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Human Rights and Workers: Limits to the International Labor Law

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Abstract: This article intends to provide an overview of the role of International Labor Law in the defense of Labor rights. In short, the present paper aims to analyze the meaning of the International Labor Law and the social rights stated as fundamental rights by International Labor Organization - ILO within the human rights and globalization context. The constitutionalization of social rights represented a normative advance in the social rights. Adopting the historical perspective of evaluation, one defends the relevancy of the human rights notion to the social rights notion. From a globalization perspective, in which the national states lose power, a worldwide social declaration rekindles debates over the value of labor in the society, the theories of justice that justify it, and over the effectiveness and financing of these social rights. This study is divided into two chapters. The first one views an overall notion of human and social rights, the evolution of the international labor law and its linkage to the human rights. From the premises it is important to define which fundamental human rights model is implied in the ILO declaration of 1998. The second chapter points out the political, economical, juridical e cultural limits to the connection between the International Labor Law and the human rights over a critical view.

Keywords: ILO, Labor Law, Human Rights

1. Introduction

The Labor Law, as a social right, as man's rights, is born locally and becomes universal in subsequent declarations, contrary to freedom rights, which are born universally and then adhere to the internal plan of the States as fundamental rights. Internally as well as internationally, human labor is continuously going through adaptations, which makes the changes of Labor Law more dynamic. If the tendency inside the States has been for the Labor Law to become more commutative, that is, more private and flexible, in the International Law field such flexibility is pursued, but on the other hand, a bigger cogency to the International Law is wanted. The second tendency may be felt in debates over the possibility of applying sanctions when a country breaks minimum standards of protection, like the debate over social clauses in international trade agreements. The ILO, as a privileged forum for labor discussions at an international level, intends to define the role of international labor rules in a globalized society and proposes in 1998 a declaration on the "Fundamental Principles and Rights at Work". With such a declaration, the ILO expressly links the discussion on labor rules to the human rights. Although the declaration of human rights indirectly contemplated the protection of the worker, the ILO declaration of 1998 makes the connection of human rights and worker's dignity explicit. Given its positive character, it is not only moral requirements that are expressed in the declaration, but the basic rights that begin to take part in the national legal system. From the historical point of view, the social rights, as second-generation rights, are not incompatible with the theory of human rights, although it is acceptable that the traditional paradigm of human rights is based on liberal declarations. In a constructivist comprehension of human rights, the first generation of human rights was similarly complemented by the legacy of socialism, that is, by the reivindications of workers in order to share the "social well-being". Historically the workers' movement stimulated the breaking of a political-juridical individualistic model, which contemplated human rights in the French Declarations and the North American Constitution.

It is easier for the national states if the social rights are limited to the field of "policies", political guidelines, definite statements as merely pragmatic principles, rather than being charged internationally by control mechanisms foreseen for Human Rights by International organizations. From the point of view of the national States, the "social issue" must be rethought from standards of solidarity with the reduction of the classical opposition between the individual and the collective which proclaims the foundation of a new State Province due to the un-creasing possibility of planning the future and because of the scarcity of work. Besides the sovereignty crisis of the State-nation involved in a growing neoliberal globalization there are economic limits to the International Labor Law, which, on the one hand, is obliged to limit the fury of developing countries, and on the other hand, needs to positively support actions showing efforts from developing countries to promote the workers' dignity, with responsibility and equity. From the premises it is important to define which fundamental human rights model is implied in the ILO declaration of 1998.

2. Fundamental Rights of Workers Within the International Order

According to Hobsbawm [9], the social rights do not have to be treated as human rights except for a rhetorical argumentation only. Social rights viewed as human rights and hence subjective rights contrast with the proper essence of social rights, which are collective by nature. To Marx [12] the worker's protection could never be formulated in terms of human rights... "None of the so-called human rights surpasses, therefore, man's egotism, of man as a member of the bourgeois society, that is, of the individual turned to himself, to his own interest". Hence, Marx related human rights to a liberal individualistic society, without the possibility of associating human rights to the social dimension historically restated. Nevertheless, from the historical point of view, the declarations of Human Rights have always contemplated, though indirectly, the dignity of the man worker.

Along with the individual rights of first generation, the second-generation rights have been foreseen in the "welfare state" as economic, social and cultural rights, where the workers' rights would not be included. Cançado Trindade [4] invokes the thesis of the indivisibility of Human Rights since the idea of generations or dimensions may represent priority among them, which would not be the best interpretation of the issue taking into account the I Conference on Human Rights in Teeran in 1968 and the II World Conference on Human Rights in Vienna in 1993, both with an integrated view of human rights. No matter how the social labor rights are classified, the fact is that such concerns with the principles protecting human labor are also present in the international declarations and directly or indirectly in international organizations like ILO and WTO and inside new realities brought up by economic blocs such as the MERCOSUR Sociolaboral Declaration or the European Social Chart.

