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GLOBALIZATION, ECONOMIC CRISIS AND COLLECTIVE BARGAINING IN INTERNATIONAL LABOR LAW

GLOBALIZAÇÃO, CRISE ECONOMICA E NEGOCIAÇÃO COLETIVA EM DIREITO INTERNACIONAL DO TRABALHO

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ABSTRACT

This article analyses the importance of collective bargaining in International Labor Law during Brazil's economic crisis and verifies how the employer’s profit could exist without demeaning the image of their employees. It examines the International Labor Organization's documents and MERCOSUR's instruments and how unions can exist along the merging of globalization and multinational companies social policy. It also explores social dumping and the protection of the rights of personality via collective bargaining.

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KEYWORDS: Globalization; Economic Crisis; Collective Bargaining; ILO; Mercosur.

RESUMO

Este artigo analisa a importância da negociação coletiva no Direito Internacional do Trabalho durante a crise econômica do Brasil e verifica como o lucro do empregador poderia existir sem diminuir a imagem de seus empregados. Examina os documentos da Organização Internacional do Trabalho e os instrumentos do MERCOSUL e como os sindicatos podem existir ao longo da fusão da globalização e da política social de empresas multinacionais. Também explora o dumping social e a proteção dos direitos da personalidade através da negociação coletiva.

PALAVRAS-CHAVE: Globalização; Crises Econômicas; Negociação Coletiva; ILO; Mercosul.

INTRODUCTION

We could not analyze the current Brazilian economic crisis without comparing the present world situation we live in, especially in the need of collective bargaining. The world economy is structured by the capitalist model of the market. After the experience of long periods when humanity chose the open decomposition of cultures and the imposition of a market imperialism, the economic crisis is in full swing, as a result of a worn out model. At no other time has another economic regime demonstrated the survival power that capitalism has. It is also true that globalization accelerated its spread through western and eastern cultures.

The labor market, in turn, has adjusted to this economic model. The hegemony that some countries exert over others produced rules with similar norms. The legal systems, as a result, only adapted to the economic dictatorship, and now have to solve the crises derived from this spontaneous generation, no matter how paradoxical it is.

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Government action and the formation of a new paradigm of institutional control may be a plausible solution to the problems of globalization. The crisis, on the other hand, follows the accelerated transmutation of information in the interconnected world, projecting itself as a monster in all the social spheres, national or worldwide.

We will analyze the need for creating an international body connected to labor law, from its founders, Robert Owen and Daniel Legrand, through its historic evolution until we get to the International Labor Organization, created in a very important time to all of us, in part XIII of the Peace Work, at the end of the World War I in 1919.

We will also explain the Southern Common Market, from its foundation to the preparation of the first up-to-the-moment Social Labor Declaration of the same economic block, including the issue of social dumping.

Finally, we will present factors that may increase or decrease the possibility of international collective bargaining, reaching the issue of protection of the right of personality.

2 COLLECTIVE BARGAINING AND GLOBALIZATION

In times of economic crisis, scholars look towards a comparison of states from the past with states from the present. Socialism, Marxism, liberalism and capitalism are still recurrent words when studying the employment relationship.

What is the role of the state - legislator, judge, administrator? Should there be interference in the activity that surrounds workers and employers, or should the invisible hand of the market regulate whatever possible?

In the core of this debate, it is possible to place the phenomenon of collective bargaining as the realization of two important movements. The first one, beyond any doubt, as the product of social pacification, contributing to the end of conflicts. The second, but no less important, is its creative capacity of legal rules to regulate the relationships between workers and companies, adjusting the changeable reality with stabilizing rules for productive activity.

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When we analyze the policy of promoting collective bargaining, it is necessary to mention its sensible "significance as a response, neither authoritarian nor bureaucratic, but decentralized and based on social dialogue (…) to the crisis of collective labor law" (GOMES, 1986, p.188).

The procedures of collective bargaining, in the legal systems, are bound to a double basic method, according to M. Carlos Palomeque López (1988, p.280): *static bargaining* and *dynamic bargaining*. In the first method, typical of Continental European countries, the parties start a business relationship in a circumstantial and periodic way, creating a series of collective standards perfectly determined and immediately configurable. In the dynamic method, typical of the British system of labor relationships, the parties generate a series of institutions of a permanent nature, which comply with the function of adapting the pacts to new demands and circumstances.

The effective legal nature of collective private autonomy is often debated. Considerable doctrine considers that private autonomy is not a power derived from the state by delegation, but an original power, prior even to the state entity, and it is recognized by it, even in its legal effects (SANTOS, 2007, p.140).

Therefore, the state recognizes, to certain organized social groups, through a collective procedure of expression of the confrontation between the corresponding collective interests (the collective business), the capacity to issue "rules that simultaneously represent balanced formulas between interests and behavior standards for the members of the same groups in their individual relationships, or else, limitations to private autonomy" (FERNANDES, 1994, p.32).

Even though Octavio Bueno Magano considers collective private autonomy a delegated power, he highlights that "it does not stop being genuine power because it generates, *motu proprio*, legal rules, not being replete in mere capability of action" (MAGANO, 1993, p.14).

Collective private autonomy relates to the realization of democracy in a visceral way, "through collective reflection, freedom and action by the representative interlocutors, for the mobilization and implementation of better working conditions" (GONÇALVES, 2008, p.60).

