# NOTES ON CONTRIBUTORS

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# INTRODUCTION

At the end of September 2016, in Panama City the 10th American Regional Congress of Labour Law and Social Security ("X CRAME 2016") of the International Society for Labour and Social Security Law (ISLSSL) took place. This represent a major scientific event for the American region on the study of labour and social security law. This volume contains a selection of papers presented at the 10th American Regional Congress of September 2016.

The topics selected by the local organizing committee and officers of the ISLSSL, identified three main themes dealing with the latest cutting edge in topical legal issues. The selection of topics was such to attract the interest of not only from academic and practitioners in the region but also from outside the American region. In addition, the regional event was complemented by the organisation of an ad hoc meeting for young legal scholars of the region. All this, was carried out in a spirit of open minded presentations and lively discussions.

List of topics analysed in the 10th American Regional Congress in Panama City.

1. Main themes: The evolution and transformation of the sources of Labour Law; trade unionism and the transformation of the company; social security: "How to be able to reach 2050 with a healthy economic and social system". The themes were presented by prestigious specialists from the United States, Brazil and the ILO-Mexico, respectively. All the lectures were enhanced with the inclusion of two specialists by subject who played the role of lecturer's commentators. They were from Venezuela, Costa Rica, Canada, Uruguay, Colombia and Chile. The methodology applied in this round of lectures was that after the main presentation, there were two other specialists to present their views which were then followed by discussions and/or short presentations. Such a method offered the opportunity to have lively debate on

the subject, and gave an opportunity to let anyone to participate in the working session.

2. The round tables focussed on themes such as: the formalization of the informal economy, the new form labour tribunal procedures, new realities in the world of work. Each one of these roundtables were integrated by four specialists in representation of the various American countries. Specialists from Bolivia, Argentina, Colombia and Mexico, Peru, Ecuador, the Dominican Republic, Chile, the United States, Chile and Brazil took part in these round tables. The methodology applied to round tables gave the possibility to contrast several points of views from different countries´ realities. The brief interventions from the panellists, ignited a very rich debate from participants of the Congress.
3. Workshops: there were two workshops with the main goal of giving to the participants a more practical debate. The workshops were on "alternative methods for the settlement of labour disputes" and on the "teaching of labour law. The main presentations of the two workshops were given by representatives of the United States and Chile, respectively.
4. Selected topics of interest to the host country were covered in two themes:
   • The new labour law for the public sector;
   • What's new in the ILO Maritime Labour Convention 2006.
   The first topic was presented by two Panamanian specialists and the second one was approached through the visions of three sections from the Panamanian Labour Maritime Sector (employers, workers and the government). In addition, a specialist from the United States and a European authority's representatives presented their points of view.
   As a matter of sub regional interest, it was included in the presentation/discussion a "Report on the situation of human rights in Central America, Cuba and the Dominican Republic", in which all the countries shared information on the internal situation on this delicate topic.
   As mentioned above, the American Young Legal Scholar Section discussed the theme of "effective domestic implementation of International Labour Standards on freedom of association". Young lawyers from Venezuela, Uruguay, Peru, Brazil, Chile, Argentina, Colombia and Mexico participated.
5. Topics for the opening and closing of the event. The American Reginal Congress saw the participation of two "Honoured Lecturers", coming from outside the region, gave keynote speeches at the begin-

ning and at the end of the congress. The first speech was on "The use of control technologies and their impact on work and workers", the second one was on "The labour law and its development". The lecturers came from Spain and Italy, respectively.

6. Free Papers: Space and time for the presentation of free papers linked to the Congress's main themes was given to the various participants. The level of participation of free papers was outstanding both in number and content. Participants were from Europe and America. The number of lecturers exceeded sixty. Thus, it has been impossible to include all of them in the current publication. However, I have been lucky to have a meaningful sample of them, thanks to the kindness of their authors. Their contributions are presented in the following pages. The other papers can be found in the website of the Panamanian Academy of Labour Law.

The overall theme of Congress aimed at looking at on unprecedented transformations of the "classic labour law". In this regard, the three main themes of the 10th American Regional Congress made possible to explore subjects of great transformation in labour and employment relations.

In this regard, Prof. Brudney in his lecture made us realize about the importance of the transformation of the sources of labour law, basically in two elements: The International Labour Standards, adopted by the International Labour Organization and the normative actions inserted in international trade agreements with the introduction of labour clauses, and the importance in registering a difference in the law, directly related to the practical application of it.

Another outstanding speaker, Prof. Mannrich, offered a panoramic view of such transformation: New players; trade union strategies and; the employer's organizations response to changes.

The topic of social security was presented by the ILO-Mexico specialist Helmut Shcwarzer, who illustrated statistics, key concepts, the demographic transition, the situation of Latin America, the informal economy and social protection (published in this volume). In this regard we have to mention the thoughtful comments about these themes made by Professor Pablo Arellano, of Chile.

We had several contributions, namely: Prof. Morgado (Chile) "Beyond the orality: the keys of the labour procedure reforms"; Prof. Garcia (Argentina) "The formalization of the informal sector"; Yone Frediani (Brazil) "The new realities in the world of work". In addition, Ana Moreira Gomes (Brazil), Giuseppe Casale (Secretary-General of the ISLSSL, Italy) and Ivan Campero (Bolivia) provided also their contributions.

