Philosophical and Sociological Reflections on Labour Law in Times of Crisis

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Edited by

Eduardo von Adamovich
and Marcel Zernikow

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TABLE OF CONTENTS

Part 2. The Essence of Labour Law: On Universal Principles and Diverging Legal Rules

A. ***Regional or Country-Specific Reports***

B. ***Universal Principles***

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INTRODUCTION

Starting from the assertion that crisis is part of the essence of labour law, this international compendium of essays is written by labour law researchers from different countries, who accepted the challenge of critically reflecting on the same disciplinary branch. Although the global health crisis related to Covid-19 was only in its beginning stages when the call for contributions to the present book was launched, it was clear that this crisis would have further social and economic consequences in all countries. Despite the different ways in which the overwhelming effect manifests in each country, it is certain that this period will scar the juridical sector. This observation also justifies the temptation to reflect on labour law from a global point of view. Given that work guarantees subsistence for a considerable part of the population in different states, labour law has an undeniable societal and economic impact and therefore is necessarily affected by the current crisis.

The connecting point between all of the contributions collected here is that they apply reflections from other disciplines, mainly philosophy, sociology or economy, to demonstrate what characterises labour law as a branch of the discipline. We considered this approach to be relevant before the current crisis, which is susceptible to bringing into question major principles and institutions of labour law. However, it is also true that labour law as such has survived different crises thanks to safeguards which are part of its essence and make it resist. From this point of view, the exercise here was for authors to identify the existing theoretical foundations of labour law in their legal systems by comparing experiences of crises from the present and the past. To summarise the method of this collective book, it is necessarily interdisciplinary. As it assembles contributions from labour lawyers who reflect on their own and/or various other legal systems at the same time, this compendium also has an important multicultural character and might contribute to comparative law.

These reflections essentially lead to the conclusion that labour law has been in constant transformation since its emergence. Starting with a theoretical approach, we seek to establish an overview of the theories which allow us to regard labour law as such. Among theories of the twentieth century, one may find those based on constitutional law and which see an order beyond the state, or even an order anchored in the latter. They were motivated by the fact that the new categories had quickly found their place

in the constitutions of Mexico (1917), Russia (1918) and Germany (1919), for example. This theoretical renewal could be retrospectively criticised, insofar as it was interpreted as giving rise to theories which, for some, also addressed authoritarian corporate thought. With the fall of authoritarian regimes and the predominance of a liberal democratic order, labour law was called upon to align with a new theoretical construction which was initially very beneficial, both in Europe and in South America. This context ended, however, in the 1970s or 1980s when the financial crisis led to restrictions on social rights. A new theoretical framework emerged which may still have repercussions today, consisting precisely of making social rights conditional on economic and financial satisfaction. This last model unfortunately led to the flexibilization of labour law and the abolition of social rights which had formerly been based on these same constitutions. Is there not a great risk that idealist constitutionalism in labour law imposes models of society which, in fact, do not exist? From the point of view of natural law, some authors may reflect on the principles which bring them to the conclusion that human dignity, for example, should exist irrespective of any legislative intervention. Does the current crisis, as a fact that defies hitherto almost uncontested legal constructions, not remind us of the need for questioning? To conclude, contributors might argue that labour law's essence is beyond positive law and even the constitutional systems that arose in welfare societies.

To reach a conclusion on the actual questions labour law has to solve nowadays, it may also be of interest to remember the societal circumstances in which labour law took its impetus. Was it not born out of the emergence of the "social question"? In the age of industrialisation, the discovery of mass production, urbanization and technological advances altered realities. These circumstances created fertile ground for discourse on the social role of private law. If these reflections remained partially unheard and could not directly influence positive law, they were nonetheless fundamental to the development of labour law as such. This also explains why labour law was — and still is — doomed to develop outside legislative formalism. Originally established as a set of rules which neither emanated from the state nor directly resulted from private autonomy, labour law can be considered as the result of political struggles between opposing forces: employees on one side, employers on the other. This specificity of labour law is reflected, among other things, in a "panel" of sources ranging from legislative standards to professional practices, including collective autonomy and the productive force of unions. Thus, sources can serve as a starting point for researching the place of labour law within the discipline of law. However, the study should also verify current legal problems. The advantage of the

sociological point of view may be that it helps us verify the presuppositions put forward according to current circumstances. Eventually, the sociological point of view will bring us to the conclusion that labour law will be called upon to adapt as realities change.

