

# A Struggle for Democracy in the Workplace : The Possibilities and Limits of the Constitutionalization of Labour and Employment Law in Brazil

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Résumé de l'article

Les relations en milieu de travail dans les pays en développement sont traditionnellement caractérisées d'autoritaires. Or, des violations graves des droits de la personne se produisent également en milieu de travail dans la plupart des pays développés, et, en conséquence, la société moderne est confrontée à une triste réalité, soit la condition universelle de vulnérabilité et de fragilité des droits de la personne dans le milieu de travail.

En conséquence de l'affaiblissement de l'appareil étatique et du renforcement correspondant des zones de puissance économique dans le cadre de la mondialisation, la survie de la démocratie dans la vie quotidienne est menacée par les sociétés transnationales, particulièrement compte tenu de l'inexistence de textes permettant de sanctionner convenablement leurs transgressions. Le mouvement des droits de la personne au Brésil est axé sur les violations des droits humains perpétrées par les gouvernements mais ne s'est guère érigé contre les violations commises par des sociétés d'envergure. Défendre la mise en œuvre des droits de la personne dans le milieu du travail, c'est déployer des efforts afin de contrecarrer la deshumanisation des travailleurs-citoyens en leur accordant davantage de latitude en vue de l'autodétermination. Il est essentiel que le principe de la dignité humaine, pourtant déjà enchâssé dans la Constitution brésilienne, devienne l'un des principaux piliers du droit du travail et de l'emploi. L'article analyse la manière dont la constitutionnalisation du droit du travail et de l'emploi au Brésil a permis de s'attaquer aux problèmes susmentionnés.

# A Struggle for Democracy in the Workplace: The Possibilities and Limits of the Constitutionalization of Labour and Employment Law in Brazil\*

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Maximiliano NAGL GARCEZ\*\*

*Workplace relations in developing countries are characterized as being traditionally authoritarian. But severe violation of human rights in the workplace can also be found in the most developed countries, and therefore modern society is finding itself faced with a sad reality: a universal situation of the vulnerability and fragility of human rights in the workplace.*

*Through the weakening of state institutions and the corresponding strengthening of the economic power spheres within the context of globalization, the survival of democracy in everyday life is threatened by transnational corporations, especially considering the lack of instruments to appropriately punish them. The human rights movement in Brazil has focused on the violation of human rights perpetrated by governments, yet it has not been so critical or outspoken regarding violations committed by major corporations. Defending the implementation of human rights in the workplace is an effort to counteract the dehumanization of worker-citizens by giving them more space for self-determination. It is essential that the principle of human dignity, already enshrined in the Brazilian Constitution, becomes one of the main pillars of Labour and Employment Law. The article analyzes how the constitutionalization of Labour and*

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\* The author is thankful to Mr. Wallace Schwab for his valuable remarks and corrections of English grammar.

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*Employment Law in Brazil has been used to tackle the above mentioned problems.*

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There is no reason for workers to be considered second-class citizens during the time they spend in the workplace. This perspective, though apparently obvious, was until recently considered innovative in the Brazilian labour and employment system, in which economic considerations often overshadow all other issues.

Several aspects of human rights in the workplace have been neglected in developing *and* developed countries. The concept of citizenship must not be restricted to the traditional notion of belonging to a State, with political rights and obligations. There is also another concept: citizenship in the workplace<sup>1</sup>. It represents the notion that all political and civil rights obtained throughout long and painful struggles can and should be exercised by workers inside the workplace, both during and after working hours.

### 1 Combating authoritarianism in the workplace

The problem of authoritarianism in the workplace is by no means restricted to the developing countries: “The authoritarianism of the workplace in the United States diminishes our standing as a democracy. Indeed, in the latter part of this century, instead of the democratization of the American workplace, the hierarchical corporate workplace model is coming to dominate the rest of society. Tactics are important to the revitalization of the US labour movement, but the tactics need to arise out of a new sense of entitlement.”<sup>2</sup> Norman Birnbaum presents the following dilemma, common to Brazil, Canada and the U.S.: “The subordination of the market by the nation and the extension of citizenship to the workplace remain the unfulfilled tasks of American democracy.”<sup>3</sup>

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1. O.E. URIARTE, “La ciudadanía laboral en el Mercosur”, in D. DE LIMA, E SILVA and E. PASSOS (cords.), *Impactos da globalização: relações de trabalho e sindicalismo na América Latina e Europa*, São Paulo, LTr, 2001, p. 45.
  2. E. BERNARD, *Workplace Democracy*, [Online], [www.bostonreview.net/BR21/3/BernardE.html] (December 15, 2006).
  3. J. HEROD, *Loss of Anti-Capitalism*, [Online], [www.umb.edu/faculty/salzman\_g/Strate/GetFre/22.htm] (March 20, 2004).

