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A Socio-Legal Exploration of the Linkages between Informal Employment, Social Protection and Labour Law in Latin America*

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ABSTRACT | For decades Latin American societies and policy-makers have attempted to confront the social, political and economic challenges brought about by high levels of informal employment and entrepreneurial activity. Social exclusion, low rates of political participation, dysfunctional social protection schemes and mistrust of the law are some of the social phenomena that are inextricably linked to informality. This research article takes a socio-legal approach to explore linkages between informal employment, social protection and labour law proposing that purely economic or legal approaches overlook crucial contextual issues that hinder the formulation of sound regulatory policies. Thus this paper develops an analytical perspective based on the social rights and citizenship discourse questioning current social policies and the role of labour law.

KEYWORDS | Informal employment, citizenship, social protection, labour law, social rights, socio-legal studies.

Una exploración socio-jurídica de los nexos entre el empleo informal, la protección social y el derecho laboral en América Latina

RESUMEN | Durante décadas, las sociedades latinoamericanas y los decisores de política han intentado hacer frente a los retos sociales, políticos y económicos provocados por los altos niveles de empleo informal y la actividad empresarial. La exclusión social, las bajas tasas de participación política, los esquemas de protección social disfuncionales y la desconfianza de la ley son algunos de los fenómenos sociales que están inextricablemente ligados a la informalidad. Este artículo de investigación parte de un enfoque socio-jurídico para explorar los vínculos entre el empleo informal, la protección social y la legislación laboral al proponer que aproximaciones puramente económicas o jurídicas ignoran problemáticas cruciales coyunturales que limitan la formulación de políticas regulatorias apropiadas. Así, esta investigación desarrolla una perspectiva analítica basada en el discurso de derechos sociales y ciudadanía que cuestiona las políticas sociales actuales y el papel de la legislación laboral.

PALABRAS CLAVE | Empleo informal, ciudadanía, protección social, derecho laboral, derechos sociales, estudios socio-jurídicos.

Uma exploração sociojurídica dos nexos entre o emprego informal, a proteção social e o direito trabalhista na América Latina

RESUMO | Durante décadas, as sociedades latino-americanas e os que tomam as decisões políticas têm tentado enfrentar os desafios sociais, políticos e econômicos provocados pelos altos níveis de emprego informal e pela atividade empresarial. A exclusão social, as baixas taxas de participação política, os esquemas de proteção social disfuncionais e a desconfiança da lei são alguns dos fenômenos sociais que estão inextricavelmente ligados à informalidade. Este artigo de pesquisa parte de um enfoque sociojurídico para explorar os vínculos entre o emprego informal, a proteção social e a legislação trabalhista ao propor que aproximações puramente econômicas ou jurídicas ignoram problemáticas cruciais conjunturais que limitam a formulação de políticas regulatórias apropriadas. Assim, esta pesquisa desenvolve uma perspectiva analítica baseada no discurso de direitos sociais e cidadania que questiona as políticas sociais atuais e o papel da legislação trabalhista.

PALAVRAS-CHAVE | Emprego informal, cidadania, proteção social, direito trabalhista, direitos sociais, estudos sociojurídicos.

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Introduction

This article highlights the socio-political struggles that have sought to translate *de jure* rights claims into actionable social and labour legislation that *de facto* protects and empowers citizens, calling for a comprehensive regulatory approach to the informal employment sector in order to elucidate the function of law's operation in society, and the limits of legislative action. This research claims that the informal employment sector is a promising and fitting analytical prism through which to study the evolution, objectives, and conflicts of social and labour regulation in Latin America over time.

Although Latin American governments have employed law as a regulatory device in order to convey the progressive rhetoric of rights and citizenship, social reality has generally been very different from this throughout history. To a considerable degree, regulatory intervention in social protection and labour law has proved ineffective in protecting workers, empowering citizens, and nurturing businesses. Nevertheless, there can be little doubt that law and regulation serve as a control and steering device for developmental processes, provided that they become embedded in inclusive and accountable socio-economic and political institutions over time.

For decades informal employment has been among the most persistent and pressing features challenging the development of participatory social and political institutions in Latin America. The fervent pursuit of specific economic development strategies coupled with a belief in top-down regulatory policy prescriptions has little bearing on a complex societal problem that will not simply fade away as a result of economic growth. The quality of citizenship and citizens' opportunities to engage in participatory action hold the key to resolving a problem that is both a cause and a consequence of exclusion and inequality.

This article places the analysis of informal employment activities among workers and firms at the intersection of the conceptual dimensions of regulation and rights, focusing particularly on the cases of Brazil, Colombia and Mexico. The labour market serves as the central locus in which to examine not only economic facets of development, but also the social and political forces that shape society's struggle for just and efficient resource allocation, as well as for protective and empowering policies. What is more, inequality and exclusion within the labour market are both symptoms and results of political power asymmetries within society. Furthermore, the persistence of barriers to participation in formal employment activities, which provide income and insurance against life risks, ignores the skills and capacities of the most deprived sectors of society. That process tends to undermine the formation of democratic political structures that aim to advance citizenship rights and economic opportunities.