Given the aforementioned theoretical foundations, it is of the utmost importance to remind ourselves that renewing a branch of a discipline does not necessarily equal devastation. However, the ambition of considering social realities is likely to have caused misunderstandings about the (legal) normativity of labour law. With positivist legalistic thought dominant at the time of its advent, labour law might have constituted a real atavism. Preparing the way for a new understanding, Gustav Radbruch asked the question: What role do laws – in the original sense of the term – play among all types of norms, and according to our absolute vision of the world? In this provocative formulation one may identify the question about the essence of law. This question targets *a fortiori* the emancipatory question if labour law is not part of law. It may even be answered positively by considering that labour law overcomes the abstract idealism of Kelsen's theory. Such a reading suggests an understanding of law that combines the sociological, political and economic forces from which it emerges. This might bring us closer to various theoretical attempts such as the three-dimensional theory of law by the Brazilian philosopher, Miguel Reale. According to the latter, law is expressed in conjunction with fact, value and norm.

More generally, contributors to this book should assume the main task of academics in this legal area, who are constantly in search of new methods to reconcile the protection of workers' social benefits with the dynamics of business, environmental preservation and the struggle for greater equality. However, an ongoing adaptation process needs theoretical frameworks more than ever. This book aims to deliver those by assembling philosophical and sociological foundations of the law as a discipline and labour law in particular.

The first part collects together the theoretical bases from philosophy and sociology which are required for reflecting on labour law. The book then goes on to demonstrate the exhausting effects of global financial and health crises, as well as technological demands, on traditional institutes of legal protection in this area.

By including country and regional reports, the second part aims to draw out how the legal discipline has mobilized institutes and concepts to struggle with the deepening social inequalities resulting from societal transformations. As similar challenges arise – to a different extent – in all jurisdictions, this book also tries to explore new patterns of thinking from a global point of

view by illustrating universal principles to deal with these challenges. As emphasised before, the objective of this book is to provide incentives to leave the habitual framework of legal thought.

This brings us to the third part which illustrates recent economic evolutions (fragmentation and flexibility), society (minorities and migration) and technology (online platforms and new kinds of work relationships). In light of these impacts, the question to be answered is: What are the characteristics of contemporary labour law? Examples of these transformations (platform work, robots, etc.) help us to rethink labour law in the new and constant context of crisis. While we have taken the current crisis as a starting point which reveals the necessity for rethinking and developing labour law further, the main concern is broader.

Therefore, the fourth part reminds us that, if we take these facts seriously, we are able to shape the future of work. Although some authors imagine irreversible transformations of this branch of the discipline, others remind us to stick to the ideas that initially underlay the foundation of labour law. While the aforementioned challenges could be considered as new parameters to be taken into account, they should not affect the essence – and thus the existence – of labour law itself.

PART 1.

THEORETICAL BASES FOR REFLECTING ON LABOUR LAW: LESSONS FROM PHILOSOPHY AND THE SOCIOLOGY OF LAW

CHAPTER 1

SOME REFLECTIONS ON THE PHILOSOPHY OF LAW AND LABOUR LAW

GIUSEPPE CASALE

Philosophy has questioned the law since the time of the ancient Greeks. Legal philosophy (or the philosophy of law) is a branch of philosophy and, like ethics and political philosophy, is a part of the philosophy of practical reason (Finnis 2014). The aim of the philosophy of law is to investigate the nature of law, exploring its relation to human values, behaviours and political communities. The central task of legal philosophy is to seek a general explanation of the normativity of positive law. The philosophy of law thinks about law, inviting the interpreter to assume the future as a fundamental phenomenon of time (Heidegger 2005).

In general, the four major theories of legal philosophy are natural law, legal positivism, Marxism and realism. However, the philosophy of law becomes interrelated with labour law when we deal with the area of legal philosophy and legal interpretation.

Legal Philosophy and Legal Interpretation

Legal interpretation has always been the subject of great attention in academic debates. While it is considered a central activity of legal practitioners (e.g. judges), it is often overlooked in legal theories by philosophers. However, legal interpretation is not the only tool by which conclusions in the legal field are produced. For example, some authors argue about "a broad meaning of legal interpretation, which concerns all interpretative activities that take place in the legal field of experience" and "a narrow sense of legal interpretation […] which concerns interpretative activity focused on texts" (Villa 2010).