The concept of labour citizenship must be incorporated in the struggle of human rights activists, so as to ensure that these rights are respected in all circumstances, especially in the place where people spend a considerable amount of their time: the workplace.

Workplace relations in developing countries, as in the case of Brazil, are characterized as being traditionally authoritarian. Valorized labour is not widespread in Brazil, beginning with its colonial past, and sustained by slavery. Labour has been often seen as only a duty for the survival of the majority of the Brazilian population<sup>4</sup>.

One must bear in mind that throughout Brazilian history, not much has been researched and written on the subject of the predominance of horizontal relations and labour democracy. Brazilian society is still influenced, albeit unconsciously, by four centuries of history of legal slavery — and yet forced labour still exists in some rural areas, mainly through debt bondage<sup>5</sup>. Jamie Pinsky articulates this by saying that slavery is not a fact of the past, since the inheritance of slavery continues to interfere in our social relations. And the lack of discussions on the subject does not help much, since “assassinating a memory, hiding a problem, is the way to not resolve it”<sup>6</sup>.

The desperate search for efficiency and increased productivity, combined with technological advances, have not improved the situation previously described. According to Skinner, one clear indication that society has truly acquired a new conception can be found in the development of a new vocabulary to discuss, articulate and debate it<sup>7</sup>. As an example of this phenomenon, the following classified advertisement shows how Brazilian society has incorporated the concept of efficiency in a very insensitive manner: “We are looking for a Psychologist. Characteristics:

4. J.L. PEREIRA, “Futuro do Direito e do Processo do Trabalho no Brasil” (2004) 40:2 *Revista TST*, 23.

5. Accordingly to International Labour Office, the Brazilian Government has been an example of a country that adopted successful measures against forced labour, see WORLD OF WORK; THE MAGAZINE OF THE INTERNATIONAL LABOUR OFFICE, *Toward a Fair Globalization: Report of the World Commission on the Social Dimension of Globalization*, [Online], [www.ilo.org/public/english/bureau/inf/download/magazine/pdf/mag50.pdf] (December 13, 2006). But still much needs to be done. One example is the constitutional amendment presented by the Workers’ Party in Parliament to allow the seizure of businesses and property where forced labour is practiced. It was approved by the Senate, and is waiting for a second vote by the Chamber of Deputies since 2005, owing to pressure from the rural landowners’ lobby.

6. J.L. PEREIRA, *loc. cit.*, note 4, 26-27.

7. Q. SKINNER, *As Fundações do Pensamento Político Moderno*, São Paulo, Companhia das Letras, 1996, p. 10.

female, single, age 25 to 30, [...] total availability related to working hours and trips, non-smoking”.<sup>8</sup>

The aforementioned advertisement is paradigmatic. It shows how the modern enterprise can become sophisticatedly authoritarian in tragically creative ways. Sexual harassment, bullying, total disregard for family life, male chauvinism, can often be presented, either in subtle or in evident manners, sometimes without causing much commotion.

Retuning to the concept of citizenship in the workplace, Norman Birnbaum poignantly expresses the issue: “I don’t see that you can check your status as a citizen when you cross the threshold of the workplace.”<sup>9</sup> It is necessary to defend the concept of the worker as a true “citizen inside the enterprise”, via the expression used by Márcio Túlio Viana, which emphasizes that the employer does not have a “free territory, where he is the chief and sovereign.”<sup>10</sup>

## 2 Differences between Human Rights in the Workplace in the North and in the South

Severe violation of human rights continue to occur in the developing world, but also in the most developed countries and in the ones most praised (and probably rightly so) for respecting its citizens’ human rights. Modern society is finding itself in a sad reality: a *universal* situation of the vulnerability and fragility of human rights in the workplace.

The discussion about human rights should not only respect cultural pluralism “as a basis for common ground”<sup>11</sup>, but also take into account that a lack of respect for human rights is not solely an issue for the developing world<sup>12</sup>. In addition to a growing divide between the rich North and the poor South, there is also a growing disparity within the North itself. It is

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8. *Gazeta do Povo*, Curitiba, 04.15.2001, caderno de Empregos.