This article is divided into five parts. These introductory remarks are followed by a second section, which establishes the context for the themes developed in the remainder of the paper, placing the issues of social protection and labour law on the broader canvas of social citizenship and democracy within a market-based economic system of societal organization. The third section explores the rationale for approaching the social question in capitalist societies via public, universal social protection. The aim is to explain the purpose of social protection and labour law, as well as their functional aspects with respect to the informal employment sector in Latin America. The fourth section conceptualizes social protection and labour law within their societal context rather than as separate analytical entities. The fifth and final section offers some concluding remarks.

Social Citizenship and Democracy

Numerous attempts to regulate Latin American labour markets and social protection systems have so far not resulted in a meaningful reduction of inequality on the one hand, and an increase in formal employment on the other hand. Latin America has a long track record of social and labour legislation covering certain select sectors of the populace. Yet analysts have frequently exposed social and labour market policies that fall short of "incorporating social rights in the status of citizenship and thus creating a universal right to real income which is not proportionate to the market value of the claimant" (Marshall 1992, 185). In other words, the notion of the universality of rights, and in particular that of social rights, in the sense of "enforceable claims" (Tilly 1995, 6), has been more cosmetic rather than real throughout much of Latin America's history, although this state of affairs has undergone significant changes over the past three decades.

Thus the Latin American experience bolsters the claim that "there is no simple and universal logic to citizenship in the 20th century" (Yashar 2011, 185), so that Marshall's (1992) taxonomy is instructive to policy-makers but not necessarily observable in societies around the world. However, at the same time, the empirical evidence available on Europe suggests that, like most instances of social change, the process of social inclusion is long-term and incremental. Luhmann aptly captures the core of the process by stating that the "welfare state is the realization of political inclusion" (Luhmann 1990, 35). However, on many occasions persons "without regular work [...] who do not meet [a function system's] requirements" are excluded (Luhmann 1997, 70). Informal employment takes on an exclusionary effect due to inadequate social security coverage and low job quality (Attanasio, Goldberg and Pavcnik 2004, 334). That particular reading of modern society raises interesting questions regarding the regulation of informal employment in developing countries.

In the context of economic development, the notion of the welfare state evolves from “[reacting] to the effects of industrialisation with measures of social help” towards “[meaning] more than just social help and more than just compensation for injuries” (Luhmann 1990, 21). In a nutshell, even though the idea of public social and labour policy propagates the inclusion of all members of society, some individuals are excluded due to their labour market status, which again tends to be the ramification of prior exclusion on the grounds of education, class, race or gender. Furthermore, advances in industry, politics and society require regulators to think beyond the rather passive notion of a safety net and towards active policies of empowerment and protection.

Societies that have already consolidated relatively high degrees of social inclusion face fewer obstacles during the implementation stage of a new policy or a novel piece of regulation due to substantial levels of trust and legitimacy. Thus, the social fabric and the social capital of a society are decisive factors in bringing about lasting regulatory change. However, measuring inclusion and the quality of the social fabric can hardly be done with numbers alone. In other words, this research is not so much interested in the number-crunching game of analysing economic indicators and counting the pieces of legislation passed successfully, but rather more in the motivations for and ramifications of shifting patterns of social and labour regulation.

Focussing solely on a critique of regulation as a cure for the woes of Latin American labour markets would be too narrow an approach to derive analytical insights into the reasons for the continuous presence of high levels of informal employment on the one hand, and policy prescriptions for possible counter-measures on the other hand. Instead, what has become more pronounced is the notion that apart from law and regulation, numerous other factors such as entrenched inequality, access to the legal system and bank credit, democratization, state capacity, housing, education, and global macroeconomic factors decisively influence socio-economic development in general terms and the informal employment sector in particular.

Of course, almost all the individual factors mentioned above tend currently to fall under some kind of regulatory regime as well, so that policy-makers would be well advised to conceive of social and labour regulation as either covering a broader remit of regulatory areas, or as a field of regulation that could produce mutually beneficial outcomes by collaborating more closely with regulatory areas such as education, housing or credit.

The combined forces of economic and political history, as well as the increasing integration of national economies into global markets, confront Latin American countries with a number of social justice

challenges. The term “social justice” is understood here as the “basic institutions of society [having to] sufficiently benefit all, including the least advantaged and most vulnerable members of society” (Brennan 2012). The contested issues of social legislation, labour law and labour market regulation are among a range of common obstacles on the road towards more equitable and economically dynamic societies.

The labour market is of fundamental importance for linking society and the economy since it acts as a mechanism that allocates “the sweet or bitter fruits of economic development [...] among the population” (Pérez 2005, 205). A labour market that is capable of improving the quality of “employment opportunities for the poor” is key to transforming economic growth into declining rates of poverty (Gutierrez *et al.* 2009, 15). Moreover, labour markets have been central to the process of “social integration” in Latin America, in the sense that dysfunctional labour markets have a correspondingly dismal effect on social cohesion (Bayón, Roberts and Saraví 1999, 104).