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In order to obtain improved working conditions, collective bargaining presents the great justification of being able to be fast and efficient, solving sporadic conflicts by the social interlocutors themselves, unions at the front as real collective entities, justifying the balance in relation to the business power.

Based on the capitalist experience of the democratic countries, Mauricio Godinho Delgado points out the following as functions of labor law (considered *amplo sensu*, encompassing union and collective labor law): improvement of the conditions of agreement of the labor force in the economic–social life, in a modernizing and progressive nature, from the economic and social point of view, along with its civilizing and democratic role (DELGADO, 2005, p.121).

When dealing with collective bargaining, the International Labor Organization through its appropriate agencies clarifies that in the Tripartite Declaration of Principles on Multinational Companies and Social Policies, it was established that, "in the special incentives to attract foreign investment, there should not be included any limitations to union freedom of workers or to the right of unionization, or collective bargaining" (OIT, 1997, p.175).

Chronologically speaking, after the end of World War II, around 1950, capitalism rapidly progressed, having a new configuration, which, according to Orlando Gomes, may be sketched with three major characteristics: "1) internal expansion (multinationals); 2) acceleration of the pace of the technological innovations and scientific discoveries; 3) State intervention (influence on development)" (GOMES, 1981, p.185).

Regarding the doctrinal re-elaboration of the employment agreement, we begin by giving priority focus to "the personal assets of the worker, such as health, intimacy, individual freedom and personal dignity" (OIT, 1997, p.186). In order words, the employee stops being only an object, a machine, a cost to the company, to become a living person, who has personality, the so-called rights of personality start to be recognized.

Concerning collective autonomy, we noted a phase of restoration and expansion of collective private autonomy in conducting self-protection of the collective interest of workers, especially through the "primacy of collective bargaining

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and in some other demonstrations of appropriation of rulemaking power by this wide and active sector of society formed by salaried employees" (OIT, 1997, p.188).

We may equally state that the new company has a different structure and function, which do not match the individualist model, at least with regard to large scale and significant social importance. Thus, the effective institutionalization of the company, in its current traits, demands that three elements be joined: "1) the staff regulations which ensure integration and continuity of the employees in the company; 2) staff participation in its management (co-management and co-decision); 3) employee profit sharing" (OIT, 1997, p.189).

The phenomenon that is normally called globalization (in the North-American focus) or internationalization (in the French point of view) revitalized capital flows, establishing "a new order of global nature" (MELHADO, 2006, p.61).

Today, we can compare the mobility of big capital 'to the image and semblance of information paradigms, (…) the money of the transnational companies demarcates property and profit in a worldwide scale" (MELHADO, 2006, p.62).

Until recently, we considered a multinational 'a company or group whose facilities and economic activities (production or distribution of assets and services) transcended the limits of a single country and disseminated through different regions of the planet" (MELHADO, 2006, p.62).

The phenomenon of economic internationalization has a special characteristic, since it "makes more important the participation of the supranational capital in the formation of big corporations, transnational or not, with regard to its operation radius" (MELHADO, 2006, p.63).

Data provided by the International Labor Organization (ILO) note the existence of 160 million of unemployed in the world in 2000, with 50 million in the developed countries. On the other hand, 500 million workers had an income lower than one dollar a day (SOUSA SANTOS, 2005, p.21).

It is possible to say that the goals of emancipation and international labor liability "remain very alive nowadays, especially because it was the capital, not work, that succeeded in becoming internationalized" (SOUSA SANTOS, 2005, p.21).

There are, in fact, some difficulties in establishing a system of transnational labor cooperation. The first obstacle certainly has to do with "the structural

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transformations that affected work itself in the last decades, due to computerization and communication revolutions" (SOUSA SANTOS, 2005, p.23). Despite the observation that work has become a global resource, "we cannot talk about a market of global work, since labor markets are more segmented today than they were in the past" (SOUSA SANTOS, 2005, p.23). As a second cluster of obstacles, we find several factors, "ranging from the tension between the national and transnational labor participation, the kind of objectives aimed by a transnational action, to the weak theoretical reflection over the theme" (SOUSA SANTOS, 2005, p.23).

After detecting the problem that involves the new collective bargaining in a worldwide economy, in which the companies take on different roles from the ones they did before the fifties in the last century, which aspects should have major relevance in the debate over the minimum guarantees owed for the benefit of workers?

The answer to this question, as it is evident, cannot be precise; however, the response must proceed by way of the guarantees of fundamental rights and of personality assured to the human person, especially to those who live by the sale of their labor force, the salaried employees.

Because of all of this, it is necessary the lucid reflection by Daniel Sarmento, when he claims that there are universal factors that demand the protective mantle bestowed by human rights "to the sphere of the relationships between particulars, before the appalling inequality, oppression and injustice that permeate these relations" (SARMENTO, 2008, p.233).