2.1. The Genesis of Fundamental Workers' Rights: The Social State

Gradually the social rights are recognized by the State, greatly due to the pressure of the working class and their struggle, as the Industrial Revolution starts in England. These rights were soon included in the nations' Constitutional Order starting with the Constitution of Mexico (1917) and the Weimar (1919) in Germany. The Social State of Law rises and its meaning is described as the State subject to the law legitimaly established, whose social precepts are in the Constitution. The Social State intends to correct the classical liberalism adding the idea of social well-being, the generating formula of the "welfare state". With the notion of equality the State intends to build an order inspired in the notion of the common welfare, in which the law has a promotional character and intends to solve the "social issue", as the social rights are dubbed. In order to promote equality, the State acquires new functions, among them the role of economic agent, re-distributor of the national income and manager of the economic process. Through these functions the Social State moved from an abstentionism in the economic life to a growing and active participation in this area through a regulating intervention. The passage from a liberal state to a social state reveals a qualitative and quantitative alteration of the State, which began to assume new political contours. Bismarck's Germany, supported by the Constitution of 1873, articulated interventions creating a social security which would become concrete between 1833 and 1889 with the first programs of compulsory insurance against illness, old age and disability, while the English factory legislation would spread abroad. In the late XIX century, the interventive State is born, more and more engaged in the financing and management of social insurance programs. Although the Social State ideologically contrasted with the advance of socialism in its first manifestations, trying to create the worker's dependency on the State, these actions have irreversibly changed the contemporary appearance of the State.

The social rights, especially the workers', have expanded in the national legislations, have entered the constitutions and become international. The States, through the new social aspect, contemplated social rights, like: positive rights of an infraconstitutional plan, subjective rights, fundamental rights, principles of social justice or promotional political guidelines. From the point of view of the theory of justice, the national states handle the social issue as a matter of social justice, still connected to the conception of the Social State which contemplates the workers' rights related to the distributive justice. In order to guarantee a decent life to everyone in accordance with social justice, it is necessary to face the thesis that the problem of the distributive justice and social justice belongs to the economy. Hobbes, through the political pact notion, in which lies the idea of exchanging protection for obedience at a commutative plan. The distribution concept can only be linked to the common welfare. Labor is a common welfare once it is linked to the idea of the universal

and the transformation of nature operated by the work, which is done for all collectivity's sake: the whole society benefits from its presence, like everyone will suffer with its absence or scarcity. One of the purposes of the social rights, according to the Theory of Fundamental Rights, is to show the State and the citizen the possibility of social justice, which represents the balance between development and health, between public space and private space, between commutative and distributive justice, between the realm of freedom and necessity, as Hannah Arendt [1] notes. This way, the concept of social justice restricts any debate concerning the social right, whether it takes place in the States or internationally. This concept came up inside the social christian humanism and it is expressed as follows:..."there is social justice that also imposes obligations which neither bosses nor workers can skip." Pio XI, Divini Redemptoris, 17 de março de 1937, nº 51. In this sense, the role of the State regarding social rights has gone through historical transformations in the content of social justice. In the Liberal State, based on an individualistic anthropology, Labor appears as part of the commutative justice. The dignity model of workers here pursued is the model of the free man. In the Social State, where exchange takes place unevenly, labor rises as a source of distributive justice. The dignity model of workers that we seek is the model of the working man whose rights of equality are guaranteed. Lastly, in the Democratic State of Law, labor appears limited by social justice, in a model that comprises either the commutative justice or the distributive one, since it sometimes belongs to the world of exchanges among equals, seen in the private sector and sometimes distributed by public politics promoting workers' rights. Here the dignity model of workers is the model of the man working with solidarity, aware that Labor is neither his possession nor property, but it is part of the common welfare. Along with the State evolution, we have seen a historical evolution of the human rights of workers, which passed from the proclamation of freedom rights in the liberal State to the protection of the State of providence with social rights that today are promotion rights and solidarity rights in the Democratic State of Law. Or, under the emblem of the French Revolution, we would be living in the period of fraternity and cooperation.

2.2. The International Labor Law

Under the world's peace flag, the social justice, which is the dignity of the working human being, the emphasis given by ILO is not only on a useful marketing expression of labor, but it is recreated in its subjective expression. Hence, for ILO, labor relates to social justice. For ILO, the rights and duties of employees, employers and governments mean reciprocal responsibilities, or in the proper sense of social justice, duties and rights emerging from the parts to the whole and from the whole to the parts. The preamble of the ILO constitution says that the overall objectives of the organization can only be attained: "... whereas universal and lasting peace can only be founded in social justice". From the relationship set in the preamble between peace and social justice, a possible conclusion is that the concept of peace cannot be only the absence of war, but it should be the construction of a just universal community. With the adoption of the Declaration of Philadelphia in 1944, the ILO's rules, besides traditional issues as the preamble of the ILO Constitution mentions, such as the day's work, minimum wage, protection of children and women, more ample themes related to work were added, like living conditions, freedom, development and social well-being. The principles stated by the Declaration of Philadelphia are: labor is not a merchandise; freedom of speech and association is essential to continuous progress; poverty, in any place, is a danger to everyone's prosperity; war against necessity must proceed vigorously within every nation, and for continuous and concrete international effort in which representatives of workers and employers, cooperating equally with government representatives, participate in free discussions and democratic decisions in order to promote the common well-being. As sources of the International Labor Law, the international labor rules have a triple function: normative, interpretative and integrating. The normative function is present when conventions had been ratified and have been in force, following a necessary application for the undersigned country. The interpretative function comes up when the international law saves as a support for the hermeneutic process of an internal law, when we start from the primacy of the international order over the internal order. Art. 37, § 1st of the ILO Constitution recognizes that the International Court of Justice is authorized to interpret the dispositions of a convention before the members of ILO. In practice, several governments ask the International Labor Workshop's opinion prior to the ratification. However, there is extensive jurisprudence from the control organs of ILO, like the Experts Commission for conventions and recommendations, the Commission of freedom of association, the Commission of Investigation and Conciliation in terms of Freedom of Association and inquiry commissions appointed in accordance with art. 26 of ILO Constitution. Third, the integration function exists to supply the gaps in the national system. The conventions set up principles more or less universal whose meaning surpasses the national obligation born from the ratification. We refer here to a broader meaning of integration, not just the integration of international laws deriving from the ratification instrument. The interpreter may resort to the international regulation on certain matters although conventions related to the national plan had not been ratified. The integrating role of ILO's rules indicates a catalogue of general principles of labor rights in which notions of Social Justice, equity and good faith are implied. Such concepts enable the legislator, the executive and judiciary of the member-States to set up action policies in the field of social rights. The ILO, through its normative system, indicates a trend towards the internationalization of the sources of the law, showing the fundamental principles in the International Law since 1919. The ILO, through international conventions and recommendations has generated what is known as the "International Labor Law".