9. THINK TANK, *Whatever Happened to Socialism*, [Online], [www.pbs.org/thinktank/transcript988.html].

10. M.T. VIANA, *Direito de resistência: possibilidades de autodefesa do empregado em face do empregador*, São Paulo, LTr, 1996, p. 115.

11. M. MUTUA, “A Noble Cause Wrapped in Arrogance”, *Boston Globe* (April 29 2001), D8.

12. We also agree with this author when he states in the same article that “if human rights are to represent a higher human intelligence, they must overcome that seemingly incurable desire to universalize Eurocentric values by repudiating that which is different and non-European.” We can use this same logic to try to avoid repudiating the fact that human rights violations are much more widespread in developing countries than most people generally realize.

becoming increasingly easy to find the ‘Third World’ inside the ‘First’, and also the ‘First’ in the ‘Third World’<sup>13</sup>.

Examples to support these statements will be shown herein predominantly from one area of society, labour and employment issues. Forced labour is undoubtedly a blatant violation of human rights. Recently the ILO released a Report from its Director-General, called “A global alliance against forced labour”, showing that forced labour has modern forms, and a universal nature: it is found in all regions. “In industrialized countries, cases of migrant workers in debt bondage have been documented in agriculture and in other labour-intensive sectors, including construction, garments, packaging and food processing.”<sup>14</sup> The U.S. Chapter of Amnesty International also released a study in 2005<sup>15</sup> about the presence of forced labour in today’s most powerful nation.

This example is often rejected as proof of the fragility and vulnerability of human rights in the workplace, considering that forced labour in the U.S.A., or in developed countries, is extremely marginal, and that it is not widespread in society. Yet according to ILO and Amnesty International reports, forced labour is much more common than may be perceived.

### 3 Globalization versus Democracy

The questioning of the limits of democracy in today’s society, including in the workplace, has much to do with the effects of the phenomenon of globalization<sup>16</sup>, the destruction of the sovereign nation-state, and the existence of super-national decision centres. There is an ever increasing preoccupation with the model of sovereign power, as executed by the

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13. Two Brazilian singers, Caetano Veloso and Gilberto Gil (also a human rights activist, and the present Brazilian Minister of Culture) wrote about it the song “Haiti”, that says: “Think about Haiti. Pray for Haiti. Haiti is here, and Haiti is not here”. Frankly, poverty similar to the one found in some parts of Haiti can be found anywhere – just ask illegal immigrants in an average big city in any number of developed countries. It is possible nowadays to find sweatshops not only in Mexico City, São Paulo, Shanghai or New Delhi, but also in New York and Los Angeles.
  14. INTERNATIONAL LABOUR ORGANIZATION, *Discussion of the Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 93<sup>rd</sup> Session, 31 May-16 June 2005, Report I (B).
  15. HUMAN RIGHTS CENTER, *Freedom Denied: Forced Labour in California*, [Online], [[www.hrcberkeley.org/download/freedomdenied.pdf](http://www.hrcberkeley.org/download/freedomdenied.pdf)] (November 12, 2006).
  16. E.D. SALGADO, “Sob os Olhos do Grande Irmão: a Luta pela Democracia na Sociedade de Controle” (2004) 4:16 *A&C Revista de Direito Administrativo & Constitucional*, 11-28.

State, which is ever more in the hands of structures that escape from its borders<sup>17</sup>.

Through this weakening of state institutions and the corresponding strengthening of the economic power spheres within the context of globalization, the survival of democracy in everyday life “constitutes one of the central theses of our time”<sup>18</sup>.

As Arat correctly emphasizes, “as countries move toward privatization and free trade under the leadership of the United States and pressure from funding agencies such as the International Monetary Fund and the World Bank, the United States’ view of democracy and the Lockean notion of human rights has become more widespread and gained strong-hold...Only liberties and political rights, which are seen as essential to the protection of property from state intrusion, constitute the focus of national and international protest of government violations of human rights”<sup>19</sup>.

There is no need for a trade-off between efficiency and respect for workers’ rights<sup>20</sup>. It is possible to imagine a third alternative: democratic citizenship in the workplace that is compatible with efficiency. And it is necessary to identify an important group of human rights violators that have contributed to the fragile characteristics of human rights in the workplace nowadays. This group, transnational corporations, presents a constant threat to human rights as well as highlights the lack of instruments that exist to penalize them. They have undoubtedly contributed to the transnational fragility of human rights in the workplace.