Finally, the volume contains the lecturers of Prof. Joaquin Garcia Murcia on “The new control technologies and their impact on the work and the worker” and of Prof. Tiziano Treu, President of the ISLSSL, on “Labour law and sustainable development”.

For the Panamanian Academy of Labour Law who hosted the 10th American Regional Congress 2016 the Congress was a great challenge but also a success with more than 400 participants who attended it and shared that rewarding time with us. To all those who have supported the Congress with their skills and knowledge, in particular to Giuseppe Casale, Secretary-General of the ISLSSL, our thanking. To the various agencies of the national Government and particularly the Ministry of Labour, in the person of its minister, Luis Ernesto Carles, our recognition and gratitude for such support.

Vasco Torres De León
(Ex) President of the 10th American Regional
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# CHAPTER 1

## "Social security: how to get to 2050 with a healthy system". The need to improve structural problems

*Pablo Arellano Ortiz*[*]



### 1. Presentation of the comment

First of all, I wish to congratulate the Labour Law Academy of Panama for this magnificent regional congress and at the same time congratulate Mr. Helmut Schwarzer and Mrs. Marta Monsalve for their presentations, which have not left me an easy task. Thank you very much for the invitation to comment such a relevant subject.

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Given that the presentations prior to this comment have made reference to the pension system of my country, Chile, before focusing on the question of this comment, I will make a brief reference to this matter. In fact, I think it would be good to clarify that there is no Chilean pension system or a pension model created by Chile in the 1980s.[1] What actually happened is that the politicians of the time took an existing figure in another order, precisely in the United States of America in the section 401 (k) introduced in the Employment Retirement Income Security Act in 1974. This rule establishes defined contribution pension plans at the enterprise level. What was done, the only originality, is to implement these type of pension plan as a compulsory basic pension schemes for dependent workers. Whether the system is good or bad, we all have an opinion about it. In technical terms it is difficult to establish a preference as both schemes have problems. For the Chilean case, issues such as low wages and a very precarious labour market have an impact on poor pensions, either with pay-as-you-go or with capitalization.[2]

Already answered in part the question raised we will refer to the main subject of the presentations. To do this, we will start our comment by a brief explanation of the social security context in Latin America and the Caribbean, then we will refer to ILO strategies: social protection floors and the transition to formality. Then, we will review the question raised: Social Security: how to get to 2050 with a healthy system? In view of this exposition we will propose what we have named as structural problems that must be overcome. We will conclude our commentary with some final reflections.

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[1] About the origins of the chilean pension system *see*: Arellano Ortiz, Pablo, *Lecciones de seguridad social*, Librotecnia, Santiago, 2015; Arellano Ortiz, Pablo, *Universalisme et individualisme dans le régime des retraites, l'exemple du Chili*, Logiques juridiques, L'Harmattan, Paris, 2012; Arellano Ortiz, Pablo, *Universalism and Individualism in Chilean pension law: an example of extension of coverage for Eastern Europe*, in Roger Blanpain, William Bromwich, Olga Rymkevich & Iacopo Senatori (eds.), Bulletin of Comparative Labour Relations, Vol. 80 "*Labour Markets, Industrial Relations and Human Resources Management*", Kluwer, 2012, pp. 219-231; Arellano Ortiz, Pablo, *The private pension system. Critic study base on the Chilean case*, in Roger Blanpain et Michele Tiraboschi (eds.), Bulletin of Comparative Labour Relations 65, "*Global Labour Market: From Globalisation to Flexicurity*", Kluwer, Enero 2008, p. 363.

[2] On this topic *see*: Arellano Ortiz, Pablo, *Reto actual de las pensiones de vejez : ¿Fin de las AFP?¿Regreso a reparto?*, Librotecnia, Santiago, 2015.

## 2. Social Security Context in Latin America and the Caribbean

In our view it is necessary to remember that social security is not a European creation, at least not totally. It should be noted that the need for protection through the mechanisms of social security has been recognized through the history of man[3] in various regions, including Latin America. It should be emphasized in this sense that the expression social security it has been established by Simon Bolivar in the speech of Angostura.[4] It should also be mentioned that the first time that the term Social Security was used in a legal body was in the Social Security Act of 1935 issued during President Roosevelt's term in the United States of America.

Thus, the current conception of social security was born in Europe at the end of the nineteenth century and developed on that continent, North America and Australia, even before World War II.[5] But its development in Latin America is also in the same period. We must highlight the adoption of laws on social insurance in Brazil in 1923 and in Chile in 1925. Both regions have a more advanced level of development than the rest of the world, but in Europe the level of coverage is more important.

In our opinion if we tried to characterize social security in the Latin American region we would find:

- A strange mixture of social insurance mechanisms with purely private financial mechanisms.
- A mixture of universal coverage mechanisms with self-protection mechanisms or individual coverage.
- A relevant protective cultures within national legislations.
- From the main presentation that we commented we agree that in the region we find an inverted population pyramid, where there is an aging population and much less young population, and also where it is necessary to highlight the appearance of new social risks and the need to cover them.