Such debate, nonetheless, as highlighted by the mentioned author, in a clear or veiled way, shows the ideological controversy. There are those who defend a more abstract vision of freedom and equality, overvaluing elements such as "individual's autonomy and the legal protection of private trade, pointing out to the dangers of a pan-constitutionalization of law, or to an inflation of the fundamental rights" (SARMENTO, 2008, p.233). In turn, there will be more intensity in the preoccupation with the real equality between the parties, or, at least, with the freedom they effectively enjoy, "in the context of a society marked by asymmetrical relations of power, and, because of that, the greater will be the tolerance of limits imposed to the autonomy of will" (SARMENTO, 2008, p.233). In the first case, we will

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be on the right of the political spectrum, and, in the second one, we turn left, sensing the echo of the warnings by Karl Marx, for whom “to confine the constitutional freedoms to the public relations represents to allow the settlement of the *law of the jungle* in the private space” (SARMENTO, 2008, p.233).

Arion Sayão Romita (2009, p.350) indicates the following fundamental rights of liability: a) right to unionization (union freedom); b) collective bargaining; c) strike; d) representation of workers and unions in the company; e) protection against discharge without cause; f) right to rest; g) occupational safety and health; h) working environment.

What is the sense or meaning of the word “solidarity”? In the so-called generation of rights, libertyand equality are addressed to the workers individually considered, while solidarity resides in the cohesion of the community, even though they aim at job preservation, “because what is at stake is the social interest geared to the support of the employees and their families, without encumbering the welfare and social security tools” (ROMITA, 2009, p.349).

Eduardo Antônio Temponi Lebre concludes, in his study, that “since we have reached the limit of tolerance of the explosion of misery and urban and rural violence to workers, especially the depletion of the working perspective among young people, it is necessary for the state to play the role of an intervener in this uncontrolled process of the capitalism, so that just r law is imposed and changes reality; it is not possible to conceive that laws should only ratify what is, for the economists, a natural rule of the market. It is unacceptable that such economic globalization is conducted as an absolute truth, without questioning, or without even the possibility of control by the people” (LEBRE, 2013, p.53-54).

Carlos Eduardo Koller and Marco Antônio César Villatore also conclude that “globalization is in a crisis. The propagation of ideals that misrepresent economy, law, society, moral and environment is broken down by technology, which, in the information society seeks help on the internet. There is a lot to be done; however, the beginning, beyond any doubt, is in the human mentality itself. The human being deserves the sustainable support for their own life, especially in the working environment” (KOLLER, 2013, p.18).

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With a view to the study of this important subject of collective bargaining, which is one of the essential ways to democratically approximate capital and work, we will examine the dynamics of the International Labor Organization; the confrontation of unionization with the worldwide business activity; the Declaration of Principles of the ILO on Multinational Companies and Social Politics; the Social Labor Declaration of the MERCOSUR; social dumping diagnostics, without solutions; Collective Bargaining in the MERCOSUR; the factors which increase or decrease the possibility of International Collective Bargaining.

3 THE INTERNATIONAL LABOR ORGANIZATION

As reported by José Carlos Arouca, "the Declaration of Philadelphia, of 1944, imposed on the International Labor Organization the obligation to foster collective bargaining in all nations in the world through programs that recognize it as a right" (AROUCA, 2006, p.271).

According to Amauri Mascaro Nascimento, the Committee of Union Freedom of the International Labor Organization, an agency that hears complaints of unions, "considers the right to bargain the essential element of union freedom; the conduct of good faith by the negotiating parties is also indispensible as a means of inspirating mutual trust, necessary to the success of the bargaining. He also highlights that the social interlocutors themselves should have the freedom to define the level in which the bargaining among the existing parties in the union organization should take place" (NASCIMENTO, 1998, p.128-129).

In Meeting n. 32, in 1949, the ILO approved Convention n.98, that, in art. 4, establishes the dimension of the universalized instrument for the amicable solution of labor conflicts, through the adoption of measures appropriate to national conditions, when necessary, to stimulate and foster, between employers and employers' organizations on one hand, and on the other, workers' organizations, the full development and the use of procedures of voluntary bargaining with the aim of regulating, through collective agreements, employment conditions.

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Convention n.154, approved by ILO, in 1981, establishes, in art. n.2, the understanding of collective bargaining as comprising all kinds of negotiation which take place with one party, an employer, a group of employers or an organization or several employers' organizations, and another party, one or several workers' organizations, with the aim of: a) establishing working and employment conditions; and b) regulating the relationships between employers and workers; or regulating the relationships between employers or their organizations and one or several workers' organizations, or reaching all the objectives.

Convention n.98 was integrated into the Brazilian legal system through Decree n. 33196, effective in the country since November 18th, 1953. Convention n. 154 was introduced in our legal system through Decree n. 1256, effective in our country from July 10th, 1993, on.

The ILO also approved Recommendations n. 91, of 1951, and n. 163, of 1981: "the first one dealing with the procedures to be observed in negotiations, and the second one regarding support and means for its accomplishment" (AROUCA, 2006, p.273).

It is important to refer to the Declaration of the ILO in relation to the labor principles and fundamental rights, approved in Meeting n.86 of the General Conference, which took place in Geneva, in June of 1998, and which urged the Member States to respect, among other values, union freedom and collective bargaining, being committed , due to their participation in the Organization, to "respect, promote and make it real, in good faith and accordance with the Constitution, the principles related to fundamental rights that are the object of these conventions, which are: the freedom of association and the union freedom, and the effective recognition of the right to collective bargaining" (TEIXEIRA FILHO, 2005, p.183).

In relation to the Conventions of the ILO on collective bargaining, n. 98, on the right to unionization and collective bargaining, was ratified by all the States Parties of the MERCOSUR; n. 154, on encouraging collective bargaining, was ratified by Argentina, Brazil and Uruguay; and n. 87, on union freedom lacks only ratification by Brazil.