However, struggling with cooperation, technical assistance, studies, education and research, ILO faces two big obstacles these days: a) it lacks concrete power to sanction violations since it only has moral means and channels to incite governments and entrepreneurs to fulfill the established rules; b) not all governments submit their legislations to the principles set up by ILO. Taking into consideration only the "moral" power of ILO to enforce these fundamental principles, we question the opportunity to create instruments for the protection of ILO's rules. That is what the WTO's policies attempt to implement through "social clauses" or "labor standards". From 1991 on, a lot of thoughts from the representative unions of developed countries approved of the idea of relating commerce with labor rights, whereas governments and trade unions from developing countries opposed to the dependence of markets and international loans on social standards. The United States and some European countries started campaigns in favor of the linkage between commerce and labor rights.

The inclusion of social clauses in the World Trade Organization by several industrialized countries during the Tokyo Round (73/79) and in the Uruguay Round by the United States, France and members of the European Community. In 1979, the ICFUO (International Confederation of Free Union Organizations) supported the initiative. They did not attain their objective. However, the subject was brought up again, this time at ILO, by the developing countries. Particularly, it was at the Ministerial Conference of WTO in Singapore (1996) that ILO was chosen consensually as the adequate forum for the issue.

Fiss [6] attacks the central thesis of this argument developed by Richard Posner in the book "An Economic Analysis of Law". According to Fiss, when Posner tried to demonstrate that all and each one of the rules of law should serve the market, reducing everything to efficiency, he failed by separating the law from the idea of justice. Thus, ILO has to face two dangers: the danger of being institutionally attacked, in terms of the formal aspect of its competence, by another international organization, the WTO, which intended to spread its "wings" to take over ILO's typical issue, and second: the problem of having its material content emptied by the economic discourse, the material content related to the promotion of social justice and social rights in the international plan as well as the internal plan of the States. As a result of ILO's response to globalization and to the idea that the Conventions created inside ILO needed to be revised and in order to carry on the growing discussion in the field of human rights, it was decided, inside the ILO, which of the 180 Conventions would contain the basic human labor rights. These conventions were called fundamental labor Conventions through a solemm declaration, at the Conference of 1998. These fundamental rights expressed in 98 are an explicit and deep expression of the Declaration of Philadelphia, adopted by the International Labor Conference in 1944 and incorporated in the Constitution of ILO in 1946.

2.3. ILO "Declaration of Principles and Fundamental Rights at Work of 1998"

The fundamental labor conventions, divided according to four fundamental themes, proclaimed in 1998, entitled as "Principles and Fundamental Rights at Work "are the following: freedom of association, forced labor, non-discrimination and minimum age at work. Historically, we reaffirm the human rights of all generations. As for the freedom of association, in spite of being stated as a social right we obviously restate it as a first generation right, the freedom which today relates to development, in its constitutive and instrumental role. As far as equity is concerned, we notice a second generation right, redefined in terms of tolerance and the way it can be conceived in a multicultural society. The moment we intend to ban slave work and child labor we are in face of the third generation rights, that is, the development rights of the citizens and all States, but at the same time, individual rights to freedom and equality are being violated when these are children and adults working under the regime of slavery. On the declaration of 98, Valticos [18] says it is opportune to go over certain fundamental truths and underscore the values at stake. He emphasizes the indivisibility of human rights proclaimed in the Universal Declaration, in both International Conventions of 1966 and mentions the importance of labor standards internationally reinforced. The ILO declaration of 98 is inserted in the "soft law" context, but as it fulfilled the ideas contained in the preamble of the ILO Constitution, its principles must be respected and implemented by the Member States, otherwise they will suffer the content sanctions foreseen by the Organization. At this injuction, the cooperation of the other actors from the international scenario is more than wanted by ILO. Today the labor view, as part of the human rights, already started in the Declaration of Philadelphia, expands through the international law and straightens the relationship of ILO with other organizations and individuals of the international law directly involved with the human rights. From the point of view of the member countries, the ILO declaration now includes what is called the "constitutionality bloc" of the member countries, being the converging point between the international law and the Constitutional law, since it deals with the human rights issue. As fundamental rights, they apply to all countries indistinctly regardless of the level of development. As a declaration of human rights, the ILO, proclaiming rights recognized by the universal juridical conscience as mankind's patrimony attaches a hierarchical juridical value to the declared principles, superior to the international rules, regardless of the formality of the ratification. In addition to this, lies the idea that the labor law, regarding the issue proclaimed in the declaration, is linked to the international system of human rights protection. The multiplicity of international instruments, in the human rights area, demands coordination among the departments and protection mechanisms in global and regional plans, always inspired by a common source: the Universal Declaration of 1948, "radiation focus of efforts in

favor of the achievement of the universality of the human rights ideal".