Put differently, “[p]overty and equity outcomes are largely determined by” an economic environment and a regulatory framework enabling labour markets to create formal jobs rapidly, particularly as an economy adapts and emerges from a prior contraction (Tokman 2002, 159). As an adequate measure of the impact of labour law and labour market regulation, one can assess the progress made in terms of contributing to labour market outcomes that protect and empower workers whilst also creating decent employment, or “economic growth [...] compatible with human development” (Deakin 2011, 157). Yet, on precisely the two issues of worker protection and the creation of decent employment, Latin American labour markets have not scored high.

In order to be effective in driving economic growth, redistributing wealth and contributing to a set of policies geared to the lower social strata, labour regulation needs to be simultaneously oriented along the lines of equity and efficiency, and it is hence important to focus on dimensions of labour market regulation beyond the employment relationship. It is helpful, therefore, to analyse current social policy, i.e. policy in the wake of Import Substitution Industrialization (ISI) and the heyday of neoliberalism in the region, against the background of the thought most prominently expressed in the seminal publication “The Great Transformation” (Polanyi 2001). According to Polanyi’s analysis, it was impossible to construct a solid and fair “social order” in a market-based society, for it established strains, which unavoidably drove “individuals [to request safeguards] from the market’s destructive power because market society sought to reduce humans to [...] commodities” (Silva 2009, 17). Against this background, it is worth bearing in mind that the Philadelphia Declaration of the

International Labour Organisation (ILO) also explicitly warns against the latter point as an outcome that said organisation has sought to avoid ever since (ILO 1944). According to Kuchler, Bourdieu's more contemporary perspective seems closely aligned to Polanyi's, as the French sociologist views the welfare state as an "achievement that protects society from run-away capitalism" (Kuchler 2006, 7, my translation).

Moreover, Silva argues that demoting people "to (fictitious) commodities disrupts [their] economic stability, [and] sense of justice, [so that] people inevitably seek [insurance] from the [...] unpredictable [...] market" (Silva 2009, 17). In this context Polanyi states that the three commodities —land, labour and money— could not in reality be translated into tradeable goods "as they were not produced for sale on the market," thus leading Polanyi to label them "fictitious commodities" (Polanyi 2001, 79). What is more, Polanyi inserts another vital clarification into debates on labour, claiming, "labour is the technical term used for human beings, insofar as they are not employers but employed" (Polanyi 2001, 79).

Silva's 2009 summary of key concepts of Polanyi's work in the above paragraph is, of course, reminiscent of the ideas on citizenship put forward by T. H. Marshall (1963 and 1992). In regulatory parlance, Polanyi's thought lays bare the tensions between private and public theories of regulation, and shifts the analytical focus towards the notion of the public interest. Polanyi's arguments "extend beyond, and [are] antithetical to the practices, values, and outcomes of market-driven decision-making" (Feintuck 2010, 39). In an attempt not only to reconcile warring competitive and protective themes, but also to provide an analytical roadmap, the institutionalist regulatory paradigm maintains that the markets for labour and commodities "are conscious institutional constructs rooted in historical trajectories and based on evolving political choices" (Chaudhry 1993, 249).

Furthermore, the signalling mechanism that prices fulfil in the markets for actual and real commodities rather than "fictitious commodities" leads to the "rapid balancing of supply and demand," and the price mechanism is alien to the market for labour in "which supply and demand are balanced" more slowly (Block 2005, 8). In more general terms, prices take on the role of languages within the setting of the market, "enabling people to form mutual expectations" (Schmidt 2012). If applied to the labour market, the concept of volatile prices would undermine "societies that sustain stable identities and identifications" (Streeck 2008, 5). Some elements of stability have, of course, already become embedded in society over time, but further societal stability has been sought throughout contemporary Latin America following the demise of ISI, the hardship of the debt crisis, and subsequent experimentation with neoliberal policies.

Thus the call for the "socially, politically and ideationally [embedded nature of markets]" (Block 2005, 8) singles out the labour market as a more natural and urgent field of societal intervention and protection than is the case with other markets which governments have historically regulated, such as the telecommunications or energy markets, for example. Within this context, Olin Wright (2005) suggests the introduction of an unconditional basic income. Key regulatory aims are to contain or to embed markets and to provide stability, so that markets are agreeable and accommodating to individuals acting within them. Moreover, we learn from Filgueira and Filgueira that protection intended to shelter individuals against market energies is either "based on the market (individual capitalization), the state (welfare regimes), or on civil society (pre-capitalist protection)" (Filgueira and Filgueira 2002, 128). As those are ideal types of protection structures identified for the purposes of analysis, one can presume that in reality the manifestations of each individual category impact a society's protective regime with different degrees of volatility over time.

Furthermore, a changing global political order in a post-Cold War world, the introduction of new constitutional frameworks in countries such as Brazil (1988) and Colombia (1991) that broadened access to justice, and an increasingly deep-seated awareness of the importance of social rights, firstly as an input factor, secondly as an accompanying theme, and thirdly as a consequence of democratization, both motivate and necessitate novel approaches to social policy-making. Parker understands access to justice as advancing "more substantive [legal] reforms [ensuring] the interests of the poor [and] diffuse public interests can [...] overcome the discrepancy between the claims of substantive justice and the formal legal system" (Parker 1999, 31).