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[3] *See*: Arellano Ortiz, Pablo, *Lecciones de seguridad social*, Librotecnia, Santiago, 2015, p. 14.

[4] In Angostura's speech he states: "The most perfect system of government is the one that produces the greatest amount of happiness possible, greater sum of social security and greater sum of political stability". Pronounced on February 15, 1819 and published in the days that followed in the Orinoco Mail.

[5] OIT, *El seguro social y la protección social*, Conferencia Internacional del Trabajo, 80a reunión, Memoria del Director General (Parte I), Ginebra, 1993, p. 9.

## 3. The strategies of the ILO: social protection floors and the transition to formality

As explained in the main presentation, the ILO's strategies for extending social security coverage focus mainly on two instruments: the Social Protection Floors Recommendation, 2012 (No. 202) and the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204).

In this sense, if both instruments have been adopted after a long deliberative and consensual process within the ILO, in our opinion they have certain shortcomings in order to have a greater effect in the region.

Both instruments are recommendations, and therefore do not have a binding value. It is necessary to take into account that the social actors do not want a greater commitment in these subjects,[6] which draws extreme attention.

In addition, it should be noted that these instruments are accompanied by a lack of social dialogue. In this sense tripartism is almost absent and is replaced by a participation of civil society.

We must bear in mind a criticism that is not recent: there is an eurocentric conception of labour relations. In our view, labour relations outside Europe respond to very different logics. In relation to the region of Latin America, it must take into account the peculiarities peculiar of it.

On the other hand, we understand that the work of the ILO is to formulate a minimum standard of regulation.[7] Therefore, the strategies adopted should aim at establishing the minimum level of labour relations in a given country. In addition, these are guidelines for protection, in any case mandatory regulations. Therefore, it must be taken into account how these strategies can be adapted to the countries of the region and from them to build better coverage.

## 4. The question asked: Social security: how to get to 2050 with a healthy system?

In this brief section of our presentation, we would like to point out very shortly that with the proposed strategies and the current state of social secu-

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[6] This can be seen in the conclusions of the Chairman of the Tripartite Meeting of Experts on Strategies for Extending Social Security Coverage, held at the International Labour Office, Geneva, in 2009.

[7] In this topic *see* Francisco Walker Errázuriz y Pablo Arellano Ortiz, *Derecho de las relaciones laborales*, Tomo 1 Derecho Individual del Trabajo, Librotecnia, Santiago, 2016.

rity protection and labour relations in the region, it is extremely complex to propose for the next few years that an evolution can be sustainable. This is because, while we believe that ILO strategies are positive in our view, a strategy based on minimums is not sustainable in the long term. We will elaborate our arguments in the following section.

## 5. Structural problems that must be overcome

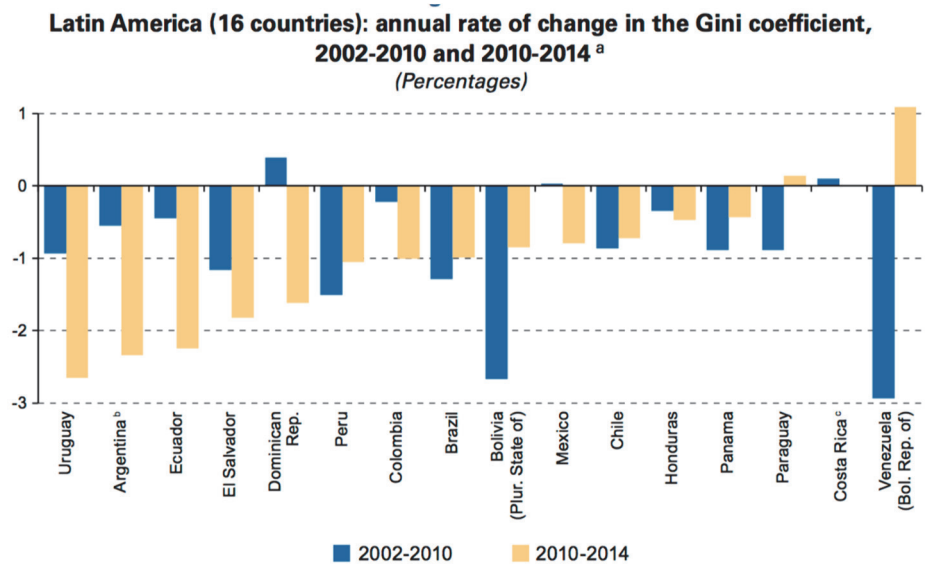
In our view, the proposed objective and the question posed can only be reached once some problems that we will call structural for the region are solved: Correction of inequality and the structure of the labour market.

### 5.1. *Correction of inequality*

In relation to this point it is interesting to be able to measure the levels of inequality existing in the regional. For this, it is important to use the Gini Coefficient, which is used to measure income inequality, within a country, but can be used to measure any form of unequal distribution. The Gini coefficient is a number between 0 and 1, where 0 corresponds to perfect equality (all have the same income) and where the value 1 corresponds to the perfect inequality (one person has all the income and the other none).