A lot of rights recognized by the fundamental labor rights, are contemplated in the Universal Declaration of 1948 under the influence of the socialist bloc. According to art. 4 of the Universal Declaration of Human Rights that says "no man shall be submitted to slavery nor servitude", prohibiting slavery appears in the ILO Conventions regarding slave work (Conventions No. 29 and 105, of 1930 and 1957). The prohibition of discrimination foreseen in art. 7 of the Universal Declaration of Human Rights appears in Convention No. 100 on the equality of remuneration for work of the same value and also in Convention No. 111, 1958, on the discrimination in respect of employment and occupation. Art. 23, paragraph 4 of the Universal Declaration of Human Rights which mentions that any person may found union associations or join one in order to protect his interests is linked to the principles defended in Conventions No. 87 and 98, of 48 and 49, respectively. Art. 22 of the Universal Declaration of Human Rights which assures the person satisfaction over economic, social and cultural rights indispensable to his dignity and free development of his personality, when read together with art. 25 referring to the "adequate level of life", and art. 26, "right to education", easily matches the ILO rules on the prohibition of child labor (Convention No. 138 and 182). Valticos identifies the issues of slave work, freedom of association and elimination of discrimination with the International Pact of Civil and Political Rights, and all the other international rules relate them to the Pact of Economic, Social and Cultural Rights. He states that the completion of the protection system for the human rights and international labor standards therein demands that we care more effectively for its application. There is a growing imposition on the national States of issues regarding the international public system which make up the basic principles of the international understanding. In this sense, the notion of "jus cogens" restated in the Convention of Vienna, art. 53, means "an accepted and recognized rule by the international community of States in its ensemble as a rule that does not admit any agreement in contrary and that can only be modified by an ulterior law of the general International Law of the same character". The international labor laws may assume several roles as sources of "jus cogens". They can be seen as treaties, when ratified, as general principles of civilized nations rights, and as an international custom. The ILO declaration of 98, as a declaration of human rights, can be seen as part of "jus cogens" by the stated principles and by the codification of the written law it represents. That is the reason why its validity and effectiveness as a rule of international public system does not depend on ratification, which has already been decided by the Interamerican Court of Human Rights and the International Court of Justice.

3. The Limits to the International Labor Law and the Human Rights

The 88th ILO Conference that ended in early June, 2000, re-examined new information based on the ILO Declaration regarding the principles and fundamental rights at work, pointing out a general discussion on the formation and development of human resources in which education constitutes a right for all and the Governments, along with the social agents, should do their best to make it a universal access, creating "a general economic environment and incentives for individual investment or overall education" for the permanent qualification of companies and workers. Emphasis was given to the human and economic development of the States and their citizens, with the promotion of decent work in the world. The problem with implementing the declaration of fundamental rights at work of 1998 is that ILO counts on national states under crisis due to a globally unstable economic substract. From the juridical point of view there is a lack of cogency in the international labor laws, the sovereignty problem or the impossibility of countries that do not ratify them or if they do ratify them, they are not fulfilled. Lastly, there are cultural limits to implementing the programmed rules of ILO. This is the scenario where the limits to the International Labor Law are examined. Soon we can point out that problems from one area reflect on the other area reciprocally, which is why a division was done to make things clear.

3.1. Political Limits to the International Labor Law

The fundamental political problem in terms of human rights of the worker is that the rights proclaimed internationally are applied by the local national States. Bobbio [3]summarizes the political problem of man's rights this way:..."the fundamental problem in relation to man's rights today is not so much the problem of justifying them, but protecting them. It is not a philosophical problem, but a political one". We must find out here which protection one can expect from the current national States. The present Democratic State of Law is going through an unprecedented crisis. This model is facing a globalized world which corresponds to a new phase on the expansion of the capital, where the sovereignty issues should be rethought so that the proper State survives, taking into account the international, national and regional plans. Neoliberalism is a complex concept reflecting a heterogeneous process: from the economic point of view it corresponds to the internationalization of the financial capital, that is, the globalization of the capital and in the political aspect, it means a series of concessions from the political power to the capital power. This one influences the behavior of enterprises and governments bringing short-term economic results and the combat against inflation in detriment of the social-economic progress and long-term policies of the national States. The issues linked to labor suffer the consequences of the mobility of investments and the internationalization of the capital, thus demanding a project for a sustainable economic growth. The Social State as a historical product was harshly built and kept in its foundations. However, in the current stage the Social State suffers attacks from the neoliberal ideology which shatters the world of labor and makes it precarious.

3.1.1. The Nation-State Crisis

Historically the Absolutist State gave way to the liberal State which would not differentiate social rights from individual rights. The social rights inserted in the Constitutional System of nations – Mexico (1917) and in Germany (1919) give rise to the Social Rights State. The promises on social justice were compromised by the State crisis explained by Pierre Rosanvalon [14] in three dimensions: the financial one, which generated the so-called structural unemployment; the ideological one, which derives from the clash between democratization of access and the bureaucratization of social demands service; and the philosophical one originated from the disaggregation of solidary ethics. The Democratic State of Law, as a successor of the Social State needs to re-define its regulating role with special emphasis on the human labor issue, which, during the State transformation, suffered alterations resulting from the production system due to the assimilation of the new technology and new demands of a transnational market. The States with formal sovereignty find themselves materially limited in their autonomy to make decisions because of the globalized economy. The new sovereignty comprises a set of international governability mechanisms in which the nation-States should no longer be seen as 'governing' powers, able to impose results on all political dimensions within a certain territory through their own authority, but as places where the forms of governability may be proposed, legitimated and monitored. The nation-States are some kind of political agencies in a complex power system acting worldwide or locally, yet they are centralized due to their relationship with the territory and the population. At this point in history we find the Contemporary State and its sovereignty compromised and subject to external intervention, more than ever, under the influence of a globalized economy.

