at 224.

127. Fernández & Vera, *supra* note 100, at 8.

128. *See* Simón Romero, *Chile Joins Other Latin American Nations Shaken by Scandal*, N.Y. TIMES, Apr. 9, 2015, at A8; see also *Corrupción, política y exigencias éticas a las candidaturas*, EL MOSTRADOR (Aug. 24, 2016), <http://www.elmostrador.cl/noticias/opinion/2016/08/24/corrupcion-politica-y-exigencias-eticas-a-las-candidaturas/>; *Las señales del SII y la Corte Suprema para bloquear las investigaciones de platas políticas*, CIPER CHILE (May 3, 2017), <http://ciperchile.cl/2017/05/03/las-senales-del-sii-y-la-corte-suprema-para-bloquear-las-investigaciones-de-platas-politicas/>.

In 1973, the country's main union confederation (CUT) was dissolved, the election of union leaders, union activity and collective bargaining were banned, special courts made up of judges and military forces were created to review the dismissal of workers and union leaders after the military coup. All of this was accompanied by an active repression and killing of left-wing union leaders.[129]

Years later, in 1978, the enactment of the laws of the *Plan Laboral* led to a new round of repression and persecution of unions and union leaders.[130] During this entire period, union leaders linked to the opposition to the dictatorship were killed. Perhaps one of the most emblematic cases was that of union leader Tucapel Jiménez, killed in 1982 by agents of the dictatorship.[131] Tucapel Jiménez was very critical of the *Plan Laboral.*

The banning of union activity, the murder of union leaders, and the collective bargaining prohibition led to the decline of unions in Chile. On the other hand, the transition to democracy in Chile was quite unusual, since after the dictatorship ended, Pinochet continued to command the army for many years, later becoming life senator. This constricted the activity of civil society, due to persistent fears of another coup.

As we already explained above, the policies of post-dictatorship democratic governments evidence an agreement of the Chilean elites to preserve the neoliberal model imposed by Pinochet, and the center-left parties of the *Concertación* have shown no interest in promoting social dialogue in Chile during its four governments following the dictatorship. In reality, center-left governments in Chile have been rather center-right coalitions pretending to be left-wing coalitions.[132] Additionally, the government is currently in the hands of the neo-liberal right wing (Sebastián Piñera).

All of this was accompanied by a policy aimed at limiting social movements, partly for fear that social protest would destabilize the recently recovered democracy.[133] In this regard, pragmatism has predominated in Chile during the post-dictatorship period. For the new leaders, restraining social movements was essential to avoid jeopardizing the recently recovered democratic stability.[134]

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129. ROJAS, *supra* note 77, at 178-81.

130. *Id.* at 181-184.

131. *See* JORGE ESCALANTE ET AL., LOS CRÍMENES QUE ESTREMECIERON A CHILE. LAS MEMORIAS DE LA NACIÓN PARA NO OLVIDAR 385 (2013).

132. Fernández & Vera, *supra* note 100, at 5.

133. Daniel Núñez Arancibia, *El movimiento sindical chileno ante el gobierno de Sebastián Piñera, in* RECONFIGURACIÓN DE LAS RELACIONES ENTRE ESTADOS, SINDICATOS Y PARTIDOS EN AMÉRICA LATINA 147 (Juan Carlos Célis ed., 2014).

134. *See* Barría et al., *supra* note 101, at 93-97.

From an economic perspective, Professor Paul Posner emphasizes the weaknesses of the Chilean model, which has been unable to stop depending on the export of commodities and to solve the country's serious problems of inequality.[135]

Chile's economic weakness, with little industrial development and based on the export of commodities and on the development of utilities, is far from being a suitable scenario for the consolidation of a strong unionism.[136]

Consequently, and as explained above, the case of Chile is a good example of the contradictions of neoliberalism. It shows the flexibility and deregulation in labor matters, but when it comes to labor unions, its authoritarian and undemocratic face emerges by promoting anti-libertarian and totalitarian legislation against them.[137]