#### **4 Democracy versus Transnational Corporations**

The human rights movement in Brazil has focused on the violation of human rights perpetrated by numerous governments, yet it has not been so critical and outspoken regarding violations committed by major corporations.

This problem has been properly addressed by David Kennedy: “The human rights movement foregrounds harms done explicitly by governments to individuals or groups—leaving largely unaddressed and more

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17. *Id.*, p. 12.

18. I.W. SARLET, “A Eficácia dos Direitos Fundamentais à Segurança Jurídica: Dignidade da Pessoa Humana, Direitos Fundamentais e Proibição de Retrocesso Social no Direito Constitucional Brasileiro” (2004) 4:14 *Revista de Direito Social*, 9-49.

19. Z.F. ARAT, “Human Rights and Democracy: Expanding or Contracting?” (1999) 32:1 *Polity*, 140, 119-143.

20. C.B. MACPHERSON, *Ascensão e queda da justiça econômica e outros ensaios*, Rio de Janeiro, Paz e Terra, 1991, p. 66-67.



legitimate by contrast harms brought about by governments indirectly or by private parties. Even when addressing private harms, human rights focus attention on public remedies—explicit rights formalized and implemented by the State. One criticizes the State and seeks public law remedies but leaves unattended or enhanced the powers and felt entitlements of private actors. Human rights implicitly legitimizes ills and delegitimizes remedies in the domain of private law and non-State action.”<sup>21</sup>

In order to render justice to the international human rights community, it is necessary to acknowledge that it lacks the proper tools to attack above-mentioned problem. The traditional human rights paradigm, present in the Universal Declaration on Human Rights and subsequent international Covenants and treaties, also attributes the main responsibility for human rights violations to States, failing to mention the offensive practices of corporations.

The intent of the following sections is to propose adequate tools for coming to terms with a *universal* human rights problem: violations by transnationals.

In today’s increasingly globalized and versatile economic system, corporations argue for their neo-liberal, economic freedom, and yet they transform the workplace into a sphere devoid of citizenship. The workers, who are free citizens, lack freedom in their workplace, exactly where they spend most of their time. There is a profound contradiction between the market freedom that transnational corporations demand, and the rigid hierarchy they impose. As Backhaus-Eger point out, the enterprise wants to be “an island of authoritarianism in a spontaneous sea of cooperation.”<sup>22</sup> Or, as Rodríguez-Garavito has properly defended<sup>23</sup> “neo-liberal globalization relies neither on ‘disciplinary’ regulation nor on corporate self-regulation or deregulation associated with the ‘retreat of the state’. Rather, neo-liberal global governance consists in a mixture of both: hard law to protect corporate rights and soft law to regulate social rights. This is most evident in the contrast between the strict, top-down, global regulatory framework on intellectual property rights and the loose and largely voluntary international system of labour regulation”<sup>24</sup>.

21. D. KENNEDY, “The International Human Rights Movement: Part of the Problem?” (2001) 3 *European Human Rights Law Review*, 252.

22. M.T. VIANA, *op. cit.*, note 10, p. 116.

23. C.A. RODRÍGUEZ-GARAVITO, «Global Governance and Labor Rights: Codes of Conduce and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala.» (2005) 2 *Politics & Society* 78, 203-233.

24. *Id.*, p. 33.

Large corporations often use the need to implement modern production methods as an excuse to justify oppression, and are importing this practice to the developing world. Kennedy points out that paradoxically, the human rights movement “contributes to the framing of political choices in the third world as oppositions between ‘local/traditional’ and ‘international/modern’ forms of government and modes of life. This effect is strengthened by the presentation of human rights as part of belonging to the modern world, but coming from some place outside political choice, from the universal, the rational, the civilized.”<sup>25</sup> The questioning of the limits of democracy in today’s society, and also in the workplace, cannot be done in a proper manner without analyzing the effects of the phenomenon of globalization<sup>26</sup>.

The movie *Swimming with Sharks*<sup>27</sup>, also known as *The Buddy Factor*, gives an example of how human rights can be severely violated in sophisticated scenarios in the workplace. It tells the story of working relations in the Hollywood movie industry. The following is a part of the film’s dialogue, between two characters, the boss (Buddy, played by Kevin Spacey, and his assistant):

Buddy: What I am concerned with is detail. I asked you to go get me a packet of Sweet-N-Low. You bring me back Equal. That isn’t what I asked for. That isn’t what I wanted. That isn’t what I needed and that (!) isn’t going to work around here.