3.1.2. Neoliberal Globalization

The notions of globalization vary a lot. For Giddens [8], globalization deals with the transformation of space and time, whereas Beck [2] reports and summarizes approximately ten globalization theories which include most of the time an idea of a worldwide society in its various effects, where the economic aspect is underscored. In its origin in the central countries, neoliberalism represents a defense of the capital in face of the advances of social rights resulting from the union struggles. One can say that neoliberalism is a radical new conception of globalized capitalism, which tends to take over the market and this way becomes the means, the method and the end of all rational human behaviour. Today's neoliberalism is nothing but the State of international capital which, through the defeat of social local interests, has imposed breaches or limitations to post-war corporate pacts. The Keynesianism, an economic thesis opposed to Hayek's liberalism, along with marxism, has lost prestige. Although some countries resist the gradual but steady imposition of the economic orientation that sets the rules of the political game, increasing the social exclusion through measures of slow and gradual dismantlement of Welfare State in all the countries where its was implanted. The problem of the States political limits reflects on the human rights whenever they need the national States in order to be implemented. Hannah Arendt [1] identifies the decline of the nation-state as the end of human's rights, since they become unfeasible to those not linked to a national State. From a positive point of view, Castells [5] understands that the State-net (he considers the States as the knots of a global net), although not having economic sovereignty, has not lost the intervention capacity which should take place through the reconstruction of the local democracy, pointing out the principles of subsidiarity, administrative flexibility and citizen's participation, among others.

3.2. Economic Limits to the International Labor Law

The market, through its supply and demand policy has guided political decisions that elect a minor intervention of the natural State. The national States accept supranational regulations from which they cannot escape in an economic globalization context. In this context, the economists' focus, who are the analysts of the market rules, becomes relevant because, as experts they orient the formulation of economic politics which, in turn, are closely linked to social politics whenever labor connected issues are discussed. The international law, at the end of the cold war, moves from international rights of coexistence to international rights of cooperation, based on international rules which look forward to the promotion of the nation's interests. The same happens to the International Economic Law and the International Labor Law since they operate under the International Law System. Broadly speaking, the International Economic Law is a branch of the international public law which deals with economic relationships and transactions, whose rules are taken from treaties, international agreements and decisions made by specialized organizations of the United Nations. The relationship between the international commercial rules and workers' rules emerges from an analysis of the International Economic Law and the International Labor Law, branches of the Law whose ethical foundation lies on the construction of peace.

In this sense, Sen [15]points out the necessity to rediscover the ethical basis of economy and therefore the idea that the law cannot be only an instrument but it ought to be permeated by a social morality of reciprocity. International trade must be seen from the economic point of view of general balance or the game theory, which takes from granted a commercial competition based on a careful consideration of the economic forces rather than the competitor exclusion or a zero-sum game, or still a perfect identity of the labor forces in the national States. Besides, we agree that Labor cannot be looked upon solely as an economic factor to solve all competition problems of the economic law.

3.2.1. Theory of Comparative Advantages

The classical formulation of the theory of comparative advantages, done by David Ricardo defines the ruling principles of the international Labor division within ample freedom of trade for the countries. The theory of comparative advantages is formulated in a way that one considers it as a "natural" or

"acquired" advantage of certain countries in the production of some goods that may be translated into lower costs and lower prices to consumers. In this case, a country with lower labor cost would have a greater "Comparative advantage" over the others. Developed countries here rise up against the "social dumping" and do not admit its transformation into comparative advantages to developing countries.

There is a common meaning to the term social "dumping" brought up in WTO debates: the disparities of labor cost in the international trade. The "social dumping" refers to a context in which the workers' conditions are placed on a minimum level of protection and therefore would add a smaller final price to the products once the labor-cost is minimized as a production factor. Thus, an enterprise in a developed country may consider the social protection offered to their workers by the State as a redhibitory disadvantage in face of other competitors whose workers have less social protection. On the contrary, an enterprise in a developing country whose workers face adverse conditions in relation to their international competitors, may be seen as a disloyal competitor.

Dumping is repressed in the International Law both by the internal legislation of economic blocs and by the WTO – World Trade Organization, which intends to restrict these worldwide unfair practices. Therefore, taking into account the need for enterprises to adapt to the exploration of comparative advantages, it is necessary to see if badly paid labor is indeed a comparative advantage to developing countries. This view of labor as a comparative advantage does not take into consideration the differences in the development degree of each country.