Labour disputes often revolve around problems of interpretation, as exemplified in cases of individual legally binding contracts or collective

agreements. That said, the situation becomes even more complex when it is necessary to interpret labour law texts such as statutes or constitutional charters. It is commonly believed that through the activity of legal interpretation, the one who interprets (the court) must seek the intention of the drafter, but identifying such an intention is often very complicated. For example, labour laws are often written by groups of people for whom the subjects have no common intention; or in some texts of labour legislation or constitutional provisions it is possible to identify different types of intention (one general and one specific). Moreover, these labour laws govern future circumstances that have yet to occur and which are often not easily foreseeable (Bix 2012). In this regard, jurisprudence plays a fundamental role in legal interpretation. Jurisprudence, like the other branches of philosophy, can be divided into several categories. Of these, the three main ones are analytic jurisprudence, normative jurisprudence and critical theories of law (Coyle 2013).

Analytical Jurisprudence

Analytical jurisprudence can be defined as "a branch of legal positivism that attempts to provide analytical tools by which the law and legal concepts are most accurately and rigorously described. It involves the examination of legal reasoning, legal interpretation, and the efficacy of laws and legal systems"[1]. Also known as clarificatory jurisprudence, this category is composed of two interrelated spheres, known as "substantial" and "methodological." Before the 1980s, this was mostly known as "substantive," as it was characterised by the creation of theories with the aim of analysing the nature of law, the relationship between legal provisions and the system governed by laws and the relationship between morality and the law. Subsequently, this jurisprudence took a methodological turn characterised by the idea that philosophy aims to understand the nature of law. In this way, analytical jurisprudence has come to be considered as a conceptual analysis of law.[2] According to Bix, conceptual analysis in law is mainly related to two activities: a) "to explain what is important or essential about a class of objects" and b) "to establish an evaluative test for the concept-word" (Bix 1995, Himma 2021).

Analytical jurisprudence is a legal approach found in jurisprudence since the beginning of the 20th century and which has been utilised by a good

[1] The definition is given by Oxford Reference.
[2] Definition of analytical jurisprudence on Encyclopedia.com, www.encyclopedia.com

number of labour lawyers. It responds to the need for stability, which is opposed to the need for change, a theme that is expressed by the more sociological branch of philosophy. The incrementing relevance of this legal approach has created increasing interest among labour lawyers whose object of jurisprudence is positive law. In other words, labour law itself is made up of different laws, which give life to the bodies of other labour laws. These are underpinned by the principles which are relevant for the interpretation of jurisprudence. Among the same principles, which are generally common to several systems, a differentiation can be made between the necessary and the unnecessary. Necessary are, for example, definitions such as "right", "duty", "freedom" or distinctions such as that between laws which are promulgated and those which are not. The unnecessary are those whose presence is not essential for the functioning of the system, such as the distinction between "laws of people" and "laws of things" (Pound 1927). In this context, jurisprudence should concentrate only on the fundamental concepts of law, analysing them in its ordinary use in the professional field.

A real change in analytical jurisprudence was brought about in the second half of the 20th century, when Hart proposed that emerging linguistic theories should be taken into account in jurisprudential debates. Normally, in the legal process of understanding, the definition *"per genus et differentiam"* is used, but sometimes the application of this method is not possible. In fact, the lexicon used in the legal field is anomalous and differs profoundly from the words of the ordinary lexicon. This situation translates into uncertainty and perplexity due to the absence of a corresponding term in the material world. Represented from Hart's point of view, this is a weak point in analytical jurisprudence, which results in an attachment to definitions and the need for further explanations to be fully understood.

According to this philosopher of law, it was important to focus attention on linguistics, with a sociological approach to law, highlighting the benefits that jurisprudence would derive from linguistics itself. His intention was to analyse in a descriptive and prescriptive way the problems that arise in the specific context of the law, and to then solve them (Bix 1991). In this, one could find similarity with the spirit of labour law, notably that labour law needs other disciplines besides itself to be better defined (Hart 1957). Somehow, from a legal philosophy viewpoint, the indeterminacy of the law is eliminated by the interpretation and application of the law, two aspects that should be considered jointly and indissolubly (Viola 1974).