Guy: I, I just thought...

Buddy: You thought. Do me a (!) favour. Shut up, listen, and learn. Look, I know that this is your first day and you don’t really know how things work around here, so I will tell you. You... have... no... brain. No judgement calls are necessary. What you think... means nothing. What you feel means nothing. You are here for me. You are here to protect my interests and to serve my needs. So, while it may look like a little thing to you, when I ask for a packet of Sweet-N-Low, that’s what I want. And it’s your responsibility to see that I get what I want.

Richard Sennett has correctly noticed that recently the qualities of the so-called *good* or *competent* worker are not the same as those of a person considered to have a *good* character<sup>28</sup>. It is vital that human rights activists give support and weight to this problem. The enforcement of social rights also depends on the cultural context in which the legislation is enacted. Defending the implementation of human rights in the workplace is an effort

25. D. KENNEDY, *loc. cit.*, note 21, 258.

26. E.D. SALGADO, *loc. cit.*, note 16, 12.

27. *Swimming with Sharks*, directed by George Huang, USA, Cineville, 1994.

28. R. SENNETT, *A corrosão do caráter: consequências pessoais do trabalho no novo capitalismo*, Rio de Janeiro, Record, 1999, p. 21.

to revert the dehumanizing process of the worker-citizen, and giving them more space for self-determination. It is therefore essential that the principle of the dignity of the human being, a principle that has been incorporated into the Brazilian Constitution as well as international conventions, be considered one of the main pillars of Labour and Employment Law. The article will analyze how the constitutionalization of Labour and Employment Law in Brazil has been used to tackle the above mentioned problems.

Defending the dignity of the human being in the workplace is no easy task. The oppression that workers endure is extremely serious, but sometimes almost intangible. Worker behaviour, inside and outside of the workplace, is quite often controlled and moulded in order to defend the interests of the employer. This control is frequently accepted by workers as something useful and necessary, and is therefore internalized by them. The notion of obedience goes beyond the physical limits of the enterprise and the working hours, dominating the life, the thoughts, the air breathed by the worker: everything in name of the employer<sup>29</sup>. Competition, fear of unemployment, and the corrosion of values caused by these factors can transform the worker into a kind of chameleon, as the character *Zelig* in the Woody Allen's movie with the same name<sup>30</sup>, that in order to adapt, throws away all individuality.

Even the workers' personality is violated in such a degraded social context: "How can long-term purposes be pursued in a short-term society? How can durable social relations be sustained? How can a human being develop a narrative of identity and life history in a society composed of episodes and fragments? The conditions of the new economy feed instead on experience which drifts in time, from place to place, from job to job."<sup>31</sup>

To summarize the aforementioned problems of workplace oppression, dialogues extracted from *Gosford Park*<sup>32</sup> have been included below. This film is a very keen study of class relations by the great filmmaker Robert Altman. Although the film depicts the lives of servants in the 1930s in England, the reality of many Brazilian, North-American or European workers in the 21<sup>st</sup> century is not, however, very different. The following dialogue from the movie defines what is expected from a 'good servant':

Mrs. Wilson: Not much of a crime to stab a dead man, is it? They can never touch him. That's what's important, his life.

Mary Maceachran: And your life?

29. A.R. COUTINHO, *Poder punitivo trabalhista*, São Paulo, LTr, 1999, p. 70.

30. *Zelig*, directed by Woody Allen, USA, Orion Pictures Corporation, 1983.

31. R. SENNETT, *op. cit.*, note 28, p. 27.

32. *Gosford Park*, directed by Robert Altman, UK, Capitol Films, 2001.

Mrs. Wilson: Didn't you hear me? I'm the perfect servant; I have no life.

The film illustrates the impressive difference between the way that the workers and employers live. Yet another scene in the film demonstrates how servants are often essentially nonexistent for the employer. In the scene, two people from the upper class are interrupted by a worker at a delicate moment, and one of them tells the other not to worry, "It's nobody". In another scene, a police inspector explains that he is investigating a murder, yet he does not want to interview the workers: "I'm not interested in the servants, only people with a real connection to the dead man." Finally, one servant asks a friend: "Why do we spend our lives living through them?"