3.2.2. Developing Countries

Whether it is fair or not, on the one hand, to consider low salaries as "dumping", on the other hand, there are doubts if the improvement of working standards in developing countries would generate better competition among the States involved in commercial practices. We must point out that WTO agrees that there are distinct interests in international trade regarding developed countries and the so-called "developing" countries, as a differentiated treatment is foreseen in the Decision on Measures in Favour of Less Developed Countries, adopted by Ministers in the Conference of Marraqueche, in 1994. Through these measures they intended to implement special treatment based on positive actions in favour of less developed countries in order to expand their business opportunities. The basic idea they supported was the impossibility to compare the activities of national companies from developing countries transnational companies due to the evident differences between them. We come to the conclusion that although labor factors could be considered as a matter of competition in an exacerbated business logic, according to OCDE studies, there are high-level countries in terms of labor rules and in terms of competition in the international market and also the contrary. Therefore, the possibility of competition in international trade cannot be subject to the value of the workers' salary in the competing States, or their situation as workers. The disparity of salaries earned by workers does not mean disloyal business without looking into the issue more deeply. From the labor point of view, once there are positive principles institutionally established in the ILO, the disparities on the costs of qualified labor in the international scenario cannot be considered as "social dumping" by WTO. Freeman [7] observes that it is not possible to establish a set of internationally accepted data on salary equivalence in several countries for identical occupations because the information available is not accurate and sufficient. The foreign relationships and internal policies of developed countries show that there is hardly ever a consistency between the declared social interest by the slower developing countries and the business practices of the richer countries. The economic limits to the International Labor Law point out two fundamental contradictions: there is contradiction within the international organizations since there is pressure from the World Bank and the International Monetary Fund towards the liberalization of markets in developing countries. How could other organizations penalize countries that accept the opening of markets under the accusation of "dumping"? The second contradiction lies in the hypocrisy of the "social dumping" speech. The rich countries allow the withdrawal of industries from their territories so that multinational companies can benefit from the cost of labor in developing countries. After such liberal policy, they want to charge the developing country, host to multinationals, of "dumping" into multilateral organizations like the WTO. These two contradictions reveal the fallacy of the social "dumping" theory. In short, the economic problem of the Inernational Labor Law is the use of the rhetorical speech on human rights in order to protect the rich country markets.

3.3. Juridical Limits to the International Labor Law

The limits to the International Labor Law broadly relate to the foundations of human rights in general, their regulations, enforcement and effectiveness. The legitimacy required from a country on an international level over the implementation of the minimum labor rights comes from the ILO Conventions ratification, which are not an end themselves, but since 1998 have had a clear purpose of spreading respect towards the worker's human rights. The inspection issue regarding the fulfillment of the ratified conventions is linked to the conditionality idea of human rights. This thesis implies that all financial aid for the development of third world countries is attributed to economic blocs (European Union) or international organizations under the condition and concrete efforts of developing democracy and promoting human rights. The positive conditionality involves the help to the country under circumstances already described, whereas the negative conditionality would mean the withdrawal of some kind of help or advantage already given.

The social rights as instruments created in 66 by the International Pact of Civil and Political Rights and the Pact of Economic, Social and Cultural Rights, have different monitoring systems. This leads to the idea that the social

rights are less important for philosophical, economic and historical reasons. He points out that it is very hard to define violations of social rights due to the possibility of their progressive realization. On the progressive realization check, he mentions barriers that hinder inspection: a) There is a practical problem concerning inspection in the 66 Pact due to the lack of a clear approach to check whether a country is fulfilling certain standards or not. Sometimes it is a statistical problem. Sometimes it is a problem of reliability regarding the government data; b) The protections system of the international Human Rights has been detached from the developing agencies and the human rights agencies do not cooperate with the developing agencies: there is a lack of cooperation among the international organizations. c) In debates over the equality of social and civil right rises the budget problem and also the difficulty to control whether the social rights are actually being implemented.

The end of the cold war provided a larger debate over the social rights and the international order is more able to give more specific and local support to the Human Rights. According to the author, the best circumstances for the protection of social human rights are still the local commitments of Governments and NGOs, added to the human rights support agencies and it is necessary to remember that the Bretton Woods system was filled with a built-in liberalism which gave the States the possibility of implementing social rights. In this sense, ILO intends to protect workers through the national responsibility. As a result, it faces the juridical problem with the conventions ratification and lack of coercion, deficiencies in the supervision mechanisms. That is, there is a result of protective standards which depend on the national regulation, but they were raised in an international environment. Globalization has weakened the regulation of nations due to the great mobility of capital which prevents tax charges to finance social protection systems. Besides, production is done through global chains crossing the national frontiers. This is the idea of the governance gap: the national laws are not effective and the international law is inadequate. The solution to the governance problem is not in the international organizations because they cannot replace the national legislations. The governance gap must be filled by a new global and local government, which channels the effects of globalization with justice. In this context, ILO may offer guidelines that must be followed through certain indicators; "benchmarks", which are charts of social declarations, common in the European Union System, in which the national States point out innovations for the governability and establishment of social rights. The declaration of 1998, may be a social indicator of development, despite its limits, as we will see.