Integrating the process of Latin America's post-1980s "Third Wave" of democratization into the analytical framework offers additional insights into social policy-making and labour market institutions (Huntington 1991 and 1997, 11). "Political competition and participation" as driving forces behind democratization not only positively impact the development of political institutions, but also result in improved labour market outcomes (Rodrik 1999, 707). More specifically, the case of Mexico illustrates that the "political context in which labour markets operate shapes [participants'] behaviour," so that the democratic nature of political institutions joins the oft-mentioned economic institution of labour productivity as an explanatory factor for wage increases (Rodrik 1999, 708).

Western European experience demonstrates that over time the competitive politics of liberal democracies lead to higher demands for welfare and social justice with corresponding pressures on public finances, public borrowing and levels of taxation on the one hand, and

more equitable societies on the other hand. According to Whitehead, a citizenry with access to universal suffrage “can exercise some leverage over public policy priorities [and revise] goals of democratic development” (Whitehead 2004, 107-108).

However, Gerring, Thacker and Alfaro caution that the dynamics of Western European democratic and welfare development do not tend to unfold in a similar fashion outside of the western world (2012, 1-2). Consequently, said authors not only claim that “the case for democracy as a welfare-enhancing mechanism appears shaky,” but also that civil society, democracy and welfare-state institutions undergo unstable development requiring a long-term perspective in order to yield political and social “dividends” (2012, 2-4 and 15). It has been suggested that the process of acculturating the elites towards “[accepting] a relative loss of social and political authority” features as one of the key challenges confronting nascent democracies (Grugel 2007a, 45). Furthermore, reforms and increased spending on primary, secondary and tertiary education probably require as much as a whole generation to bear fruit in terms of equipping citizens with literacy skills and technical training, so that they can more actively engage in and contribute to democratic and socio-economic development (Tenjo 2012).

On a related matter, Santiso and Zoido argue that political pressures and the design structure of a democratic polity place “fiscal policy at the heart of the relationship between citizens and the state,” so that the contributory system of Latin American countries that fund social policies appears as a promising area of analysis (Santiso and Zoido 2011, 309). In fact, a study of Latin America by Nieto and Santiso covering the period between 1990 and 2006 reveals that “the impact of elections on fiscal policy is high” and more significant than in high-income countries in terms of increased short-term expenditure for electoral gain (Nieto and Santiso 2012, 566 y 580). With respect to the development of democratization and social policy in southern Europe, Ferrera notes that the stability of democracy is enhanced by universal social protection, which buttresses “citizens’ loyalty to national institutions [and ensures their] allegiance through the provision of material advantages” (Ferrera 2007, 95).

Furthermore, Turner and Martz argue that during the consolidation of democratic institutions, “the level of confidence that citizens have in the institutions of their nations” is central (1997, 65). Nevertheless, whereas Spain and Portugal democratized during the 1970s in a geopolitical environment hospitable to coupling political change with increased social budgets, Latin American paths to democracy were, by and large, strewn with the necessity to limit budgetary demands during times of “economic crisis and neo-liberal state reform” (Grugel 2007b, 248).

In this context it is crucial to point out that Latin America’s history of social reform has experienced frequent instances of piecemeal rather than universal implementation of protective schemes, which goes some way to explaining the divergence between Ferrara’s (2007) observation on Europe and Latin America’s social reality. Moreover, similar to the evolution of citizenship rights, democracy in Latin America “followed an unusual political evolution when compared with [some European] cases where democracy emerged on a step-by-step basis” (Valenzuela 2001, 268). In fact, Latin American industrialization was not accompanied by the “formation of an industrial working class and labour movement,” and hence tended to lack a crucial emancipatory force conducive to citizenship (Huber 1988, 23). In this context, O’Donnell stresses that the process of democratization implies achieving “some reasonable levels [...] of modernization and democratization of many social—not just political—relations, and redefining a role for the state” (O’Donnell 1992, 49).

Despite Tilly’s convincing claim that the progressive advance of democracy and citizenship is a function of “the maintenance of [...] rights” (1995, 5), democratic politics has actually had a lesser impact on the development of social policy in Latin America than “state expansion,” which has played a stronger role, especially during the ISI period (Filgueira 2007, 136). Put differently, the mechanics of welfare state creation tend to be guided from above rather than by participatory elements from below. Yet Filgueira’s research findings suggest that due to “the relationship between democracy and welfare expansion [being] strongly path-dependent,” the contemporary democratic nature that predominates in the region “might well be the basis for a new push regarding social policy efforts” (Filgueira 2007, 137-138).

Before the onset of democratization processes throughout the region and prior to popular forces intensifying processes of legal innovation in the form of influential constitutional courts in some Latin American countries during the late 1980s and early 1990s, the state had often failed “to discipline capital” in order for citizens to actually “exercise [...] rights” (Tilly 1995, 13). In contemporary times, the three branches of government have been subjected to more profound pressure from national as well as international actors to shore up the stability and authority of the state.