In essence, analytical jurisprudence does not provide a particular interpretation of legal terms. It limits itself to the assertion of a certain interpretation of a specific term, in the search for a solution to a problem. These particular decisions are up to the judge and not to the philosopher of

law, who only has the task of highlighting when a given interpretation is logical and reasonable. In sum, the increasing interest in analytical jurisprudence has promoted the philosophical dimension of labour law, especially in the common law tradition (Lacey 2006).

Normative Jurisprudence

Normative jurisprudence "involves the examination of normative, evaluative, and otherwise prescriptive issues about the law, such as restrictions on freedom, obligations to obey the law, and the grounds for punishment" (Himma 2021). To this, it should be added: "Normative jurisprudence aims to reinvigorate normative legal scholarship that both criticizes positive law and suggests reforms on the basis of stated moral values and legalistic ideals" (West 2011). Normative jurisprudence questions general issues that contemplate the interaction between values and law, and can translate into what exists between labour law, politics and ethics. Even more, it encompasses issues related to constitutional principles and democracy in the workplace.

Normative jurisprudence is based on the consideration that stating the law is no different from saying what the law should be. The philosophers of normative jurisprudence believe that the law is not adequately explained without recourse to moral evaluations. As some legal philosophers have stated: "the task of characterizing law 'as it is'" is closely linked to an individual's understanding of how law morally should be (Himma 2015).

In this regard, labour lawyers are interested in three common themes of jurisprudence, notably the extent and modalities in which the laws can intervene in citizens' freedoms by limiting them; the nature of the obligation to obey the law; and the justification of the sanction in cases of the law being violated. In terms of the first point, criminal and civil laws limit the freedoms of human beings, but considering that human freedom deserves moral respect, it is necessary to identify the times and manner of these limitations. In this regard, Mill argues, "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. Over himself, over his own body and mind, the individual is sovereign" (Mill 1906, 12f.). Limitations on freedom can occur based on different approaches. As a first example, one can take into consideration legal moralism, which delineates the limitation of freedom by the law as being justified only when it is used as an instrument for eliminating behaviour that is in conflict with collective

morality.

Another approach is that of legal paternalism, which could be defined as the interference of the state in the behaviour of citizens for the wellbeing of the same. In cases such as when protecting the health and wellbeing of the human person, coercive intervention by the state, such as during the Covid-19 pandemic, is justified (Himma 2021).

Regarding the second issue, namely the nature of the obligation to obey the law, some authors believe that there is a moral obligation to obey the law for societies that are founded on social cooperation. This argument has received some criticisms, as it does not provide the explanation in relation to an obligation regardless of the content of the law, and citizens are not offered the possibility to refuse the benefits they derive from the law itself and its compliance. Other arguments are problematic too, such as that of consent as, in the case of the acceptance of benefits that cannot be refused, real consent is not implied (Himma 2021).

Critical Theories of Law

When examining the critical theories of law, which have their roots in Hegelian Marxism (Christodoulidis 2019), one could find an innovative approach to the more traditional forms of the philosophy of law (Himma 2015). Their starting point is realism. Boyles wrote, "it is a commonplace that to understand critical legal thought one must first understand legal realism" (Boyle 1985). A common and distinctive trait of the theories falling into this category is the rejection of any cognitive claim and doubt about legal knowledge. During the 1970s and 1980s, important debates of critical theorists mainly revolved around which concept of law was the best one (Balkin 2009). The liberal claim was that the law could not be apolitical and impartial, because it is understood as being a political tool that hides the reality characterised by oppression and domination (Sinclair 2010). The Critical Theories of Law marked a significant debate around the philosophy of law. Among others, mention should be made of critical legal studies, minority jurisprudence and women jurisprudence.

Critical Legal Studies

Critical legal studies is an intellectual movement which believes that the law is not free from moral values and politics. Members of the movement use the term politics not to mean "class struggle" but as a reference to the role of economic and social actors within society (Kennedy 1992). This point of view is reflected in their conception of jurisprudence, no longer seen as a

system of accumulated wisdom over time, but as an unfair instrument of power. This movement is openly left wing and advances a project of change in society that it sees as unjust and unequal (West et al. 2020).