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In the year of 1998, the Declaration of the ILO on the Principles and Fundamental Rights in Labor and its Follow up was adopted, being a universal reaffirmation of the commitment of the Member States and the international Community in general, to respect, promote and apply a basic standard of principles and rights at work, which are recognized as fundamental to workers.

These principles and fundamental rights are present in eight Conventions that encompass four basic areas: union freedom and the right to collective bargaining, child and youth labor, elimination of forced labor, and non-discrimination at employment or occupation.

So, in 1988, after the end of the Cold War, the Declaration of the ILO on the Principles and Fundamental Rights in Labor and its Follow up was adopted. The document is a universal reaffirmation of the obligation to respect, promote and achieve the principles reflected in the fundamental Conventions of the ILO, even if they have not yet been ratified by the Member States (ILO, 2001).

The referred Conventions and the ratifications occurred in each one of the State Parties are the ones shown in the table below.

Table – Ratifications of the Fundamental Conventions of the International Organization by the State Parties of the MERCOSUR

	Forced work		*Union Freedom*		*Discrimination*		*Child Labor*	
	Conv. n. 29	Conv. n. 105	Conv. n. 87	Conv. n. 98	Conv. n. 100	Conv. n. 111	Conv. n. 138	Conv. n. 182
Argentina	14.03.50	18.01.60	18.01.60	24.09.56	24.09.56	18.06.68	11.11.96	05.02.01
Brazil	25.04.57	18.06.65	_	18.11.52	25.04.57	26.11.65	28.06.01	02.02.00
Paraguay	28.08.67	16.05.68	28.06.62	21.03.66	24.06.64	10.07.67	03.03.04	07.03.01
Uruguay	06.09.95	22.11.68	18.03.54	16.11.89	16.11.89	16.11.89	02.06.77	03.08.01
Venezuela	20.11.44	16.11.64	20.09.82	19.12.68	10.08.82	03.06.71	15.07.87	26.10.05

Source: Own drafting, according to data from the International Labor Organization, 2016. Available in: <www.ilo.org>.

As it can be noticed in the table above, Brazil is the only State Party of the MERCOSUR which did not ratify the eight Fundamental Conventions of the ILO, Convention n. 87 on union freedom remaining unratified, precisely as a result of our union uniqueness and the obligatory collection of union dues (art. n.8, items II and IV, of the Constitution of 1988, respectively).

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As we noted, the ILO outlines important parameters so that collective bargaining can be freely developed.

4 THE CONFRONTATION OF THE UNION EXERCISE WITH THE WORLDWIDE BUSINESS ACTIVITY

Antonio Baylos reflects upon the position unions will take faced with a global world, pointing out that their lack of the capacity to project itself on the workers they represent and the "consequent loss of influence in broad layers of society may be verified here and there throughout the several existing union systems" (BAYLOS, 2003, p.20).

The main problems are summarized by Baylos in the following way: a) crisis of union representation as the general representative subject of the labor force; b) the difficulty inwhich the union finds itself in defining its action of protecting the interest of workers in general; and c) progressive loss of importance of the state as the place or space where the union action is developed (BAYLOS, 2003, p.21-23).

According to reference by Georgenor de Sousa Franco Filho (1998, p.291-292), unions acquired a new characteristic through globalization, going beyond the territorial limits of their States of origin, starting to act beyond borders. He also notes the emergence of transnational companies, from the nineteenth century on, highlighting that this is technically the most appropriate name, even though they are also known as multinationals, a more popular designation. As far as Samuel Huntington (FRANCO FILHO, 1998, p.294) is concerned, he defines the transnational company as one which performs important transactions, under centralized supervision, in the territory of two or more nations, different from the international one whose organization control is explicitly shared among the representatives of two or more nations.

To implement collective bargaining in the transnational context, the deep transformations the world experiments should be absorbed, according to Gonzalo Oscar Cuartango (2001, p.193), among which he cites the following: the general acceptance of the market economy after the fall of the Berlin Wall; the reduction of

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the public sector; the redefinition of the role of the state; economic restructuring and internationalization; the generalization of effective techniques to fight against inflation; the expansion of atypical ways of working and temporary contracts; processes of political and social democratization; the increasing autonomy of unions.

Georges Spyropoulos (1994, p.95) highlights that, due to the novelty of new mechanisms of economic internationalization, it is no surprise that unions have not yet fully adapted to the new situation. The defense of workers' rights will no doubt demand, as the author explains, that the union movement reflects and strengthens its organization internationally.

As for international unionization, we should remember that the twentieth century is the century of the internationalization of the economic, political, social and union structures in two clearly distinct stages, as explained by Georges Spyropoulos (1994, p.95): a) during the first half of the twentieth century, the concept of state and interstate collaboration was in the core of international exchanges and the corresponding union action; b) from the fifties on, the process of internationalization starts a new stage, not so much characterized by the concept of state as before, but by transnational mechanisms of a new kind, such as multinational companies and the treaties of regional economic cooperation and integration; unlike the previous stage, characterized by certain stabilization of the mechanisms of international exchanges, the new stage coincides with an impressive acceleration of the structural changes resulting from the internationalization of the economy.