In more general terms, Brennan argues that “[i]f our basic institutions systematically fail to benefit innocent people [...] then it is unreasonable to ask them to observe those institutions” (2012). With respect to labour and social regulation, Arthurs cautions that “[i]f [...] labour law [...] is so transformed that it no longer advances justice [...], it will lack legitimacy [and efficiency]” (Arthurs 2011, 29). Policy-makers are hence called on to either maintain or strengthen the relevance of labour law as an integral part of compre-

hensive social protection policies with respect to such areas as informal employment and the burgeoning group of own-account or self-employed workers and micro-enterprises.

Furthermore, social policy acts as the transmitter between aspiration and implementation in order to make social rights accessible to as large a proportion of the population as possible, and thus to gradually achieve a state of universality. In other words, in the contemporary Latin American context, social policy attempts to construct “*a state-society nexus that is developmental, democratic, and socially inclusive*” (Draibe and Riesco 2007, 2, italics in original). Whereas informal employment is in large part an act of exclusion, social policy seeks to create more inclusive social relations that make an individual’s life course more predictable and secure. Inclusive social and labour market policies aimed at the informal sector seek to formalize employment as well as businesses, so that a greater number of productive units complies with at least a minimum level of social and labour regulations.

Advancing the idea of labour regulation in terms of “a minimum threshold” is not an endorsement of any restrictions placed on informal workers’ claims to rights under a country’s labour code (Tokman 2011, 785). The underlying notion appeals rather to policy-makers, business associations and unions to become more familiar with the realities of Latin American labour markets and their “grey areas” (Tokman 2001, 50) in order to “[improve] informal-sector enterprises’ ability to comply, and [to commit] them to follow this path” (Tokman 2011, 785). Micro-enterprises are especially at risk of generating insufficient profits and failing to amass the necessary legal and fiscal know-how in order to stem the expenses of regulatory compliance. Therefore, policy-makers face the complex and electorally unattractive task of advancing along a path of incremental regulatory steps with respect to micro-enterprises and street vendors. Such regulatory advances would have to benefit informal workers and enterprises by initially offering the key benefits of a formal employment relationship and a legally recognized business in exchange for the prospect of increased tax receipts for the state in the future.

However, social and labour legislation have all too often pursued separate agendas, setting adverse incentives that have facilitated socially and fiscally malevolent behaviour in the labour market. That also includes the threat to formal firms posed by informal economic units, since “tax evasion can amount to a large subsidy for low productivity firms” (Chong and Pagés 2010, 153). In fact, the Colombian labour economist Jaime Tenjo (2012) wonders whether a substantial number of participants in the informal labour market actually rather prefer to maintain their informal status rather than a formal employment opportunity. Considering the generally

low educational levels of informal workers, a key reason for their exclusion from the formal employment sector, coupled with the subsidies many receive via government social assistance programmes, the pursuit of such informal activities such as taxi services and selling confectionery, beverages or mobile-phone minutes on the street may generate a higher standard of living than what they can find in the formal labour market (Tenjo 2012).

The alternative to rethinking regulation is that the state’s protective and fiscal edifice either fails to take shape or inevitably crumbles, as rules imposed from above do not sufficiently correspond to social realities on the ground. Put differently, supported by a sufficiently substantial coalition of societal interest groups, regulation has the potential to arrest the decline towards corrosive forms of behaviour, and instead strengthens the respect for equity-enhancing institutions and the rule of law.

Nevertheless, the regulatory approaches that have been formulated to address specific labour market challenges have been counterproductive, incoherent and inefficient in many cases thus far. Not only does this represent a fiscal disaster for governments in the region, it also means an uphill battle for those outside of the system. Individuals in the informal sector strive for a level of labour protection, insurance to soften the blows of economic hardship, and the acquisition of capabilities with which to exploit their creative talents. Analysing the evolution of specific social policies in the context of the labour market’s informal sector reveals the strong links between holding a formal job with de jure access to public social services on the one hand, and the funding of significant parts of Latin America’s social security systems on the other hand.

Yet the dichotomous structure that allows certain citizens disproportionate access to different streams of public spending whilst shutting the door to others leaves little room for stability and lasting social peace within a society. Echoing Filgueira and Filgueira’s taxonomy, despite their de jure status as citizens, the outsiders must rely on their very own efforts or those of their closest kin in a “pre-capitalist” mode of insurance as opposed to the blend of state-based and market-based insurance available to many of the insiders (Filgueira and Filgueira 2002, 128). Over time, socio-economic and political inequality feeds pressures that eventually surface within today’s predominantly democratic Latin American countries. Hence, the state has faced the challenge of finding and employing resources in a way that provides individuals outside the formal system with a level of de facto access to public services such as social insurance, legal redress, and education.

There have indeed been advances in recent years in terms of coverage and access, especially with respect

to the extension of social assistance programmes that cut the link between the formal employment relationship and access to social insurance. However, many so-called complementarities such as corruption and clientelism are still rampant in politics, and basic needs of housing, infrastructure and personal safety have remained disconnected from social citizenship. A further corollary is the fact that state budgets need to adjust to a new paradigm of higher social spending, which requires corresponding revenue increases in the long term. The latter is best achieved if a greater proportion of the economically active population holds formal jobs producing income that can be taxed. Striking a balance between the desire to empower as well as to protect on the one hand, and the desire to get people into productive jobs as well as to let them enjoy the fruits of their labour on the other hand, spells out the gist of the puzzle. Against this background a policy focus on human capabilities is most likely to lead to a process of transformation and development.