3.3.1. The Social Clauses

International organizations such as ILO – International Labor Organization and WTO – World Trade Organization brought up the debate over the "social clauses or Labor standards" which has been dormant in the political plan since 1996, but has not lost importance in the area of human rights. Since ILO has no sanction power in case member countries do not fulfill their rules, the "social clauses" appeared, say Langille [10]. They were proposed in many WTO debates and are described as inciters and a mechanism of pressure, including clear conditions in business and cooperation agreements so that the governments at least fulfill the fundamental ILO conventions to protect and promote the basic and essential workers' rights. For the ILO, the social clause would be an insertion in the international trade treaties so as to guarantee the fulfillment of certain social rules in the process of the production and exportation of goods, which may lead to the application of sanctions to the exporting countries of such goods (negative clause), like for instance, to prohibit the importation of such merchandise. On the contrary, the social clause may be a positive condition as it benefits the country that fulfills certain social standards with a more favorable access to the international market (positive clause)". Another way of understanding the social clause is to classify it into typical and atypical. In the first, there is a commitment or multilateral obligation of the member States regarding the respect to the minimum or equitable labor rules having the possibility to apply commercial sanctions to the country that does not comply with the rules. An example of this kind of typical social clause is in the NAFTA (North American Free Trade Agreement) in which the bloc States oblige themselves to promote the fulfillment of the internal labor legislation in each State and apply it effectively. Economic sanctions are foreseen in case rules are not fulfilled and they are applicable after using the mechanism for controversy solutions. In case the minimum labor "standards" are actually not fulfilled, the money from the sanction will go to a fund. Thus, it will strengthen the enforcement of the labor legislation of the law-breaking country. If there is no payment, the tax benefits foreseen in the trade agreement will be suspended up to the amount due to charge the imposed sanction. Contrary to the elements above mentioned, if there is not a clear statement of obligation in the commercial agreement, containing program regulations without any previous establishment on juridical and commercial consequences in case rules are not fulfilled, we have an atypical or imperfect social clause. In this case, the agreeing States declare that they will try to maintain fair labor rules or rules that tend to improve workers' lives. However, they do not assume obligations of result, but they do assume obligations of means. The problem with all the discussion on the social clauses is that the interests at stake are totally contrasting and the theme is overwhelmed by the protectionism thesis of the rich country markets [11].

3.3.2. Conduct Codes of Transnational Enterprises

The conduct codes of transnational enterprises arise as an evident tendency towards privatization of the social clauses and minimum social standards theme and partly as a reply to the indefinition and reticences regarding the theme among international organizations. Nowadays, the responsibility of transnational enterprises towards the protection of workers'

human rights has been clearly shown in the adoption of conduct codes [13]. The theory on the responsibility of enterprises concerning the workers' protection reflects a movement of expansion in terms of subjects responsible before the international law. It is an opportune measure as the nation-States become weaker and weaker. Awareness of the great transnationals power leads to recognizing their responsibility towards human rights, although it is done secondarily in relation to the States. In this context, in the 90s, private conduct codes of transnational enterprises which contemplate rights already acclaimed by ILO internationally are created. This means a two-way movement, the privatization of the international labor rules or the publication of private conducts. However, what must be highlighted in both themes regarding the social clauses and conduct codes is that the coercion mechanisms are not clear, which is problematic from the classical juridical point of view. On the other hand, in cases of severe human rights violation, human decency in its minimum sensibility and morality is broken and the international law wished it had more "teeth" (tools), better means to sanction or hinder abuses. In the juridical aspect, this still an unreachable limit to the International Labor Law.

3.4. Cultural Limits to the International Labor Law

The polemic takes place in terms of the discussion over the universality and particularism of human rights and reflects on a double understanding in relation to the international labor rules. Some, like Valticos [18], understand that the international labor rules should be uniform, a thesis supported by Western countries. Others, like Blanchard and others say that the international labor rules should only be rules of variable geometry, a position upheld by developing countries and by some East European countries as well. For those defending the last line, the adaptation of the rules to several situations in each country may or must rule over the universality characteristic, thus making the international labor rules in the conventions more flexible. The concept of human rights for those who agree with it, deals with two theses, the universalist and the particularist. To Bobbio [3], human rights are born as natural rights and develop as positive private rights since they are included in the internal system of the States, and when realized they become positive universal rights. According to abstract or universalist theory of human rights, the economic, social and cultural differences among human beings are not considered, consolidating a univocal concept of human rights, which gets close to the notion of uniformity. This conception begins with the iluminist jusnaturalism, in the XVII and XVIII centuries, which contemplates man out of history, free from particularities that characterize the concrete man and conveys a conception of law in which the rule remains separated from the concrete situation. The relativist conception of human rights, or particularist, asserts the equivocal character of the universal rights Declaration text, in which the terms "freedom", "equality", would carry completely different meanings when utilized by peoples or different States. According to this conception, universal human rights do not exist, only fundamental private rights. The individual, a-historical, independent, abstract, self-interested, is only seen as value in the West, whereas in other cultures they do not accept the "human rights" doctrine supported by this anthropological view, because they do not see themselves in it. So, for example, the allegation that the human rights were mentioned for the first time in the Islamism is formulated by many Islamic authors and in official documents. According to the particularist conception of human rights, the cultural and authropological particularities should not be outrooted, or disregarded since one might remove the human person's circumstances. Instead, they should be taken into account when human rights are applied. Steiner [16] analyzes the problem of cultural relativism which is directly related to the issue of human rights particularism and multiculturalism. More and more societies are becoming multicultural, which means that the members in this society identify themselves with another local culture, different from the hegemonic culture, though. The question to be discussed is the legitimacy of these minority cultural members seeking recognition for their collective cultural goals. Multiculturalism deals with the idea of not imposing one culture upon another. For that purpose, it is necessary that the processual liberalism respect the differences, enabling the liberal society to accept the collective goals of certain groups. The traditional processual liberalism is contrary to the idea that the fundamental rights may be applied in a varied way in different cultural contexts. The homogeneous equality predominates, and equalitary freedom imposing a unique model of human rights with a neutral vision on the goals to be reached collectivelly. The human dignity model accepted through this liberalism reinforces the thesis of individual autonomy clashing with a collective idea of welfare. Minority groups or minority cultures, on the contrary, propose an idea of good life to the society, and therefore, a notion of human dignity which boosts diversity, particularity, and helps promote certain shared values considered important to the society. An example of the clash between rights – freedom and diversity is the discussion that recently took place in Canada [17]. Obviously, the theme concerning particularism and universalism of the International Labor Law is discussed inside the International Labor Organization. Perhaps the complementarity position between both positions was summarized by ILO in the declaration adoption of 1998, with an evident pragmatic character of those rules, which is too early to judge. If neoliberalism as a ruling culture regards work as a more productive force and work is a merchandise which is worth less and less and loses importance because it is reduced to a sheer fact, a sheer piece of information, what we have to recover is the work as value, a form to express the human being's dignity.