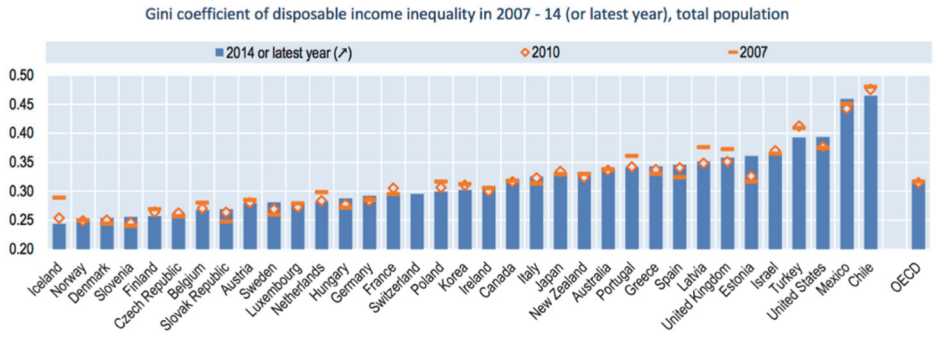
The Economic Commission for Latin America and the Caribbean (ECLAC) have recently published an study[8] that show that the average Gini coefficient for the countries with recent information available fell from 0.497 in 2013 to 0.491 in 2014. When the most recent figures are compared with those from the start of the 2010s, a more substantial reduction is found. The regional index stood at 0.507 in 2010, so that by 2014 there had been a cumulative fall of 3.2%, equivalent to 0.8% a year. There were statistically significant changes in the Gini coefficient in 9 of the 16 countries considered during this period. The largest reductions were in Uruguay (– 2.7% a year), Argentina (– 2.3%) and Ecuador (– 2.2%).

[8] *See*: ECLAC, *Social Panorama of Latin America 2015*, Social Development Division and the Statistics Division of the Economic Commission for Latin America and the Caribbean (ECLAC), 2016.




*Source*: ECLAC, 2016, p. 13.

However, when analysing the presence of Latin American countries in the context of the OECD, it can be noted the true reality of inequality in the region. It can be seen that Mexico and Chile are the most unequal countries of the OECD.




*Source*: OCDE, November 2016.

In addition to the above it should be mentioned that according to ECLAC and OXFAM, income and wealth concentration are at the heart of inequality

in the region. The richest 10% in Latin America and the Caribbean own 71% of wealth and their tax rate is only 5.4% of their income.[9]

### 5.2. *The structure of the labour market*

The composition of the labour market is vital to the success of any social security system. This is because since its origin social security has been conceived taking into account a worker who provides the needs of his family. In this way, a basic budget in the establishment of a protective mechanism is how it will be financed and if it will be contributory, is a basic assumption in order to give protection. In the event that its financing is not contributory, it will resort to the revenues of the state to protect.

In our opinion, in the region the balances that must be given between contributory and non-contributory, and especially the possibility of adopting sound public policies are influenced by the following factors.

First of all, the outsourcing of labour. This phenomenon has long been collected and developed by Latin American doctrine.[10] The destruction of the classic conception of the enterprise and the use of the labour force as a commodity brings with it an obvious labour precarization whose consequences also affect our opinion to the protection of social risks.

A second factor is informality. In this respect we must point out that all forms of labour regulation have been structured on the basis of the existence of a relationship of subordination and dependence between two subjects, one the employer and the other the worker. This link is conceived within the margins that the State fixes when regulating the labour market. In principle, any employment relationship outside these margins escapes the regulation of the State and at the same time these workers are left to their fate. A normative limbo of lack of protection then affects the informal worker.

The informality knows several denominations, the doctrine speaks for example of the informal sector, the informal economy or non-structured sector to refer to groups of workers almost identical. The origin of this concept is attributed to the ILO, as we specifically point out to the work done by this organization in the 1960s and 1970s[11] in Africa. However, today it is used

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[9] *See* the information at *http://www.cepal.org/en/pressreleases/income-and-wealth-concentration-are-heart-inequality-region-according-eclac-and-oxfam.*

[10] It needs to be noted this important publication about this subject Ermida Uriarte, Óscar y Colotuzzo, Natalia, *Descentralización, Tercerización, Subcontratación*, OIT, Lima, 2009.

[11] ILO, *Employment incomes and equality: A strategy for increasing productive employment in Kenya*, International Labour Office, Geneva, 1972.

globally because its object can not only be found in that continent.

The Recommendation about the transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) defines in Article 1.2 of the Recommendation what is meant by the "informal economy" for the purposes of the Recommendation:

a) refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements; and
b) does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons, and money laundering, as defined in the relevant international treaties".

For its part, the doctrine has also been concerned with trying to specify the content of this category of workers. For Professor Marius Olivier informal employment relationships encapsulate those activities that fall de facto or de jure, outside the scope of the law, including social security.[12] The informal economy is not an individual condition but a process of income generation characterized by a central feature: it is not regulated by the institutions of society, in a legal and social environment in which similar activities are regulated. On the other hand, according to Victor Tokman, two factors have probably contributed to increasing interest in informality. The first would be the strong link between informality, poverty and underemployment, as well as a strong absorption of the most vulnerable groups in society, including women and youth. The second is the adaptability of the concept to economic and social changes in the world.[13]

A final factor to consider in relation to labour market composition is migration. According recent ECLAC figures in Latin America and the Caribbean, there has been a reduction in emigration to countries outside the region and an increase intraregional flows between 2000 and 2010. In that year, some 28.5 Millions of Latin Americans and Caribbeans resided in countries

[12] Olivier, Marius, *Work at the margins of social security: Expanding the boundaries of social protection in the developing world*, in *Invisible Social Security Revisited, Essays in Honour of Jos Berghman*, Lannoo Publishers, Lovaina, 2014, pp. 215-230.