The velocity and capacity to adapt demanded of workers by large corporations, doesn't have and doesn't look for a meaning. It only creates insane competition, which from a moral or social point of view, no one can really determine what purpose it serves<sup>33</sup>.

The growing weakness of the labour movement in almost every geographic region has made that situation even worse in recent years<sup>34</sup>. "The multinational corporate structure creates problems both of public and private democratic governance. Unions as well as nations find themselves dealing increasingly with corporations that 'can more easily weather economic struggles, conceal information, and transfer, or more credibly threaten to transfer, work to other localities, or indeed, other countries, than could their predecessor counterparts.' For unions, which are organized nationally, the likelihood that corporate decisions are made elsewhere, by the home-based parent company, makes it difficult to exercise countervailing influence or power"<sup>35</sup>.

Legal systems, both national and international, haven't been able to adequately address the damage that transnational companies are causing on the status of human rights. A study submitted to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, prepared by Senegalese jurist El Hadji Guisse, analyses the economic power of the transnationals: "of the 100 biggest concentrations of wealth in the world, 51 percent are owned by transnational corporations and 49 per cent by states. [...] Mitsubishi's turnover exceeds Indonesia's Gross National Product (GNP), while Ford's turnover exceeds South Africa's GNP and Royal

33. E.C.de MELLO, *Antevisões imperiais*, São Paulo, Folha de São Paulo, 2001, Caderno Mais, p. 14.

34. M.L. COOK, "Labour Reform and Dual Transitions in Brazil and the Southern Cone", *Latin American Politics and Society*, vol. 44, n° 1, spring 2002, p. 27-28.

35. J. ATLESON, "'An Injury to One...': Transnational Labor Solidarity", in J.A. GROSS (ed.), *Workers' Rights as Human Rights*, Ithaca, Cornell University Press, 2003, p. 160, 164.

Dutch Shell earns more than Norway.”<sup>36</sup> He also considers that transnationals “are unaware of or disregard the impact their activities could have on economic, social and cultural rights, whether at the collective level or at an individual level. These companies are frequently, if not always, behind massive human rights violations; in the same spirit, the states that benefit from their activities pass legislation on their rights.”

David Kennedy also has also pointed to their growing power: “The medium for international affairs has become increasingly cultural: Coca-Cola has become more important than the Voice of America or the military establishment; CNN has replaced the embassy cable.”<sup>37</sup> Other warnings are properly presented by Guisse: “The globalization of the economy leads to the risk of generating even wealthier transnationals and swelling the ranks of the poor, above all in the weakest economies.” It is also necessary to make the transnationals abide “by the rules, in the economic development of the states where they are located and in whose economies they operate”<sup>38</sup>.

It is obviously not enough to acknowledge their might. It is important to implement measures to make corporations liable for the offences they commit to human rights. As such, the most effective measures for combating violations of human rights by large corporations have been by applying punishment targeting a strategic location: their pocketbooks. It is for that reason the present Brazilian government has been considered by the ILO in its above mentioned report as the country that most effectively has implemented measures to combat forced labour—by making that method largely unprofitable, as well as applying serious criminal prosecution. The next step that the Brazilian Government wants to impose, if approved by Congress, is to pass a constitutional amendment to allow the Administration to seize any property that is used as a means of forced labour, including the actual land, and transferring it to the people that have suffered this ignominious form of oppression.

Another necessary approach has been suggested by Guisse: “Countries should draw up laws criminalizing all activities by transnational corporations which violate economic, social and cultural rights.”<sup>39</sup> The growing power of large corporations not only affects economic and social rights, but also ‘first generation rights’, as they are traditionally known. For instance,

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36. GLOBAL POLICY FORUM, *Human Rights: Holding Transnationals in Check*, [Online], [[www.globalpolicy.org/socecon/tncs/humrig.htm](http://www.globalpolicy.org/socecon/tncs/humrig.htm)] (December 15, 2006).

37. D. KENNEDY, *loc. cit.*, note 21, 122.

38. GLOBAL POLICY FORUM, *supra*, note 36.

39. *Ibid.*

it is impossible to adequately and efficiently exercise freedom of speech without having the means to *speak* properly—and hopefully to *be heard* properly, and this requires access to the mass media. The media is increasingly being controlled by a limited number of transnational companies, many times part of the same conglomerate group.