A discussion on labor perceived as human rights will culturally reorient the debate over the value of human work. A new requirement, in the entire society, claims that dignity should be maintained for all workers fot the sake of their dignity and not only to satisfy the economic interests.

4. Conclusion

One of the problems with the Labor Law regards the coordination between the internal law and the international law, since the latter cannot replace the internal law.

The national identity has become overshadowed, once the internal sovereignty is not sufficient to face a scenario marked by globalization. The States operate a cession of the sovereignty instalments to the international organizations or regional blocs or even to transnational conglomerates, which may choose the application of the legal rules that best suit them, like "shopping at the mall".

New international normative networks are built offering no resistance to the local protection systems and without our knowing, "a priori", how much the national states will be affected, that is, the national states going through a crisis as independent subjects to the International Law and which are trying to protect aspects of their formal sovereignty.

A complete and precise regulation of social rights in the international field has not appeared yet; on the other hand, it is certain that the national legislations no longer help to solve all the labor problems in the social context.

Due to the introduction of new international rules in the field of labor, principles not linked to the labor law tradition of certain countries may be spread, demanding legislative changes and at times, the slimming of protections sometimes rigid regarding certain aspects of the Labor relationship, generating the flexibilization of some standards. A new need for balance rises among the international and national, public and private areas of labor.

The Social State invested marginally in the new needs of globalization. Issues like tax barriers, investments overrun local discussions and the world economic and social processes are asymmetric with the state sovereignty from the political and juridical point of view. Thus, there is a growing lack of worker protection in a global environment in which ILO rules do not enhance the social growth, as they reproduce the States mechanisms in their weaknesses. In this context, the linkage of some workers' rights to the fundamental human rights was an ILO strategy which reveals a reapproach of human rights to social rights, bringing up new arguments to the debate that places another perspective in opposition to this one, the economicist, which says that be labor is a by-product of the competition right, though both of them might have the same anthropological basis. At last, one questions the possibility of redefining human rights, bringing into life new consistency for the concept of social justice which limits the International Labor Law to carry out this task nowadays.

References

[1] ARENDT, Hannah. *A condição humana*, 7ª Ed. Rio de Janeiro: Forense Universitária, 1995, p. 83.

[2] BECK, Ulrich. *O que é globalização*? São Paulo: Paz e terra, 1999, p. 59-120.

[3] BOBBIO, Norberto. *A era dos direitos*. São Paulo: Campus, p. 30.

[4] CANÇADO TRINDADE, Antônio Augusto *Tratado de Direito Internacional dos Direitos Humanos*. Porto Alegre: Fabris, 1997. v. 1., p. 226.

[5] CASTELLS, Manuel. O *poder da identidade*. 3ª ed. São Paulo: ed. Paz e Terra, 2001, p. 409-410.

[6] FISS, Owen. *La autonomía del derecho***.** http://www.yale.edu/lawweb/lawfac/fiss/sfiss.pdf.

[7] FREEMAN, Richard B.; OOSTENDORP, Remco H. Nuevo banco de datos sonre los salarios por ocupación en todo el mundo. *Revista Internacional del Trabajo*. 4, 2001, p. 443-468.

[8] GIDDENS, Anthony. *A terceira via*. São Paulo: ed. Record, 2000, p. 109-128.

[9] HOBSBAWM, Eric J. *Mundos do trabalho: novos estudos sobre a história operária*. 3ª ed. São Paulo: Paz e Terra, 2000, p. 434.

[10] LANGILLE, Brian. Eight ways to think about international labour standards" in "*Journal of world trade.* Vol 31, n. 4, p. 27-53, 1997.

[11] LEARY, Virgínia. Worker's rights and International trade. "in" Bhagwati, J; Hudec, R. (ed) *Fair trade and harmonization.* Cambridge: MIT Press, 1997.

[12] MARX, Karl. *A questão judaica.* São Paulo: Centauro, 2000, p. 37.

[13] RATNER, Steven R. Corporations and humam rights: a theory of legal responsability. *Yale Law Journal*, p. 452 – 518. December, 2001.

[14] ROSANVALLON, Pierre. *A crise do Estado – providência.* Brasília: UNB, 1997. p. 13-33.

[15] SEN, Amartya. *Sobre ética e economia.* São Paulo: Companhia das Letras, 1999, p. 104-105.

[16] STEINER, Henry; ALSTON, Philip. *International Human Rights in context: law politics and morals.* Oxford: UniversitY Press, 2000, p. 323-366.

[17] TAYLOR, Charles. *Multiculturalismo.* Lisboa: Instituto Piaget, 1994, p. 72-73.

[18] VALTICOS, Nicolas. Labour Rigths, Human Rigths. *International Labour Review*, vol. 137 (nº 2, p. 130, 1998).