By and large, most Latin American countries have opted for a social protection regime linking employment status to social insurance, a relationship that has in some cases been operating for almost a century. Thus, the system makes access to social insurance contingent on the existence of an employment contract, thus establishing an unshakeable link between labour and social regulation. On a global scale, one finds numerous countries that have implemented this system with considerable success, as is the case in western Europe, although widening cracks have begun to appear on the funding and sustainability side even in Europe. Nevertheless, in most Latin American countries, social insurance financed through payroll tax revenue continues to suffer both from high deficits and from low coverage and participation, a combination that is neither conducive to the generation of formal employment nor to financial sustainability of the welfare regime.

However, the problem is not only one of ill-devised incentive schemes that have evolved over time. Rather, “informality is above all an expression of the lack of trust in public institutions [and] the limited understanding of the benefits derived from social security” (Schmid 2009, 38). Conducting longitudinal research in the *favelas* of Rio de Janeiro over the course of almost four decades, Perlman claims that *favela* residents make little distinction between jobs in the formal and the informal sector as long as they have the chance to “earn fair pay for decent work” (2010, 264). The perspective of *favela* residents “is that given the opportunity to earn their living, they could solve most of their other problems on their own” (Perlman 2010, 264).

There are manifold factors that explain why workers might not highly value direct and future eligibility for social security coverage, which they earn via their

co-financing of mandatory non-wage payroll taxes over the course of a formal employment relationship (Atal and Ñopo 2010, 187). Workers may “assign a [low] utility” to the social benefits, as well as fiscal duties that a formal employment relationship involves, and may instead opt for higher take-home pay due to “liquidity constraints; lack of knowledge of the [social insurance] systems; myopia; financial illiteracy; limited access to benefits; poor programme quality; undesired bundling with other social security elements; lack of government credibility” (Atal and Ñopo 2010, 187-188).

In a nutshell, trust in social insurance and in the benefits of participation seem almost as important as the existence of the system itself. What is more, laws that do not bring about substantial change will not deliver the trust that is needed in order to formalize, increase revenues via taxes, educate and invest. Roberts advances a similar argument by stating that, even though the process of formalization does not by its own nature result in enhanced “services and effective coverage, [...] it does mean a deepening of citizen-state relations” (Roberts 2005, 153).

The above discussion indicates the gap between aspiration as expressed in legislation and political rhetoric on one side, and the way most Latin Americans experience socio-economic reality—or the “distance between norms and facts in labour market institutions”—on the other side (Bensusán 2006, 115, my translation). According to García and Rodríguez, the “gap between the written law and reality does not seem [...] to be a dysfunction or a failure [...] but rather [law’s] characteristic element” (2003, 30). The complexities of informal employment are very much an expression of this dichotomy. Thus, paradoxically, we witness the “expansion of informal activities in a largely regulated context” (Castells and Portes 1989, 13).

The Purpose of Social Protection

Social protection as a tool of social policy-making acts as an anti-poverty measure, pools risk across society, and deals with issues of individual myopia in terms of insuring against risks. The motivation for social protection originates from social rights discourse and the contested notion of citizenship. Seen through the conceptual lens of Amartya Sen’s capability approach, the combination of social protection and labour law establishes “institutional mechanisms [extending] the substantive freedom of action of individuals” (Deakin and Koukiadaki 2011, 6). What is more, regulatory policy-making motivated by social rights discourse does not stop at providing “formal access to the institutions of property and contract,” but also seeks to fulfil a “*market-creating function*” to provide incentives and equip citizens to “participate in the labour market” (Deakin 2005, 4, italics in original).

Labour regulation is chiefly concerned with the issue of freedom of association, the prohibition of child labour, safety provisions, minimum wage policies, overtime and vacation legislation, as well as “maternity-related leave” (Cox 1997, 129). Labour law regulates individual and collective aspects of the employment relationship and industrial relations. Those regulatory devices have generally been extended to cover the issues of generating employment and providing vocational training (Cox 1997, 129). According to Hausmann, traditional social policy vis-à-vis the regulation of labour includes three additional components: “public provision of health and education services; [...] publicly provided social security; interventions in the price mechanism through controls and [...] subsidies” (1994, 173).

Basic social security acts as an inclusive measure “making the outcomes of economic forces more equitable [enhancing] peace, stability and social cohesion” (ILO 2008, 2). In order to facilitate the management of an individual’s life risks and to contribute to lowering the poverty rate, “[g]overnments make transfers to households, either in cash or in kind” (Ferreira and Robalino 2011, 836). Life risks such as an individual’s health, longevity, and income are to a considerable extent dependent on employment status.

Regular occurrences of market imperfections, moral hazard, imperfect information, and adverse selection that cause instances of market failure, suggest a need for government intervention in order to provide a mechanism to cushion the impact of risks by spreading uncertainties across society rather than concentrating societal burden on a specific sector (Akerlof 1970, 488; Arrow 1963, 967; Rothschild and Stiglitz 1976, 648). Purely private systems of health or unemployment insurance, for instance, would only admit relatively healthy individuals or those with relatively high degrees of skills or job security, so that the resulting costs must be shouldered by either the state or the “vulnerable worker,” disregarding considerations of “cost effectiveness as well as social cohesion” (Deakin 2011, 164-165).