Transnational companies have been allowed to commit terrible violations of human rights, and Nation States often lack the means—and sometimes the willingness—to tackle this problem. There are many reasons for this. Foreign investment is much needed in the developing world, and frequently governments find themselves at terrible crossroads: on the one hand they can accept investment by transnational corporations that are known for severe disrespect for human rights or on the other hand refuse the investment, even though they find themselves in need of money for social or economic reasons.

Especially in the Brazilian reality, it is necessary to be sceptical of the use of soft law to fight human rights abuses by big corporations. Consumers haven't really started to be driven by how "socially responsible" the producers of goods and services claim to be. And "given their voluntary character, most codes offer a corporate-friendly alternative to regional and global labour laws."<sup>40</sup> Lampedusa's *The Leopard* describes the trials of the Sicilian aristocracy as they attempt to adapt to the coming 20th century. It contains the famous sentence: "Unless we ourselves take a hand now, they'll foist a republic on us. If we want things to stay as they are, things will have to change." Alluding to *The Leopard*, Gennari notes that the so-called role of the fulfillment of Social Responsibility is very efficient in the universe of transformations that follows the logic in which *everything changes so to ensure that everything continues as it is*<sup>41</sup>.

Within this context, it is sometimes inevitable to acknowledge that the market is the only 'law' available to the labour unions. If maximizing the profit is the only aim, playing by the rules and logic of capital sometimes demand the appropriate use of soft law. As properly emphasized by Rodríguez-Garavito<sup>42</sup>, "far from privileging a particular scale, hegemonic and counter-hegemonic actors simultaneously pursue strategies at different scales" and exploit "the legal and political opportunities offered by the tensions and contradictions within and among local, national, regional, and global regulations."

40. C.A. RODRÍGUEZ-GARAVITO, *loc. cit.*, note 23, 82.

41. E. GENNARI, "Responsabilidade Social da Empresa: Uma Fábula" (2004) 211 *Cadernos do CEAS*, 23, 35.

42. *Id.*, p. 81.

A global strategy is a successful one in combating transnationals: “the transnational anti-sweatshop movement has combined political and legal strategies to advance the cause of international labour rights. [...] Such counter-hegemonic use of law should be understood in the context of the ongoing struggle to define the rules regulating capital and labour in the global economy”<sup>43</sup>.

## 5 Constitutionalization of Labour and Employment Law in Brazil

The principle of the prevalence of the Constitution has had foremost importance in the field of interpretation of labour laws in Brazil, even though in several occasions labour courts have been reluctant to apply the Constitution, specially its basic principles to their fullest extent. The Portuguese master Canotilho stresses that amongst the several possibilities of interpretation; one should admit only the option that is not contrary to the Constitution, including not only the constitutional provisions, but also the programmatic content of the constitutional order<sup>44</sup>. Such an interpretive technique, especially in countries that have experienced years of dictatorship, as are the cases of Brazil and Portugal, constitutes an instrument for implementing the democratic rule of law. Unfortunately, it is often possible to observe in Brazilian courts an unacceptable inversion in interpretation by applying the Constitution based on the law, and not the other way around<sup>45</sup>. This is especially important in Brazil, where the Constitution is very detailed, with many principles that are applicable directly and indirectly to the labour and employment arena.

All the prescriptions in the Constitution can be utilized as criteria to verify the constitutionality of norms. In accordance with the understanding of the most recent constitutional doctrine, the preamble and programmatic principles of the Constitution must also be considered as norms in the strictest sense<sup>46</sup>.

Brazilian labour lawyers and legal activists should try to follow the same course that has given excellent results in the advancement of civil rights, via the process of “approaching private law through public

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43. *Ibid.*

44. J.J. GOMES CANOTILHO, *Direito Constitucional e Teoria da Constituição*, Coimbra, Almedina, 1992, p. 235-236.

45. P.R. SCHIER, “A interpretação conforme a constituição”, *Boletim Informativo Bonijuris*, Curitiba, n. 20, jan. 1999.

46. C.M. CLÈVE, *A Fiscalização Abstrata de Constitucionalidade no Direito Brasileiro*, 2th ed., São Paulo, Revista dos Tribunais, 2000, p. 42.

criteria”.<sup>47</sup> The convenience of adopting such a technical and ideological option also in work relations should be emphasized. The constitutionalization of private law, specifically family law, has served very well in the fulfillment of technical and judicial gaps existing in Brazilian courts. This can and should be used as an example for the expansion and implementation of labour and employment rights. The constructed categories used to distinguish the civil society, the State, the citizen and persons in their material form, limit and impose the content of legal norms. Constitutional law can increasingly be used to expand liberty and rights. The text of the Constitution and constitutional doctrine has allowed the study of private law from the perspective of fundamental rights, originally set up against the State, and stresses its common nucleus found in human dignity<sup>48</sup>.