The case of Chile is also a good example of the limitations of neoliberalism. It sees unionism as a monopoly, whose basic function is to regulate salaries. However, specialized literature points out that unionism plays an important political role, both before the government and the employers.[138] It also fulfills a role linked to democracy within the workplace, giving workers a *voice*.[139]

The case of Chile evidences the fallacies of neoliberalism. As explained above, José Piñera, creator of the *Plan Laboral*, stated that one of his objectives was "state neutrality." But how can a state that regulates and limits union activity down to the last detail be neutral? Union relations are always trilateral, with the participation of employers, unions, and the state; the latter through direct intervention by its legislation, and even by omission if it allows market forces to prevent unionism. Hence, the impartiality or neutrality of the state in union matters is a myth.[140]

As we have already pointed out, at this time, we cannot ascertain whether this trend will be reverted in Chile, especially considering the great instability of the labor market, our commodity-based production system, and the internal tensions within a union movement (rather heterogeneous as to its foundations, with a slow process of ideological restructuring and with directives that are constantly being questioned).[141] For example, in the

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135. *See* Posner, *supra* note 100.

136. GAMONAL, *supra* note 12, at 32.

137. NUMHAUSER-HENNING, *supra* note 30, at 191-97.

138. *See generally* JAKE ROSENFELD, WHAT UNIONS NO LONGER DO, at ch. 7 (2014).

139. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

140. GAMONAL, *supra* note 12, at 223-24.

141. Dasten Julián Véjar, *Chile Tendencias de un sindicalismo fracturado. Sindicalismo*

CUT, the largest confederation of workers, the elections of leaders for year 2016 was annulled due to irregularities in the electoral register.[142] Given this scenario, we find it rather difficult to be optimistic about the future of unionism in Chile.

VI. LESSONS OF THE CHILEAN MODEL

We have already explained that collective bargaining in Latin America is weak and has a low coverage. But there are some exceptions, such as Uruguay and Argentina. María Lorena Cook explains that the governments of Argentina and Uruguay have reinforced their union systems, unlike Chile, where, even though center-left governments have extended the scope of social assistance programs, they have not abolished the neoliberal system of the dictatorship.[143]

Uruguay has a system of bargaining by branch of activity, covering more than 90 percent of its workers[144] and established in the 1940s (Law No. 10,449 of 1943). This system is based on wage councils, i.e., commissions convened by the Ministry of Labor, where representatives of employers and unions meet at the national level to set minimum wages for different economic fields. Over the years, they started to cover other matters,[145] such as the minimum regulation of employment contracts.[146]

These councils were no longer convened during the Uruguayan dictatorship (1973–1985), and collective bargaining was significantly reduced.[147] Upon Uruguay's return to democracy, the wage councils were once again convened by center-left governments, and since 2009, Law No. 18,566 has provided that unions or employers can convene them without government approval.[148] The Uruguayan model is an example of pluralism in industrial relations, for which conflict is inevitable and legitimate and is

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autoritario vs. sindicalismo movimientista, *in* RECONFIGURACIÓN DE LAS RELACIONES ENTRE ESTADOS, SINDICATOS Y PARTIDOS EN AMÉRICA LATINA, *supra* note 133, at 120.

142. Macarena Segovia, *El "olvido" del Tricel: el 30% de los padrones abultados en las elecciones 2017 de la CUT*, EL MOSTRADOR (Aug. 19, 2019), <https://www.elmostrador.cl/noticias/pais/2019/08/19/el-olvido-del-tricel-el-30-de-los-padrones-abultados-en-las-elecciones-2017-de-la-cut/>.

143. Cook & Bazler, *supra* note 101.

144. *See La cobertura de la negociación colectiva ha disminuido como consecuencia de la crisis financiera mundial*, INT'L LABOUR ORG. (Oct. 19, 2015), <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_415628/lang—es/index.htm>.

145. *See generally* HÉCTOR-HUGO BARBAGELATA ET AL., EL CONTENIDO DE LOS CONVENIOS COLECTIVOS (1998).