5 THE DECLARATION OF PRICIPLES OF THE INTERNATIONAL LABOR ORGANIZATION ON MULTINATIONAL COMPANIES AND SOCIAL POLICY

According to Celso Furtado (1999, p.22-23), "the strategy of a transnational company is something very complex and entails a strong harmony with the structures of political power upon which it has growing influence. This explains the weakening of the union power and the decay of the policies in full employment".

The Board of Directors of the IL0 approved, in Meeting n. 204, in November 1977, the Tripartite Declaration of Principles on Multinational Companies and Social

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Policy, which, as explained by Georgenor de Sousa Franco Filho, does not have a binding power of *stricto sensu* treaty, representing an array of principles that should guide the behavior of society.

As for Jorge Rosenbaum and Octavio Racciatti (2000, p. 160-170), this instrument represents a guide on the "social aspects of the activities of the multinational companies, including the creation of jobs in countries in development." There exists a mechanism of follow up, consisting of some periodic information on the application of the declaration, and a procedure of interpretation for specific cases, supervised by the Subcommittee of Multinational Companies of the Board of Directors. This Subcommittee directly reports to the Board of Directors, and also examines: a) the measures adopted in the execution of the Tripartite Declaration of principles on multinational companies and social policy (in particular, the triennial examination of the course given to it); b) the requests of interpretation of the Declaration; and c) the measures relating to multinational companies adopted by the ILO, and other agencies, in the understanding that the other aspects of activities of the multinational companies could be treated, as necessary, in other commissions.

With regards to collective bargaining, the Declaration prescribes that: a) the workers of transnational companies can nominate the organizations they consider representative for the purpose of negotiation (n. 48), without the need of the presence of the state or its representative; b) the Collective Labor Conventions can be celebrated to establish employment conditions (n. 49); c) the guarantee of not being threatened by the exercise of the right to unionization is recognized (n. 52); and d) there should be provided, by the transnational companies, to the representatives of the employees, effective and correct data, according to Recommendation n. 129, with the purpose of negotiation (n. 54).

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6 COLLECTIVE BARGAINING IN THE SOUTHERN COMMON MARKET (MERCOSUR)

The importance of studying the evolution of labor law, in MERCOSUR, as an agency of regional integration founded by Treaty in Asuncion, signed on March 26th, 1991, is because this theme was quite neglected.

Thus, this legislative and doctrinal evolution can be noticed, with the formation of Labor Sub-groups, the Economic-Social Advisory Forum, the Observatory of the Labor Market, the Socio Labor Declaration, updated in July 2015, in addition to the idea of a Social Charter and the elaboration of a legislation on the free movement of workers.

The Argentinian government expressly pointed out the possibility of the development of a regional collective bargaining, in reply to the Committee of Union Freedom, in the case related to the withdrawal of collective conventions in harbors and sea and inland transport, when they expressed their interest in the possible negotiation of a collective agreement at a MERCOSUR level, through ex-Subgroup.

Concerning the agents, which can practice transnational collective bargaining in MERCOSUR, Georgenor de Sousa Franco Filho suggests: the Co-ordination of Union Centers of the referred Economic Block and its Industrial Board.

It is now advisable to analyze one of the main normative documents, a Recommendation of MERCOSUR.

6.1 THE SOCIAL LABOR DECLARATION OF THE MERCOSUR

On December 10th, 1998, during Regular Meeting n.15 in Rio de Janeiro, the Socio Labor Declaration of the MERCOSUR (“SLDM”) was established, subdivided in the following parts: “a) Individual rights: non-discrimination, promotion of equality, border workers and migrants, elimination of forced labor, child and minor labor, rights of employers ; b) Collective Rights: freedom of association, union freedom, collective bargaining; c) Other Rights: stimulation of employment, protection of the unemployed, professional formation and development of human resources, work inspection, social security; d) Application and Follow up”.

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In its art. 10, regarding collective bargaining, the following was mentioned: “Employers or their organizations, and workers’ organizations or representatives have the right to negotiate and conclude conventions and collective agreements to regulate working conditions, in accordance with national law and practice”.

When interpreting this international document, Amauri Mascaro Nascimento asserts that the guarantees of collective bargaining and the right to strike, prescribed in our country, are protected, since “it has a system of preventive ways and alternatives of self-composition of labor conflicts, with the use of independent and unbiased procedures of solutions to controversies, just the way the jurisdictional ones are, preceded by the attempt of collective negotiation and the mediation of the Ministry of Labor and the Office of the Labor Court” (NASCIMENTO, 2005, p.110).

This scholar does not recognize self-enforcement in the Declaration, assigning to it only “programmatic effects”, because it would not have “legal validity in the sense of being incorporated to the internal legal systems of each country. However, it acquires the dimension of a set a principles to which these systems should adapt to, a perspective of harmonization of labor law in MERCOSUR” (NASCIMENTO, 2005, p.109-110).

We notice that the “SLDM” summarizes several principles and rights, in the area of Unions and Collective Labor Law, taking into consideration the “decision by the State Parties to consolidate, in a common instrument, the developments already achieved in the social dimension of the process of integration, and sustain the future and constant advancements in the social field, mainly upon the ratification and fulfillment of the main Conventions of the ILO,” apart from other instruments and declarations of an international order.