In fact, Samuelson (1958, 481-482) analysed social insurance from the point of view of a social contract between the different generations of society and the state “as a complicated device for self- or reinsurance,” so that the system allows for efficient and reliable inter-generational burden-sharing. Of course, such a complex social insurance scheme not only invokes “Kant’s Categorical Imperative [enjoining like people to follow the common pattern that benefits the most],” but also stresses “money as a medium of exchange” (Samuelson 1958, 480-481). Stable money as a key motivational factor to buy into state-orchestrated social insurance has only recently become a hallmark of at least the major Latin American economies, as a degree of permissiveness towards inflation has undermined the state’s legitimacy and its capacity throughout the region’s history.

On an elementary level, social protection is motivated by equity concerns and risk pooling “from localistic micro-solidarities to societal institutions such as trade unions, insurance companies, or the welfare state” as societies undergo processes of modernization (Esping-Andersen 1999, 48). Industrialization increased the demand for wage labour, and in the context of an industrialized economy the existence of social security can provide an incentive to workers to seek employment in the formal labour market (Deakin 2011, 165). However, Deakin’s argument needs to be scrutinized because an economy has to create labour demand and thus offer formal employment in the first place in order for a worker to participate in social security. Moreover, contemporary social policy can no longer rely on the relative safety provided by the nuclear family and the idea of the male breadwinner. Similarly, policy-makers have to take into account socio-economic shocks like the forced displacement of a country’s population, as in the case of Colombia.

A further rationale for social security is based on the need to counteract the negative ramifications of such human personality traits as myopia, implying that “agents [discount] near dates much less than distant dates and [end] up saving too little” (Andersen and Bhattacharya 2011, 157). Individuals with little access to information and education particularly tend to be worse affected by myopia, as they are subsequently less likely to be able to act on future financial concerns such as old-age pensions and health insurance. Therefore, governments have built up bureaucratic and administrative capacities in order to put in place a system of mandatory contributions and savings.

Domestic workers tend to have low levels of education, inadequate knowledge both of social security and the legal system, as well as low job security since they can easily be substituted. These workers often require the support of benevolent employers and Bureaus of Citizen Advice in order to fully grasp the importance of regularly funding their public pension accounts. Of course, an additional explanatory factor for the relative passivity of domestic workers is the fact that the poor in Latin America generally have a low opinion of government schemes that purport to provide them with security. Moreover, with lower-than-average life expectancy, the poor find it difficult to value a pension that would only be paid out to them once they reach the age of sixty or older, depending on the individual country’s legislation (James 1999, 13).

Governments have devised social protection systems with two protective components. The state centralizes income streams via its monopoly on taxation and redistributes resources according to shifting patterns of spending priorities, which are informed by the competitive forces of politics. It is difficult to draw a clear conceptual line between the two elements of social protection, namely social insurance and social assistance (Ferreira and

Robalino 2011, 837). However, on a fundamental level social insurance is “intended for consumption smoothing and [social assistance] for redistribution in permanent incomes” (Ferreira and Robalino 2011, 837).

Social insurance tends to be financed via contributory schemes, i.e. payroll taxes that are co-financed by the employer and the employee in a formal employment relationship. Social assistance is paid for out of the non-contributory components of the national budget, i.e. consumption taxes or royalty income, and, importantly, income from formal labour market participants’ payroll taxes or non-wage labour costs.

Crucially for the informal sector debate, due to the relatively low number of participants in the contributory scheme, social assistance has taken on a markedly higher degree of importance as an anti-poverty measure in most Latin American countries over the past decade. Most social assistance programmes thus focus on “in-kind transfers (particularly food programmes); workfare programmes; non-contributory social insurance schemes (such as social pensions); and conditional cash transfers (CCTs)” (Ferreira and Robalino 2011, 838). Social assistance has thus been devised in order to protect those citizens who do not contribute to social insurance via their co-payments of non-wage labour costs.

This situation tends to arise because of “either legal avoidance (primarily through self-employment) or illegal evasion” (Atal and Ñopo 2010, 185). In fact, a majority of households do not have a “family member in the labour market who receives protection against risks,” so that, depending on an individual country’s social and labour regulation and policy, there potentially exists a significant danger of downward social mobility if an individual falls sick, becomes unemployed, or reaches old age (Atal and Ñopo 2010, 185). However, advances in social assistance have sought to create a mitigating buffer in so far as the social protective system nowadays provides access to basic social healthcare, for instance, independent of the employment status of the head of household, at least in urban areas.

Indeed, the current structure of social protection can act as a disincentive to seek formal employment. Based on an individual’s calculations, he might be better off earning a wage in an informal job whilst at the same time taking advantage of elements of social assistance programmes, which would normally be denied to him if he were in a formal employment relationship. In fact, “[c]onditioning welfare transfers on the labour-market status of the potential beneficiaries will increase the level of informality of the economy” (Galiani and Weinschelbaum 2012, 837). Maloney observes that “[o]ften an entire family is covered by medical benefits when any one member is formally employed, so the marginal value of benefits to the second formal sector worker is zero” (2003, 72).