146. *See generally* NELSON E. LOUSTAUNAU, CONSEJOS DE SALARIOS (2010).

147. *Id.* at 18.

148. Óscar Ermida Uriarte, *Introducción*, *in* CUARENTA ESTUDIOS SOBRE LA NUEVA LEGISLACIÓN LABORAL URUGUAYA, XXXV ANIVERSARIO DEL GRUPO DE LOS MIÉRCOLES 5 (2010).

respectful of the autonomy of social actors,[149] very different from the Chilean model.

In Argentina, several laws that date back to the governments of Perón and Alfonsín promote collective bargaining by branch of activity.[150] This is the case of Law No. 23,551 of 1988, on Trade Unions, Law No. 14,250 of 1953, on Collective Bargaining, Law No. 23.546, of 1988, on Collective Bargaining Procedures, and Law No. 14,786, of 1958, on Resolution of Collective Bargaining Disputes.[151] Of all such laws, the main one is Law No. 14,250, which set the principles on which the Argentinian collective bargaining system is based.[152] The coverage of collective bargaining exceeds 80 percent.[153]

Law No. 23.551 allows workers to form unions by field or branch of activity, and it provides that, upon their registration with the Ministry of Labor and once their application to the relevant branch of activity (homologation) has been authorized, collective bargaining agreements shall have general effects on the entire branch of activity (including both workers and employers).[154] This coverage of collective bargaining agreements to the entire field or branch of activity (homologation) is characteristic feature of the Argentinian legal model.[155]

Law No. 14,250 also provides that, upon the expiration of collective bargaining agreements, they will continue to apply until a new collective bargaining agreement is agreed upon (ultra-activity).[156] In this way, if no collective bargaining procedure is carried out, workers are still covered by the previous collective bargaining agreements. This law also allows the government to extend a sectoral collective bargaining agreement to another sector or field when it deems doing so convenient and upon request of the relevant unions.[157]

In Argentina, the collective bargaining structure is highly conditioned by a legal framework where the state's participation consists of approving

149. Juan Raso Delgue, *Intervención y Autonomia en la Negociación Colectiva: una reflexión desde el modelo pluralista uruguayo de relaciones laborales*, *in* DERECHO A LA NEGOCIACIÓN COLECTIVA: LIBER AMICORUM PROFESOR ANTONIO OJEDA AVILÉS, *supra* note 15, at 423-24.

150. Claudia Rodrigo Silva, *Derecho colectivo del trabajo en Argentina: Un modelo a considerar en Chile*, REVISTA DE DERECHO, No. 1, 2013, at 49, 50.

151. *Id.* at 55.

152. Azucena Beatriz Ragusa, *Capítulo IV: La Negociación Colectiva y los Convenios Colectivos*, *in* CURSO DE DERECHO DEL TRABAJO Y LA SEGURIDAD SOCIAL 735, 736 (Adrián Goldin ed., 2009).

153. Rodrigo, *supra* note 150, at 51.

154. *Id.* at 55-59.

155. Ragusa, *supra* note 152, at 735.

156. Rodrigo, *supra* note 150, at 60.

157. *Id.* at 61.

or rejecting what the parties agreed upon. One of the characteristic features of this model is its stability, as it has remained practically intact, despite the numerous crises and different governments.[158]

In our opinion, María Lorena Cook's perspective is key in these countries, unlike the case of Chile. Upon the return to democracy in Argentina and Uruguay, politicians have shown the will to amend the collective bargaining system.[159] In Chile, on the other hand, the elites decided to continue and even reinforce the neo-liberal model after the dictatorship.[160]

After the dictatorship in Argentina, different political and economic factors led to strengthening of unions, despite the neoliberal policies. For example, the union division that Alfonsín's government tried to use to amend the trade union structure brought the unions of said country closer together.[161] Likewise, the revitalization of the "internal commissions" at the company level have been very important in the Argentinian case,[162] nor should we forget the impact of social policies implemented by the recent left-wing governments of Néstor Kirchner and Cristina Fernández that preceded the right-wing government of Mauricio Macri.[163]