There is no doubt that the SLDM did not obtain legislative approval, or ratification by the State Parties. Moreover, its text does not contain a provision demanding the fulfillment of an approving or internalizing device for its effectiveness and application.

In any event, and as an auspicious signal of legal weight , in several legal decisions of Group n. 6 of the Labor National Chamber of Argentina, especially in the votes by Judge Capón Filas, the SLDM was applied. As clarified by the First Report on the Application of Law of MERCUSUR by National Courts (2003), “in some

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decisions, it was recognized as hierarchically superior to the internal laws, considering its derivation from the Treaty of Asunción (TA) and the provision in art. 75, item 24, of the Argentinian Constitution" (MERCOSUR, 2005, p.133).

This same judge, in a concrete case, "pointed out that Mercosur is a premise intended to improve the conditions of life of its inhabitants. He stated that the appealed decision should be altered, since, by denying to the plaintiff fair remuneration, it provokes a setback in the Treaty of Asunción, and that the SLDM, because it is derived from this treaty, is higher than the laws (with reference to art. 75, item 24, of the National Constitution)" (MERCOSUR, 2005, p.134).

In MERCOSUR Social Summit n. 18, occurring once again in Brasilia on July 17th, 2015, there happened a review of the Social and Labor Declaration of such an important Economic and Social Block, with 34 sections, adding nine to the 1998 original in addition to amendments, being divided into General Principles (which did not exist in the original one); Individual Rights; Collective Rights; Other Rights; Application and Follow up (MINISTÉRIO DAS RELAÇÕES EXTERIORES, 2015).

Among the most important aspects, we can mention the focus on the right to decent work, the fight against child labor and the creation of a social free zone; some of the sections are transcribed now:

SECTION 1

Definitions

For the purposes of this instrument, the terms "worker" and "workers" include "working man and woman" and "working men and women", and the terms "employer" and "employers" include "male and female employer" and "male and female employers".

SECTION 2

Decent Job

1. States Parties agree to:

a) formulate and implement active policies of decent work and full productive employment in consultation with the most representative organizations of employers

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and workers, articulated with economic and social policies so as to promote the generation of employment opportunities and income;

b) raise the living conditions of citizens;

c) promote sustainable development in the region.

2. In the formulation of the active policies of decent work States Parties must bear in mind:

a) the creation of productive employment in an institutional, social and economically sustainable environment;

b) the development of measures for social protection;

c) the promotion of social dialogue and tripartism; and

d) respect, dissemination and application of fundamental rights and principles of work.

SECTION 3

Sustainable enterprises (…)

SECTION 20

Social dialogue

1. The States Parties agree to promote social dialogue at a national and regional level, establishing effective mechanisms of permanent consultation between the representatives of the governments, the employers and the workers, in order to guarantee, through social consensus, favorable conditions for the sustainable economic growth with social justice in the region and for the improvement of the life conditions of its peoples.

2. Permanent consultation, practiced on the effective basis of the tripartism established in ILO's Agreement 144, should allow for joint examination on matters of mutual interest, in order to reach, as far as possible, mutual agreement solutions.

3. The consultation has a main purpose to encourage mutual understanding and a good relationship between public authorities and the organizations that most represent employers and workers as well as between organizations themselves, with the purpose of fostering social dialogue and the possibility of creating framework work agreements as essential elements to consolidate a democratic, plural and just society (MINISTÉRIO DAS RELAÇÕES EXTERIORES, 2015).

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Jorge Rosenbaum and Octavio Racciatti pointed out that:

> the legal ground of regional collective bargaining in MERCOSUR derives from the international rules on union freedom and collective bargaining (the principle of union freedom emanates from the ratification of the Constitution of the ILO), as well as the recognition of the social dialogue in the MERCOSUR Social and Labor Declaration of 10.12.98 (ROBORTELLA, 1993, p.195).

The last part of section n. 5 of the new text of the Social Labor Declaration establishes collective bargaining as a way to guarantee equality of opportunities and treatment between women and men (MINISTÉRIO DAS RELAÇÕES EXTERIORES, 2015), as well.

Directly related to collective bargaining, we find the new section 17, establishing the following:

"Collective bargaining

1. Employers or the organizations that represent them, even those in the public sector, organizations that represent workers, even those in the public sector, have a right to negotiate and execute collective agreements to regulate the work conditions, in accordance with the national legislation and practices of the States Parties.

2. The State Parties agree to provide mechanisms to encourage collective negotiation in its different areas" (MINISTÉRIO DAS RELAÇÕES EXTERIORES, 2015).

As we remember, this important document, updated in 2015, establishes, in section 20, under the title Social Dialogue, the following:

"1. The States Parties agree to promote social dialogue at a national and regional level, establishing effective mechanisms of permanent consultation between the representatives of the governments, the employers and the workers, in order to guarantee, through social consensus, favorable conditions for the sustainable economic growth with social justice in the region and for the improvement of the life conditions of its peoples.

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3. The consultation has a main purpose to encourage mutual understanding and a good relationship between public authorities and the organizations that most represent employers and workers as well as between organizations themselves, with the purpose of fostering social dialogue and the possibility of creating framework work agreements as essential elements to consolidate a democratic, plural and just society".

It is equally important that in section 32 of the new Social Labor Declaration it was established that in six years another review will be performed, according to practice, besides the fact that the committee should meet at least twice a year to study what has been done in the current State Parties (Argentina, Brazil, Paraguay, Uruguay and Venezuela).