[13] Tokman, Victor, *Informality: exclusion and precariousness*, paper prepared for the *Tripartite interregional Symposium on the Informal Economy: Enabling Transition to Formalization*, Organización Internacional del Trabajo, Ginebra, 2007.

other than their birth.[14] This type of figures leads to the conclusion that the migration context in Latin America and the Caribbean is numerically more important than in the European region. However, it is noted that the same protection is not available for migrant workers and their families. We believe that a greater concern about the effects of migration on acquired rights and social security rights in course of acquisition is urgent in the region.

Among the different realities found in the Latin American region we would like to highlight the case of the Monotributo programa in Uruguay. This mechanism consists of a unified tax package, optional, which includes both the payment of social security contributions and the payment of taxes. It is mainly intended for micro and small enterprises involved in the informal economy. Implemented initially in 2001, due to the diagnosis that more than 80 percent of Uruguayan independents were excluded from social security, it did not have much success until the incorporation of new criteria in 2006 when multiple companies were able to access the monotributo regime.

## 6. Final thoughts

From the reflection in this comment we would like to conclude the following ideas. The ILO strategy is, as it was conceived, a minimum.[15] Not like the standard to follow. Therefore, you can act on that level and it is what to expect.

The principle of subjective universality of social security, i.e. that all people are covered, can be reached through national floors of social protection. However, their effects are insufficient if poverty is maintained and in some cases increases. A multidimensional approach is urgently needed to improve inequality rates in the region.

As for the protection of informal workers, we believe that the worker should be protected in his/her state and not forced to be what he/she is not. Therefore, the informal should be protected as such. There are examples in the region in which the informal worker is included in social security protection and he/she remains informal. What is needed is to abandon the classic

[14] According to reports Cepal October 5, 2015 on its website *www.eclac.cl.*

[15] About ILO and its origin *see*: Francisco Walker Errázuriz y Pablo Arellano Ortiz, *Derecho de las relaciones laborales*, Tomo 1 *Derecho Individual del Trabajo*, Librotecnia, Santiago, 2016, Arellano Ortiz, Pablo, *La conformidad de la legislación chilena a las normas internacionales del trabajo de la OIT*, in *Revista de Derecho de la Universidad Católica de la Santísima Concepción*, Junio 2011, pp. 39-60.

mechanisms and seek innovative methods of social risk protection.

Finally, we would like to point out that protective efforts have resulted in the middle class being abandoned. It is necessary to rethink the coverage approach or the existing strategies will create an even more segmented society. If we can build a homogeneous and well-covered middle class in the region, many of the points observed in this comment will have been overcome. The challenge is important, however we believe is achievable.

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Francisco Walker Errázuriz y Pablo Arellano Ortiz, *Derecho de las relaciones laborales: un derecho vivo*, Librotecnia, Santiago, 2014.

# CHAPTER 2

## Evolution and Transformation of Sources of Labour Law in the Americas

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**Summary**: 1. Introduction. – 2. Domestic labour laws since 1990. – 3. Domestic labour practices since 1990. – 4. Labour law sources in a larger international law setting. – 5. Conclusion.

### 1. Introduction

I appreciate the opportunity to participate in this important Regional Congress on such a timely topic, and to address a diverse audience of judges, administrators, faculty, and union and employer members. I would like to start by sharing several preliminary observations.

Having been immersed for years in the textualist interpretive style of our late Justice Scalia, I note that the title assigned for my presentation at the American Regional Congress on Labour and Social Security Law used "and" rather than "or": "The Evolution and Transformation of Sources of

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Labour Law". This suggests to me a view that there has been both evolution and transformation in labour law sources. Yet, these two concepts – evolution and transformation – are often viewed as contrasting. One tends to think of a body of law evolving, or in the alternative that same body of law being transformed.

Taking the U.S. setting, for example, labour law has evolved over 80 years since the National Labour Relations Act of 1935 (NLRA), and it has done so almost entirely without legislative participation – based on a series of incremental decisions from courts and agencies.[1] One might consider the 80-year evolutionary pattern of the NLRA to be transformative, in the sense that this law is now understood to provide considerably less protection for workers and unions than it was thought to offer when enacted. That change, however, is due primarily to extrinsic factors, notably a transformed set of economic and social conditions (globalization, automation and other technology, immigration, public and political hostility to unions) rather than a transformative change in law itself. Indeed the absence of legislative or constitutional change in U.S. labour law may well be one of its most distinctive features.

In short, if evolution in the law is considered a more gradual and incremental process, and transformation a more sudden and radical shift, then perhaps my topic is more aptly framed as whether there has been an evolution or a transformation of sources of labour law.