The movement attempts to expand Marxist ideas into a critique of traditional liberal jurisprudence. Their thinking is opposed to that of the realists who, according to them, underestimate the indeterminacy of the law. Such indeterminacy of the law creates a sort of internal inconsistency, which allows judges to justify conflicting results. The indeterminacy contrasts with democratic principles because it leaves a great deal of space for the interpretative power of judges, who find themselves not only interpreting the law but also constructing it. In doing so, they run counter to democratic principles, which establish that legislators make the law and are accountable to the electorate (Himma 2015). The movement reached its peak in the 1970s, when it was a reflection of the profound dissatisfaction with the state of legal doctrine which, at the time, was considered excessively conservative and far from the role it should have been occupying. The term conservative can be interpreted in a broader sense that does not take into account morality and the effects of injustices, and does not seek to change the status quo. Perhaps the most lasting contribution of critical legal studies is the consideration that even the set of constitutionally guaranteed rights (e.g. the right to equality, the right to sexual freedom, the right to privacy, etc.) are instruments of subordination. In fact, they have the effect of alienating us from each other, legitimising the conviction of the need for subordination to the ruling classes. Some legal philosophers developed precisely this point by stating that the result of these rights proposed by the liberal legal system is to make humans distrustful of each other, leading them to live a life of anxiety in fear of being stabbed in the back by the other (West 2011).

In this argument, it is possible to identify a common point given by the desire to modify the social structure. In this regard, it is possible to say that labour law has two souls: one “moral” and one “jurisprudential”. The path of the first one is to alleviate a moral suffering while the second one is to intervene in the indeterminacy of the law to make it an instrument for the elimination of subordination (West 2011).

The critical legal studies movement, starting from the critique to liberalism, has developed a cultural legacy. Through the cultural critique, it is possible not only to understand the function of labour law, but also to reach a real understanding of its meaning. Precisely through this full understanding of the law, it is possible to render it an instrument of social transformation (Torres 1988). At this point it is interesting to see the position of Audain, who believes it is possible to identify within this movement at least six distinct criticisms and two sub-categories of

criticisms. The first of these is the "neutrality critique", according to which there are no discourses that are politically neutral. The second one, called "indeterminacy critique", focuses on the indeterminacy of the legislative dictate with the aim of demonstrating it. Then, the "entrenchment critique" allows the scholar to demonstrate how the law is an instrument that keeps power in the hands of those who already have it and continues to fulfil their interests. The "ideals critique" leads the scholar to affirm that the instrument of the law is not suitable for achieving the ideal objective that it had set itself. Finally, the "power critique" demonstrates how knowledge of the legal object contributes to conferring power on those who possess it. Audain, as previously mentioned, also identifies two subsidiary categories: the "mystification critique" and the "constraining critique". The first leadss the philosopher to show how the law leads to the deception of others, while the second how it fails to limit the exercise of power (Audain 1992).

The Increasing Relevance of Legal Rationality in Labour Law

In this regard, in every labour law system there is persuasion to comply with the law. This is seen as necessary in order to avoid unpleasant consequences, in the sense that compliance is considered just. Obedience to rules is requested because they are issued in accordance with just procedures and they are based on valid general standards applicable to all individuals. In this way, the law appears as a neutral and rational body of rules supplemented by objective principles, which require universal respect.

This kind of rationality in the legitimation of power of the dominant interest encompasses not only practices in the workplace but also much slower-paced rationality in the area of labour relations. Historically, the domination of capital was asserted through the instrumentality of the absolute rule of the employer in the enterprise, as reflected in work rules and the system of sanctions applicable in the workplace. In previous years, large employers were anxious to remove the stigma attached to their profit-making activities, which endangered the life of children and women, so they started to support the movement for protective labour legislation.

In this sense, labour law is not the outcome of a single philosophy of the dominant classes but the product of conflicting ideologies, and hence of different approaches to legal philosophy. Among the most common ideologies, mention should be made of the ideology of self-help, the ideology of state help, the ideology of patriarchy, the ideology of social Christianity, and the ideology of socialism.

In assessing the influence of all these ideologies supported by philosophical thinking, one could argue that the development of labour law

does not end with the enactment of specific legislation. The instrumental aspect of the law requires enforcement and the adjudication of disputes as well. The philosophy of law in its various interpretations continues to be of relevance. This can be seen in the way labour law is applied in a proactive manner where, increasingly, prevention and a conciliatory mode is preferred to enforcement and sanctions. In addition, this is connected to the way the philosophy of law is understood within the framework of labour law. Certainly, the positivist theories of law emphasise the neutral role of legal rules in maintaining the interests of all groups within the pre-established "rules of the game". This makes labour law more interactive with the philosophy of law, in the sense that it aspires to provide "just rules and procedures" to be applied in the workplace. In this regard, an example is provided by the increasing relevance of women's jurisprudence.