7 SOCIAL DUMPING: DIAGNOSED, BUT NOT SOLVED

Social dumping, according to Carina Frahm and Marco Antônio César Villatore (FRAHM; VILLATORE, 2003, p.150-151), is a practice which governments and employers of highly developed countries frequently accuse less develop countries of deliberately neglecting labor rules. This concept, thus, is invoked, according to the same authors, "with the aim of protecting the internal market of developed countries from the goods produced by labor considered deprived from the minimum rights of the worker: long working hours, use of child labor, precarious social security system, etc."

Having in mind that the use of child labor in the manufacturing of Nike footballs in Pakistan, Vietnam, China and Indonesia, Frahm and Villatore (2003, p.151) summarize the understanding of the subject, stating that: "As the worker's wage represents a relevant obstacle for the increase of profit, labor is exploited to obtain lower costs of production, which also allows the decrease of the selling price, instigating, this way, the practice of social dumping".

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According to Georgenor de Sousa Franco Filho (FRAHM; VILLATORE, 2003, p.297), the serious problem of social dumping takes place "because transnational companies are usually set up in countries where labor is cheaper, promoting a diverse treatment, and since they usually act in the several processes of integration, they tend to subvert these to their interest".

A manifestation of such nature may take place in at least three ways, according to Luiz Carlos Amorim Robortella (1993, p.1.315): a) companies move from one state to another to seek lower labor cost and tax advantages; b) internal fixing of low wages to attract foreign companies; and c) the worker moves to the state which offers greater protection and a higher *wage*, such a fact which aggravates the economic social situation.

Juliana Machado Massi and Marco Antônio César Villatore (MASSI; VILLATORE, 2013, p.80-105) claim that "when one resents, their values on ethics and liability flourish more strongly and their social act becomes more effective. The judge's action is, this way, similar to the action of a social agent. However, their importance is also fundamental as a procedural agent. Ethics should be present in employment relationships, and above all, in procedural relationships", concluding that "it is time of changes: exchange of paradigms. Values should be recovered and set above economic bias and profitability. This is the only way to achieve real social justice and live in harmony".

The proposed theme is important and justified by its currency and by the repercussions, both, negative and positive, that trade promotes in the economic activities of the countries and their employment relationships. Thus, it is essential to study applicable measures to protect not only the market, but also the dignity of the workers as human persons. It is at this point that the relationship capital vs. labor is "in check."

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8 FACTORS WHICH INCREASE OR DECREASE THE POSSIBILITY OF INTERNATIONAL COLLECTIVE BARGAINING

In an extensive essay, Jorge Rosenbaum and Octavio Racciatti point out that there are factors which favor and others that weaken international collective bargaining (ROSENBAUM; RACCIATTI, 2000, p.160-170).

With basis on this study, in a few words, the main factors considered to favor international collective bargaining were: a) that the integration of the countries of the region in a common market, in the characteristics of the MERCOSUR, should open the way to the expansion of collective autonomy; b) both, economic globalization and regional integration, which act on production, trade, communications and finances turn into active agents to modify the social system, boosting a redirection of the systems of employment relationships, presenting a new context for them to be developed. In this context of economic and social worlds, which affects labor relationships, it can be admitted that, inevitably, there is a tendency to the internationalization of the actors and their relations, and this circumstance should also operate by itself as a stimulus to international collective bargaining; c) that the important expansion of multinational companies, and the integration of companies and/or groups of companies with each other, to face the challenges of international competitiveness, in the scheme of globalization which prevails in the present reality, configures one more piece, of the several ways, procedures, structures and relations which transcend to the "*State–nation*" and draws part of the "economies–world".

On the other hand, following the same scholars, we can find the main factors which weaken international collective bargaining and that may be summarized in the following way: a) inadequacy of the structures of the union organizations and the organizations of employers for this purpose; b) absence of negotiation willingness that is effective and convincing in the social interlocutors to conclude collective rules. This reality – even with diversity of levels and nuances - is a very generalized factor in the world, however, much more in regions and still more in countries that, like Argentina and Uruguay, have a tradition of practices in this subject; c) current deficiencies of trade unions – the workers' organizations do not hold enough power to take on organizations of employers and multinational groups to sit at a negotiating

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table; d) union weakness in the market, where the company plays a protagonist role, and the union organizations lost their touch, playing a less and less decisive role; e) the accumulation of practical difficulties, which operate as a brake on an adequate development of international collective bargaining, many of them are enhanced, or respond, almost exclusively, to the regional reality to which the countries of the area belong to; and f) technical (legal) problems that are found around them – the existence of a diversity of national legislations on collective bargaining, and the parallel absence of a unique international system regarding it, represent an almost insurmountable barrier for multinational collective bargaining.

According to Gerardo Cedrola Spremolla (1995, p.70), citing H. Northory and R. Rowan, the criticisms of international collective bargaining were converted into an already "classic" list of impediments; 1) multipl legislations, or, more strictly, the diverse regulation from which collective bargaining makes the several legislations of the states; 2) employers' resistance; 3) lack of union preparation; 4) lack of workers' convictions; 5) obstacles due to the macro-economic policy of the governments.