The time frame I have chosen to explore begins more recently than the NLRA of 1935. I examine changes in labour law sources over the past 25-30 years, dating from about 1990, with some related thoughts from slightly earlier times. In this shorter period, it may be easier to characterize rapid evolution in sources of law as functionally equivalent to transformation. Nonetheless, I believe that sources of labour law in the Americas have not been transformed, or altered in radically transformative ways. But sources have been imported from outside of national contexts, and these sources have influenced and altered traditional domestic structures, in ways and at speeds I would consider quite significant – at times even rapidly incremental although not cathartically transformative.

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[1] Judicial and agency decisions "make law" in common law countries in ways they do not in civil law settings, but the U.S. pattern is unique even when compared to other common law countries. In Canada, Britain, and Australia, the norm is for legislatures to play the lead role, modifying and updating statutes. Legislative activity may be part of an ongoing dialogue involving responsive court and agency decisions, or it may reflect an initiation of change for extrinsic policy reasons. Such legislative activity has been an integral part of labour law development in all major common law countries since 1950, except the U.S.

My basic thesis is that two key transnational sources of labour law have had a pronounced evolutionary effect on domestic labour law instruments and to a lesser extent on domestic labour law practices. These sources are first, ILO norms and related international labour rights developments, and second, the proliferation of labour provisions in bilateral and regional free trade agreements.

This thesis of a pronounced evolutionary effect is not seamlessly coherent as applied to an entire hemisphere of 35 countries, mainly because it encompasses two distinct fault-lines or divisions. One is the existence of substantial country-specific variations in legal culture and history, such that labour law sources have shifted or evolved at different paces and with differing impacts over the past quarter-century. The second is the important division between changes in law and changes in practice. When labour statutes or decrees, labour provisions in constitutions, or labour decisions by domestic courts, are substantially modified, there remains the question of effects on the ground: how are the changes being implemented, monitored, enforced, and sanctioned. Often, the reality of changes in practice lags well behind the claims or aspirations associated with changes in law.

I concentrate my examination on two areas of labour law: Child Labour, which implicates certain basic minimum substantive protections, and Freedom of Association, which involves basic participatory voice. Within this dual focus, I examine the impact of four fundamental ILO Conventions (C. 138, 182, 87, 98), both as direct instruments of change and as mediated through trade agreements. I also draw distinctions between law and practice in the two areas.

In pursuing this examination, variations in experience among countries in the Americas may be as important as any single pattern across the hemisphere. At the same time, I cannot attempt to do justice to the specific narratives for twelve countries in South America,[2] seven countries in Central America,[3] thirteen countries in the Caribbean region,[4] and three countries in North America.[5] Accordingly, my examples focus on a smaller number of countries across the region.[6]

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[2] Brazil, Argentina, Paraguay, Uruguay, Chile, Bolivia, Peru, Ecuador, Colombia, Venezuela, Guyana, and Suriname.

[3] Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

[4] Antigua and Barbuda, Bahamas, Barbados, Cuba, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent, Trinidad and Tobago.

[5] Mexico, US, Canada.

[6] In South America, primarily Brazil, Colombia, Chile, Peru; in Central America, primarily Guatemala, El Salvador, Panama; in North America, primarily Canada and Mexico.

I have largely omitted considering any changes in sources of law within the United States, due to that country's self-proclaimed exceptionalist stance toward international law and related teachings. This exceptionalism, asserted regularly in Congress and at the Supreme Court, has precluded any serious impact from transnational sources on U.S. domestic labour law.[7] On the other hand, the United States has been a major player in leveraging the impact of free trade agreements as sources of change for the labour laws of other countries, as discussed below.

My final preliminary observation is about the need to remain humble. It is very hard to become an expert on someone else's legal culture without having lived and practiced law in that culture for an extended period. I have not done this for the countries I am examining. I received some responses to questionnaires I distributed to Congress participants, with the gracious support and assistance of Professor Vasco Torres de Leon. However, even with the responses and my continuing research and reflection, there are legal dimensions and political realities that I will have missed as a cultural outsider.

## 2. Domestic Labour Laws Since 1990

### A. *Background Pattern of Ideological Change*

From 1980 onward, the overall path in the politics of labour regulation in Latin America has been toward restored or newly created labour protections.[8]

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[7] It is worth noting that although U.S. law largely comports with ILO conventions on certain subjects (for instance, non-discrimination under Convention 111), there are notable gaps between U.S. labour relations law and freedom of association and collective bargaining norms under Conventions 87 and 98: (i) U.S. employers have the right to hinder employee free choice (e.g. through captive audience speeches); (ii) U.S. employers may exclude union organizers from employer property (*Lechmere Inc. v. NLRB,* 502 U.S. 527 (1992)); (iii) entire categories of U.S. workers are excluded from statutory coverage (e.g. agricultural and domestic workers; public employees); (iv) permanent replacements are permissible in strikes (*NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938)); (v) minority unions lack the right to bargain when no majority exists; (vi) public employees do not have collective bargaining rights in many states. *See generally* Lance Compa, *National and International Labour Rights* in *Voices at Work: Continuity and Change in the Common Law World* 364, 367-68 (Alan Bogg & Tonia Novitz eds. 2014); Cesar Rosado Marzan, *Labour's Soft Means and Hard Challenges: Fundamental Discrepancies and the Promise of Non-Binding Arbitration for International Framework Agreements*, 98 *Minn L Rev* 1749, 1793-98 (2014).