In Uruguay, the left-wing governments of the *Frente Amplio* coalition,[164] from 2005 to the present, and the construction of a culture of dialogue between social actors[165] were of great importance. In said country, left-wing governments promoted trade unions, and the legislative majority of these governments facilitated the enactment of laws promoting collective bargaining.[166]

The case of Chile is rather different. The legal framework and the

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158. Cecilia Senén González et al., *La negociación colectiva y sus determinantes en la Argentina: Un abordaje desde los debates de las Relacionas Laborales*, REVISTA LATINOAMERICANA DE ESTUDOS DO TRABALHO, No. 25, 2011, at 168.

159. *See generally* Cook & Bazler, *supra* note 101.

160. *See generally* Fernández & Vera, *supra* note 101.

161. Maurizio Atzeni & Pablo Ghigliani, *Pragmatism, Ideology or Politics? Unions' and Workers' Responses to the Imposition of Neo-Liberalism in Argentina*, *in* THE INTERNATIONAL HANDBOOK OF LABOUR UNIONS: RESPONSES TO NEO-LIBERALISM , 50-51 (Gregor Gall et al. eds., 2011).

162. *Id.* at 57.

163. *Id.* at 58.

164. Verónica Pérez et al., *El Frente Amplio tras Once Años en el Gobierno*, ANÁLISIS, No. 18, 2016, <https://library.fes.de/pdf-files/bueros/uruguay/13603.pdf>.

165. JORGE NOTARO ET AL., POLÍTICAS PÚBLICAS EN LA REESTRUCTURA DEL MUNDO DEL TRABAJO. URUGUAY 2005-2009, at 25-29, 38-41 (2011), <https://www.colibri.udelar.edu.uy/jspui/bitstream/20.500.12008/4382/1/FCEA_02_Notaro_2011-10-26_webO-TODO.pdf>.

166. Juan Jacobo Velasco, *Renewing the Social Contract Through an Active Trade Union Participation: the case of Labour Reforms in Uruguay* (Paper prepared for the 5th Conference of the Regulating for Decent Work Network, Int'l Labour Office, 2017), <http://www.rdw2015.org/uploads/submission/full_paper/584/Juan_Velasco_submission_584.pdf>.

institutions created thereunder are linked to the 1980 Constitution of Pinochet,[167] and the essence of the neo-liberal system adopted from the dictatorship has remained intact. For this reason, Chileans feel like they are living an endless transition, always pending and inconclusive.[168] In the words of Professor Atria, the 1980 Constitution still divides Chileans, as it was created to neutralize majorities, the people,[169] succeeding in this purpose. This neutralization has enabled the dictatorship's ideas, and the *Plan Laboral*, to survive in Chile.

The question, then, is what can other countries learn from the Chilean system? Have the four pillars of the *Plan Laboral* been applied in other legal systems?

Every country has its own traditions and, in this regard, the Chilean case is quite special. However, it is clear that the four pillars of the *Plan Laboral* in Chile have led to a weak collective bargaining system, and thus, it does not seem a good recipe to institute effective collective bargaining.

On the other hand, neoliberal ideas currently rule the world, and specialized literature advocates for decentralization and bargaining at a company level, and it also highlights how the prevalence of deregulation by weakening unions have affected middle classes in developed countries And, in this regard, the contradictions of the neoliberal model present in Chile can also be witnessed in other countries.

The trend towards decentralization has been criticized. This, since centralized collective bargaining leads to better jobs.[170] Some authors have stated that, after the 2008 crisis, the disparity between a small group of counties with centralized collective bargaining systems and little wage inequality, and a bigger group of countries where the market has set the policies and inequality has grown, has further increased.[171]

As for the relationship between lower collective bargaining rates and a weakened middle class, several authors agree that collective bargaining reduces wage inequality, and that systems with collective bargaining by branch of activity have less wage dispersion.[172] Hence, one of the impacts

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167. Juan Jacobo Velasco, *CHILE: mitos y realidades de una transición*, ÍCONOS: REVISTA DE CIENCIAS SOCIALES, No. 018, 2004, at 133, 133-34.