Women's Jurisprudence

With the term women's jurisprudence or feminist jurisprudence, we mean the "examination of the relationship between law and society from the point of view of all women" (Audain 1992). This implies the use of ideas and principles of feminism in law. Consequently, feminist theories are the key to reading feminist jurisprudence. Feminist jurisprudence as a field of law studies and theories began to develop in the 1960s. With its intervention, feminist jurisprudence seeks to correct legal theory and practices of the tradition. It focuses on the ways in which the law has been structured to deny women's experiences and needs. Although feminist jurisprudence can be divided into different schools of thought, it is generally agreed that they all have a common aspect, namely that feminist jurisprudence is centred on analysing the position occupied by women in a patriarchal society and on methods to eliminate this patriarchy. Precisely because of their critique of the system, the thinking of feminist jurisprudence is closely linked to that of critical legal studies (Lacey 1990).

Feminist theorists distrust the law as it is and start from three fundamental points. First, fundamental legal doctrines are made by men and therefore are characterised by a fundamental male bias, even in cases where they appear neutral. Second, the diversity of women's lives compared to those of men means that the theories proposed by them are inapplicable to women. Third, feminist theory requires that women produce theories from their own perspective and from their own experiences (Baer 2011). As in many cases, the law is unable to see the dangers women face and the needs they have (Sinclair 2010).

A recurring topic in feminist jurisprudence is concern around respecting rights and equality. In particular, there is concern around equal treatment in the workplace. The recurring issue to be answered is how women are treated at work. This is of particular interest to pregnant women. The viewpoint of Herma Hill Kay is especially interesting in this respect, according to whom it is important to protect women from the loss of equal opportunities that could come from pregnancy (Kay 1985, Burchard 2021). Precisely on this issue of pregnancy, the same author theorizes different approaches and develops arguments of discrimination between men and women and the rights that must be recognised for all. In this regard, worthy of note is the thought of Littleton, who believes that the presumption of a difference between men and women must be accepted and that the choice should focus not on eliminating it, but rather on its effects. Therefore, equality should work in the sense of eliminating the costs of these differences. Empowerment models follow this path, rejecting differences as irrelevant, hence "equality […] is understood as what balances power for groups and individuals, and dismantles the ability of some to dominate others" (Burchard 2021).

The critique of feminist jurisprudence extends to overwhelming even the law of contracts. In fact, it is characterised by a cold language that excludes the private and family spheres, with the effect of further penalising women by condemning them to subordination (Letwin 2005).

One of the most problematic knots for feminist jurisprudence to resolve is the determination of damage. In fact, since the system is characterised by a strong patriarchal vision, it is difficult to recognise harm to women in the first place. Women's jurisprudence has allowed the debate to be shifted towards three acts that are harmful to women — rape, sexual harassment and beatings — which, in some cases, were previously not even really considered by the legal system to be crimes. Cases relating to these three harmful acts are often united by the same profiles, which brings attention to some problematic issues, such as the fact that it is often the female victim who is blamed. Women's jurisprudence also extends its investigation to the evaluation of whether or not it is possible to have legal neutrality, that is, if it is possible to be judged by legal practitioners only for one's own actions. Thus, all efforts should be made to the inclusion of the prejudices of the person who is called on to be judged (Burchard 2021).

Legal doctrine is the result of human behaviour. Women were previously excluded from the legislative process, which is why the law was filtered from the point of view of men. Women's jurisprudence first emerged during the same period in which women entered the legal sector either as judges or lawyers. The laws were thus modified to include the point of view of women. Despite these interventions, male prejudice remains in the system,

which still leads the legal doctrine to respond more to the needs of men than women. Both scholars and legal professionals know there is still a long way to go until equality and fairness is achieved in this respect (Baer 2011).