[8] *See generally* Mark Anner, *Labour Law Reform and Union Decline in Latin Amer-*

Labour relations scholars have attributed this trend to a confluence of several factors: the demilitarization of government structures; the democratization of political participation and power sharing; and the emergence of more diversified economies.[9] Over these decades, there has been some ebb and flow between reforms that coincide with wider democratic participation (enhancing worker rights and protections, both individual and collective) and reforms that respond to free-market policies and pressures (encouraging informal employment and increased flexibilization in labour relations).[10]

From a big-picture perspective in Latin America, governments in the 1990s often supported pro-market weakening of worker standards – through "flexibilizing" changes in law and practice – whereas governments in the period since 2000 have tended to be more protective of worker rights and interests.[11] Again speaking in general terms, the weakening of protections in the 1990s via pro-market reforms that encouraged flexible and informal employment arrangements often had an adverse effect on individual rights more than collective rights. Where organized labour was sufficiently strong, the bargaining coverage and political heft of unions minimized the prospects for such weakening.[12]

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*ica* in LERA 60th Annual Proceedings (2015); Andrew Schrank & Michael Piore, *Norms, Regulations, and Labour Standards in Central America* in *Estudios y Perspectivas* (2007); M. Victoria Murillo & Andrew Schrank, *With a Little Help From My Friends: Partisan Politics, Transnational Alliances, and Labour Rights in Latin America,* in 38 *Comp. Pol. Studies* 971 (2005).

[9] *See generally* Matthew E. Carnes, *Continuity Despite Change: The Politics of Labour Regulation in Latin America* 2-3 (2014); Maria Lorena Cook, *The Politics of Labour Reform in Latin America: Between Flexibility and Rights* 14 (2013) Schrank & Piore, *supra* at 19-20.

[10] *See, e.g*. Carnes at 5-8; Cook at 13-14; Maria Victoria Murillo et al., *Latin American Labour Reforms: Evaluating Risk and Security,* in *The Oxford Handbook of Latin American Economics* 790, 792-95, 801-02 (José Antonio Ocampo & Jaime Ros, eds., 2011).

[11] *See e.g*. Cook at 32-37; Salo V. Coslovsky, *Flying Under the Radar? The State and the Enforcement of Labour Laws in Brazil*, in 42 *Oxford Development Studies* 169, 171 (2014). *See* also Graciela Bensusan, *Legislation and Labour Policy in Latin America: Crisis, Renovation, or Restoration?,* in 34 *Comp. Lab. L. & Pol'y J.* 655 (2013) (concluding that since 2000, labour protections that were eroded in 1990s have been expanded and reaffirmed in Argentina, Brazil, Chile, and Uruguay, although not in Mexico).

[12] *See* Carnes, *supra* note 9, at 2-3, 5, 14; Cook, *supra* note 9, at 7, 25. *See also* Murillo & Schrank, *supra* note 8, at 972 (identifying growth of collective labour rights in 1990s, and attributing this development for some countries to influence of traditional labour-backed political parties, and for other countries to pressure from U.S. trade unionists and human rights activists).

Notwithstanding these general trends, the impact from the cycles of development has differed, at times substantially, among countries. Thus, for example, Argentina and Brazil tended to have strong organized labour and only moderate pro-market reforms during these years.[13] By contrast, organized labour was weaker in Chile and Peru, and more extensive pro-market reforms took hold during the period.[14] Moreover, the larger difference between 1990s pro-flexibility direction and post-2000 trends toward greater worker protections should not obscure the reality that cross-country variations in these labour market reforms have been more pronounced within each of the two periods than between them.[15]

Still, over a period of several decades when a number of developed nations, enamoured of market reform, have been pursuing an agenda of softer individual employee protections and/or reduced collective labour rights,[16] the Latin American picture is relatively supportive of worker protections in general terms. The question I will address is the extent to which sources of law outside of increasingly democratized and economically diversified national circumstances have contributed to or accounted for these developments in labour law and practice.

### B. *Influence of the ILO, Examined on Three Levels*

The ILO's mission is to promote social justice through internationally

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[13] *See* Cook at 20-24. *See also* Carnes at 55, adding Mexico as having extensive, protective labour codes; Murillo & Schrank, at 975 (listing countries with union-friendly and union-averse collective labour laws enacted in 1990s). As discussed in Part III *infra*, gaps between enacted laws and actual practices are often substantial in this collective rights area.

[14] *See* Cook, *supra* at 20-24.

[15] *See generally* Murillo et al., *supra* note 10, at 794-95 (listing legal reforms affecting external flexibility enacted in thirteen countries – from 1985-99 and 2000-10).