168. *Id.* at 139-40.

169. ATRIA, *supra* note 6, at 192-93.

170. Santos M. Ruesga et al., *Negociación colectiva y calidad del empleo en la Unión Europea*, REVISTA DE ECONOMÍA MUNDIAL, No. 29, 2011, at 87, 112-14.

171. Jelle Visser, *What Happened to Collective Bargaining During the Great Recession?*, IZA J. LAB. POL'Y 30 (2016), < https://izajolp.springeropen.com/track/pdf/10.1186/s40173-016-0061-1>.

172. Simon Deakin et al., *Legislación laboral, participación salarial y desempleo en seis países de la OCDE entre 1970 y 2010*, 133 REVISTA INTERNACIONAL DEL TRABAJO 1, 7 (2014).

of weakening collective bargaining is the shrinking of the middle class.[173] This has also been reinforced by the decline of unionism and thus, of the redistributive role of collective bargaining, thanks to which wages have grown at a slower rate than the economy as a whole.[174] Professor Schenk has stressed the virtuous relationship between unionism and the reduction of inequalities.[175]

Contrary to the opinion of orthodox neoliberals, Professors Traxler and Brandl believe that an intentional or voluntary decline of the collective bargaining system does not improve economic performance, but rather generates costs and social conflict.[176]

VII. CONCLUSIONS

In this paper I have analyzed the most recent Chilean labor reform. First, I contextualized Latin American labor law, characterized by an extensive regulation that privileges individual rights over collective unions. Then, I described Pinochet's *Plan Laboral*, analyzed the 2016 reform, and concluded that the pillars of the *Plan Laboral* have been maintained over the years. Then I explained the Chilean model and its contradictions (more freedom means more restrictions on unionism), and briefly outlined the Argentinian and Uruguayan models, very different from the Chilean model. I finally discussed some of the main factors that have helped encourage the continuation of the neoliberal hegemony in Chilean labor law and the potential lessons of the Chilean model.

The case of Chile is a good example of the challenges of union legislation. In Latin America, the legislator regulates every detail concerning unions, becoming the best example of the regulatory system explained in the introduction to this paper. However, regulation itself is not the main issue, but rather the type of regulation. Regulation can be based on development; it may ease and pave the way for workers' representatives, foster collective bargaining and social dialogue processes, and empower workers by strengthening the right to strike. On the other hand, regulation can play the role witnessed in the case of Chile: limit labor unions as much as possible and leave the workers subject to individual negotiation with their employers, i.e., to the coercion arising from power

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173. Bruce Western & Jake Rosenfeld, *Workers of the World Divide. The Decline of Labor and the Future of the Middle Class*, FOREIGN AFFAIRS, May/June, 2012, at 88.

174. Paul Krugman, *"¿Quién era Milton Friedman?"*, CLAVES DE LA RAZÓN PRÁCTICA, No. 171, 2007, at 15, 15.

175. CHRISTOPHER SCHENK, UNIONS AND DEMOCRACY 12-14 (2014).

176. FRANZ TRAXLER ET AL., THE ECONOMIC EFFECTS OF COLLECTIVE BARGAINING COVERAGE: A CROSS NATIONAL ANALYSIS 29 (2009).

asymmetries between employees and employers.

It is clear that new winds have yet to blow over Chile's process for it to overcome the neoliberal hegemony and move towards a more democratic society, where workers are able to represent their interests and defend their rights.

Perhaps the Chilean model has not been replicated identically in other countries; in some of them, such as Argentina and Uruguay, it is diametrically opposed. Nonetheless, the world tends towards the decentralization of collective bargaining, consistent with the deregulation ideology of neoliberalism, and the Chilean case is a good warning about the difficulties faced by unionism within a neoliberal legal framework without counterbalancing elements.