Conclusion

The philosophy of law and labour law have always interacted and have their roots in the past. They have been able to adapt to the needs of different historical periods, becoming a vehicle for the expression of the needs of different social classes and their on-going demands. Philosophers who have dealt with legal debates have questioned the law and its function as well as its *raison d'être* since the times of the ancient Greeks, giving rise to different movements of thought. Legal philosophy is intertwined with legal interpretation, where jurisprudence becomes the main tool for the interpretation of the law. It is precisely in this context that philosophy shows its incredible relevance, both when it comes to analytical jurisprudence and normative jurisprudence, but above all when it comes to critical legal theories and the feminist approach, which bring to the fore social problems of profound actuality. All of this nurtures labour law. Thus, we can observe how, over the years, the study of the nature of jurisprudence has evolved into including a political dimension that goes beyond questions of morality and which endeavours to seek tangible and pragmatic answers to reality.

Overall, we can conclude that while jurisprudence and the legal system have evolved through time to meet the needs of societies, there is an increasing sense that political, social, economic and technological advancements will increasingly question, and thus demand, a rapid change to its status quo. If the legal apparatus of countries fails to address this ongoing trend, and labour lawyers do not actively question the pre-conceived notions of legal philosophy, there is a risk that the jurisprudential system could see a complete overhaul of its powers conferred to it by society and the state.

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CHAPTER 2

THE CRITICAL CONCEPT OF WORK AS A KEY TO JUSTICE

LEONOR SUÁREZ LLANOS

The Relevance of the Concept of Work

The history of societies is the history of their representative, cyclical, successful, urgent, convinced, violent, peaceful, silent, lasting transformations and of the reading of these transformations by the different economic, cultural, political, legal, artistic and religious bodies, and whether or not they promote the recognition of people.

In this history of stories, any conceptualisation that is not strictly descriptive of a given and scientifically demonstrable positive fact — and there are few of these for various reasons of concreteness, value assessment and proof — incorporates a structure of evaluative and normative justification that puts "innocent" concepts at the service of "ideologies."

One of these concepts is that of "work" which, when contemplated through its law, proves to be fertile, interesting and relevant because of its capacity to influence the set of transformations, changes and daily revolutions that go beyond work and alter and define our vital status in a broad sense. I am thinking here, for example, of the successive computerisation and robotization of production; of teleworking; of the young people who are rapidly being spun out of the labour market into precarious working conditions or into systemic-structural unemployment. I am also thinking of workers from the age of forty-five onwards who do not comply with the youth parameters of current markets and management strategies; and of the belligerent scenarios in which women encounter glass walls and ceilings and the gaps, stigmas, prejudices, uncertainties and fallacies that prevent them from accessing all professions and hierarchies.

The aim of this work is to investigate a critical concept and justification of what work is: its reifying (see Lamo de Espinosa 1981, Díaz 1999, 255), alienating (cf. Alonso Olea 1974, on "alienation" and its history in the field

of labour law), redistributive and recognition scope, through a deconstruction and a reconstruction aware of the complexity of the concept and the need to reasonably manage its conditions, objectives and consequences, without "occurrences."[1]

The critical perspective that I work with, therefore, is projected onto the "object" to be known, assuming, on the one hand, that there is a concrete society segmented by multiple and contradictory claims to knowledge that will be appropriated and used by the will to power in the current capitalist, legal, social and market framework. Therefore, the interest of critical theory is to account for the evaluative conditions on which a concept is constructed which, in its apparent innocence and descriptive simplicity, normatively imposes the conditions of labour injustice or justice. And, for this reason, the critical concept I am pursuing demands both to follow different paths from those established by the simple understanding of work as a mere activity of paid production, and to abandon the metaphysics of definition and the objective and universalising presumptions about the identity and subjectivity of those who work.

On the other hand, this critique is confronted with a universal and objective approach, acting as a true critique of society and its theories. After all, each of these theories expresses a reflexive moment that arises from society itself and that accounts, as Lukács emphasised, for the knowledge that reality has of itself and of the objects of knowledge whose concept it refers to.

To this end, I will bear in mind the Marxian contribution in a more Western (Perry Anderson) and less orthodox critical sense, at the service of emancipation and self-possession. Further, I will follow paths that are taken with the impulse of different critical motors of legal conceptualisation which, from the critique of the Enlightenment by Adorno and Horkheimer, point to an alternative, externalised perspective of foundation, rooted in personhood and his or her recognition. These are critical motors that, in different ways, make use of the insights offered by post-structuralism and post-modern conceptions, and also point to post-positive legal approaches. However, labels are the least of it, and they can also present us with undesirable travelling companions who can lead us astray from our destination, tempting us into an unedifying nominalist drift.

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