[16] *See* David Rueda, *Social Democracy and Active Labour-Market Policies: Insiders, Outsiders and the Politics of Employment Promotion*, 3in 6 *British J. of Pol. Sci*. 385, 392-93 (2006) (describing labour policies under Thatcher government); Andrew Glyn and Stewart Wood, *Economic Policy under New Labour: How Social Democratic is the Blair Government?*, in 72 *Pol. Q.* 50, 62-63 (2001) (describing labour policies under Blair government); Reimut Zohlnhöfer, *Partisan Politics, Party Competition and Veto Players: German Economic Policy in the Kohl Era*, in 23 *J. of Pub. Pol'y* 123, 145-46 (2003) (describing labour policies under Kohl government); *see generally* Thorsten Schulten and Torsten Müller, *A New European Interventionism? The Impact of the New European Economic Governance on Wages and Collective Bargaining*, in *Social Developments in the European Union* 181 (David Natali & Bart Vanhercke eds., 2013).

recognized labour and human rights. It has carried out that mission by promulgating labour standards, monitoring implementation of the standards, and providing technical support and training to governments and social partners seeking to conform their own laws and practices with those standards.[17] Since roughly 1990, ILO activities through these three distinct channels – convention ratifications, supervisory body monitoring, and provision of support to governments – have had a direct and substantial influence on the development of domestic labour laws in the Americas context.

1. Convention Ratification. The first and most powerful area of influence in the post-1990 period stems from the ratification of conventions, especially although not exclusively fundamental conventions. Twenty-two countries in the Americas ratified both fundamental child labour conventions in the period between 1990 and 2016.[18] Convention 182, addressed to the Worst Forms of Child Labour, was not adopted by the ILO until 1999, so the focus there is on countries that ratified this convention rapidly, and that also approved Convention 138 (adopted in 1973 and addressed to the Minimum Age for admission to employment) during the 1990s and early 2000s. This is a period in which the ILO notably intensified its commitments to child labour as an issue, buttressed by the UN Convention on the Rights of the Child that came into force in 1990 and has since been ratified by every member of the United Nations except the United States. Overall, the child labour ratification record of countries in the Americas is impressive over the past 25 years.

A number of these countries also ratified one or both fundamental freedom of association and collective bargaining conventions in the same recent period.[19] Convention 87 on Freedom of Association was adopted in 1948, and Convention 98 on the Right to Organize and Collective Bargaining in 1949, and the vast majority of countries in the Americas had ratified both conventions decades prior to 1990.

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[17] *See Mission and Impact of the ILO*, available at *http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm.*

[18] These 22 are Argentina, Barbados, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Guyana, Jamaica, Mexico, Panama, Paraguay, Peru, St Kitts & St Nevis, Trinidad & Tobago. Ratification data, by convention and country, available at *www.ilo.org.*

[19] For ratifications since 1990, *see* Chile, El Salvador, St. Kitts and St. Nevis, St. Vincent and the Grenadines. Additionally, Uruguay ratified four of the eight fundamental conventions between 1989 and 2001 (29, 100, 111, 182), having ratified the four others several decades earlier.

There have been many other ratifications of ILO conventions from countries in the Americas since the early 1990s, including technical conventions related to occupational safety and health and social security protections, as well as the governance convention involving tripartite consultation. A substantial number of safety & health ratifications have occurred within the past ten years, and almost all have been since 1990.[20] Convention ratifications have frequently been accompanied by changes in domestic laws, reflecting a commitment to conform national constitutional or statutory standards to the international norms approved by governments. To cite a prominent example in child labour, Brazil brought its Constitution into alignment with Conventions 138 and 182, which it had ratified in 2000 and 2001.[21] Brazil's changes in domestic law include an innovative Child and Adolescent Statute to protect the rights of children in the workplace,[22] a constitutional amendment committing to a minimum age of 16 for employment and 18 for hazardous work,[23] and presidential decrees in 2000 and 2002 mandating the implementation and enforcement of both conventions.[24] As I will discuss below, Brazil's practices have for the most part successfully implemented these new legal standards, and there has been a remarkable reduction in child labour (ages 5 to 17) between 1992 and 2012.[25]

Other countries also have adopted domestic child labour laws pursuant to their recent ratification of Conventions 138 and 182. In Peru, the ratification

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[20] For example, Argentina ratified Convention 184 in 2006, Conventions 155, and 187 in 2014; Brazil ratified Conventions 167 and 176 in 2006; Panama ratified Convention 167 in 2008; Peru ratified Convention 176 in 2008; Uruguay ratified Conventions 167 and 184 in 2005, and Convention 176 in 2014.

[21] *See* Constitution, art.7, title II; Labour Code, art.403 (age 16); art.2 of Decree 6,481 of 2008 (age 18). *See generally* Jerome September, Children's Rights and Child Labour: A Comparative Study of Children's Rights and Child Labour Legislation in South Africa, Brazil and India 68 (2014).

[22] *See* Daniel Hoffman, *The Struggle for Citizenship and Human Rights*, North American Congress on Latin America (1994), available at *http://pangaea.org/street_-children/latin/statute.htm.*

[23] *See* ILO International Programme on the Elimination of Child Labour (IPEC), *Business and the Fight against Child Labour: Experience from India, Brazil and South Africa* 34 (2013).

[24] Proper cites to Cardoso Decree No. 3597 (Sept.12, 2000) and Decree No. 4134 (Feb.15, 2002).

[25] *See* ILO CEACR 2016 Observation on Brazil, C.138 at 227-28; Patrick del Vecchio, *Child Labour in Brazil: the Government Commitment*, in 10 *eJournal* USA 27 (May 2005); *see infra* at text accompanying notes 80-82 and 171-72.