9 IMPONDERABLES REGARDING THE FUTURE – AN ENIGMA TO BE DECIPHERED – AND THE FEASIBILITY OF PROTECTION OF THE RIGHTS OF PERSONALITY VIA COLLECTIVE BARGAINING

Roland Hasson had already warned that our:

> greater concern is to guarantee the integration of the individual to the lanes of the capitalist system of inclusion and expansion, merging with the economic realization of aspects inherent to human dignity and existence. So, it can be noticed that the dignity of the human person is confused with the economic activity they exercise, as well as the possibility of stability in the development of this same activity, preventing any event which provokes the rupture in the individual's inclusion in the consumption web, generation and distribution of wealth (HASSON, 2007, p.49-50).

International collective bargaining presents a great enigma to be deciphered. Adrián O. Goldin and Silvio Feldman consider it "a process with certain converging traces, from significantly different realities which, in turn, open new perspectives

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regarding the potential representation that can move collective bargaining as a normative source to the integration of social protagonists in their achievements and style of development (GOLDIN; FELDMAN, 1995, p.68) .

Actually, and most importantly, it is not about determining the existence of a series of international organizations to make transnational collective bargaining possible. Much more than that, it is about promoting a double process of organizational construction and of acting, inside and outside the national states, as explained by Antonio Baylos: a) at a supranational level, strengthening a union organization to act in an autonomous way, which is not limited to the mere co-ordinations of national unions; b) in parallel, and simultaneously, national unions should develop a scope of action appropriate to the supranational dimension of its union action (GOLDIN; FELDMAN, 1995, p.28).

Georgenor de Sousa Franco Filho (1998) points out, with accuracy, “that transnational collective bargaining, far from being news in labor law, is a practice that should be encouraged and supported, since it is a result of today’s reality, irrepressible in the future”.

When we understand law not only as that which is given, but what can be achieved, re-created, international collective bargaining may become a methodical instrument, efficient and agile, to improve the internationalized relations of the companies with workers.

In the society we live in, called post-modern, or post-industrial, labor law (either individual or collective-union) moves in the direction of respectfor the fundamental rights of workers, with the aim of setting up the “empire of dignity of the worker as a human person, as a being that produces for the benefit of society” (ROMITA, 2009, p.422).

In this sense, it can be stated, beyond any doubt, that fundamental rights (including here the rights of personality as well) exercise a double function: “they limit the exercise of the employer’s power in the course of the employment relationship, and represent a barrier against the flexibilization of working conditions through collective bargaining” (ROMITA, 2009, p.422).

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As pointed out by Alice Monteiro de Barros, collective agreemennts s (which is the concrete result of collective bargaining) surely bring a reaffirmation of the union power and "the faculty it was assigned in the sense of solving problems and improving workers' conditions of life" (BARROS, 2009, p.1.270).

It is time, thus, to re-elaborate collective bargaining so that its effectiveness surpasses the national barriers, serving as a magnet to aggregate the demands of the international proletariat and establishing a certain predictability in the internationalized activity of the companies.

Therefore, it becomes necessary to suggest, fundamentally, that the International Labor Organization (at front…) and the supranational blocks (European Union, MERCOSUR; NAFTA, etc.) move towards a basic system to establish minimum rules in the capital / work relationship.

Having occurred a change in the relationship between political and economic institutions, it became indispensable to devise a new system that takes into consideration conceptual categories and techniques different "from the ones employed in the dominating cultural models in the field of labor law" (GOMES, 1981, p.191).

Another issue debated nowadays is the negotiated model in relation to legislated labor law, something already discussed long ago, making it possible for the union entity to modify rights of its category, being only prohibited to alter rules of occupational safety and health.

CONSLUSION

An analysis of collective bargaining in international labor law, in the face of the economic crisis that has come and stalledin our beloved country, it is important for us to understand which ways we may follow so that the employer's profit continues to exist without demeaning the image of their service providers, or, more directly, their employees.

The International Labor Organization, as the most international agency, possesses a number of international documents which can guide any one of the

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more than 180 State-members, Brazil being one of the 10 most important ones, since its creation in 1919.

As for the MERCOSUR, which appeared as merely an economic block to create economic rules, has by means of the union centrals of the original four State Parties (Argentina, Brazil, Paraguay and Uruguay) ended up creating instruments to guide them, in addition to Venezuela and the guest States.

We need solutions for the creation of jobs, to put an end to hunger and poverty, to stop violence against the environment, or else, to impose limits to capitalism and globalization; only when we find these solutions will we be able to effectively minimize the occurrence of outrages to the right of intimacy and privacy of the employee.

Even with all the existing legislation in Brazil and in the international agencies, more and more pressed by increasing unemployment, there is some concern with the right of personality, making the government and the legislative power try to create a new legislation or, under another perspective, make collective bargaining prevail over the legislated, even though some scholars still worry about some less prepared union agencies.

For this task of reordering, academic research in the field of employment relationships becomes essential, assimilating new behavioral standards of workers and new business techniques to ensure, always and in any hypothesis, the preservation of fundamental rights and rights of personality, essential ingredients of citizenship and human civilization.

This text ends reflecting on the imponderables regarding the future. The enigma to be deciphered is in the equation between what will be considered primary in internationalized business development: salvaging profitability at any cost, with the decrease of the social conquests, or, evolving an effective protection of the rights of personality via international collective bargaining.

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