Constitutionalization can also be seen as a strategy to expand rights in the workplace, due to the difficulty of passing progressive legislation in Parliament. The constitutionalization of labour rights also serves as a means of defence from the growing power of transnationals. “There is no compelling reason, however, to continue this unrealistic separation of rights that distinguishes between violations caused by a tyrannical government and violations caused by tyrannical forces in an economic system. As Senator Wagner [points out], it is not only the state that has the power to violate people’s rights. Employers have explicit power over individuals’ lives, and implicit power can be found in the supposedly free market”<sup>49</sup>.

One of the most recurrent parameters for devaluating private autonomy is based on the asymmetry between the involved parties within their relations as private actors. According to Daniel Sarmiento, the larger the real inequality is among those involved, the more intense is the protection of the fundamental right in question, and less is the protection of private autonomy’. Inversely, in a situation tending to equality, the private autonomy will receive a more intense protection, opening space for more profound restrictions for the conflicting fundamental right<sup>50</sup>. This logic can be very useful for the defence of workers’ interests.

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47. D.C.M. DONEDA, “Considerações Iniciais sobre os Bancos de Dados Informatizados e o Direito à Privacidade”, in G. TEPEDINO (org.), *Problemas de Direito Civil-Constitucional*, Rio de Janeiro, Renovar, 2000, p. 124.

48. J.A.P. GEDIEL, *Os Transplantes de Órgãos e a Invenção Moderna do Corpo*, Curitiba, Moinho do Verbo, 2000, p. 5-6.

49. J.A. GROSS, “A Long Overdue Beginning: The Promotion and Protection of Workers’ Rights as Human Rights”, *Workers’ Rights as Human Rights*, Ithaca, Cornell University Press, 2003, p. 1-22.

50. V.A. SILVA, *A Constitucionalização do Direito: Os direitos fundamentais nas relações entre particulares*, São Paulo, Malheiros Editores, 2005, p. 156.



Another valuable constitutional principle for the defence of worker's rights can be found in the principle of the prohibition of social regression, which results directly from the principle of maximizing the effectiveness of all norms pertaining to fundamental rights<sup>51</sup>.

The relative advances for fundamental rights cannot be destroyed, erased or dejected, because they are achievements for the advancement of humanity and not state gifts that can be taken away according to momentary opinions or future parliamentary majorities<sup>52</sup>.

## 6 Conclusion: Workers rights and the limits of the legal framework

As workers in the legal arena, it is both highly necessary and extremely unpleasant to acknowledge that a company can follow labour and employments regulations, refrain from discriminating against minorities, promote diversity, avoid having any anti-union activities, and still be a terrible employer, through the payment of very low wages. Hence, this means that following the main constitutional and legal provisions is not enough.

A company can create an environment of non discrimination with respect for the worker's cultural background, be an equal opportunity employer, and still be very bad for workers and society. In many countries—including the United States—respecting the law by paying the minimum wage amounts to paying a misery wage: “A strikingly recurrent statement in interviews with [...] factory managers, and business associations' staff members is that [...] ‘all the development of the sector is based on compliance with national law.’ [...] On the one hand, through explicit or implicit threats to move production to countries with low labour regulations [...], global brands and contractors exert downward pressure on labour laws of countries desperate for jobs. The indirect pressure coming from individual mobile firms has a collective, institutional counterpart among retailers', [...] and contractors' associations that lobby in Southern countries for greater flexibility in labour regulations.”<sup>53</sup>.

It is important for labour activists, union leaders and jurists that have the desire to defend human rights in the workplace use all the tools at their disposal—one important factor being the constitutionalization of labour law. One should not forget the following words, ones that make such a task a very complicated one: sometimes “labour law is no longer an obstacle, but rather an excuse”<sup>54</sup>.

51. I.W. SARLET, *loc. cit.*, note 18, 37.

52. *Id.*, p. 48.

53. C.A. RODRÍGUEZ-GARAVITO, *loc. cit.*, note 23, 81.

54. *Ibid.*