Thus, according to institutionalist regulatory parlance, such social “[i]nstitutions [as social protection] reduce uncertainty by providing a structure to everyday life” (North 1990, 3). Nevertheless, apart from structuring human interactions in socially beneficial ways, institutions can also perpetuate suboptimal social orders, constantly challenging the historical and contemporary configuration of social protection and labour law in the economic development of Latin America.

The Social Policy Perspective on Informal Employment

This section stresses the renewed impetus that Latin American countries have given to social policy in the sense that it also inevitably includes labour legislation—the workplace being a locus of exploitation—but also of social mobility, of course. Indeed, the protective institution of social insurance tends to be delivered and administered via the formal labour market (Levy 2008). The term ‘social policy’ is here “understood as any actions by which the state intends to provide *direct* assistance to individuals to raise their living standards.” The state can provide *indirect* assistance by means of “monetary [and] trade policy,” for example (Atal and Ñopo 2010, 184, my italics).

The complex issues that informality raises in terms of insufficient coverage of social protection have also featured more prominently in Latin American policy debates in recent years (Levy 2008). Moreover, there exists a two-way relationship between informality and social policy; i.e. the current design of social protection to some degree provides an incentive to informal activities in the labour market, whilst social protection as a part of social policy has frequently failed to cover individuals who, due to their informal employment status, do not fully participate in the system of social protection that is currently in place in Latin America.

Murillo Ronconi and Schrank state that under current conditions “labour-market based systems of social protection [...] pool risks at the level of the enterprise rather than the economy, and thereby elevate labour costs, undercut redistribution, and give firms and workers an incentive to enter the informal economy” (2011, 809). The policy of funding social insurance via the contributions of the relatively small number of formal labour market participants, in conjunction with commonplace evasion of social and “labour regulations and individuals’ low valuation of social [insurance] benefits” provides incentives to entrepreneurs and employees to “remain uncovered in order to avoid contributions” (Atal and Ñopo 2010, 203). Consequently, that socially suboptimal path adds to the pressure on the social protective regime, which then not only has to provide resources for the coverage of children, the sick and the elderly, but also for those “not covered

by the formal mechanisms” (Atal and Ñopo 2010, 203; Vuletin 2008, 12). In other words, the current funding mechanism of social protection measures runs counter to the principle of equitable burden sharing in society (Levy 2008).

Furthermore, only if a country manages to sustainably control the level of unemployment are there sufficient revenue and budgetary resources for social services. Conversely, employment creation in productive parts of the economy is a political and economic imperative, which governments around the world have found hard to implement. In fact, since the labour market functions as a “social integration axis [...] social protection strategies based on universal rights do not override the purpose of creating more and better jobs” (Bertranou and Maurizio 2010, 27).

What is more, the conceptual framework of this paper does not adopt an analytical focus on employment contracts, which Langille regards as “a very thin and negative foundation for labour law” (2011, 36). Therefore, issues such as the analysis of disputes between individual employees and their employers, as well as changes to the system of severance payments and dismissal legislation, are not discussed in detail. Furthermore, individual labour law has little bearing on labour market and social protection institutions in the presence of high numbers of informal workers and self-employed individuals on the one hand, and low coverage rates of labour contracts, especially in the agriculture, construction and trade sectors, on the other hand. Thinking beyond the confines of this article, an examination of employment contracts would, however, be relevant as part of an extensive analysis of informal employment because of the inextricable links between approaches to creating formal employment and the fiercely debated themes of deregulation and flexibility of labour markets.

Nevertheless, the analytical perspective employed in this research has been guided by social rights discourse, which pursues “a thicker and more positive claim” (Langille 2011, 36). Applied to the study of regulatory approaches to informal employment, only a conceptual lens that contextualizes the nexus between law, socio-economic structures and political forces can be expected to yield a promising analysis. By stressing the essential human and social nature of work, we can more convincingly claim to be wresting the debate on informal employment from the hands of some members of the economics and legal professions who all too often tend to be concerned with dichotomies such as regulation versus deregulation, flexibility versus rigidity, and the minutiae of contract details and court procedures, even though work as a human activity touches on the personal, socio-economic, legal, political and cultural domains.

Political actors and analysts have repeatedly criticized the institution of labour law as a stumbling block on the road towards economic development and as ineffective in protecting “vulnerable workers” (Davidov and Langille 2011, 1). Given the pressing questions raised by informal employment, “[l]abour law faces the challenge of how [to] integrate diversity [and] status issues such as that of precarious workers,” how—as part of a comprehensive social policy approach—labour law can “[protect] the vulnerable,” and in what ways labour law “[relates] to the increasing complexity” of industrial and societal modernization (López, Chacartegui and Cantón 2011, 346).

Moreover, this paper stresses the relevance of the currently operational funding mechanism of the social security system and its claim to universal coverage as a framing mechanism to analyse social and labour regulation. The factors of participation in the formal labour market, sustainability of the contributory system, coverage of social protection, and inclusive policies for the informal sector form the inextricable nexus between labour and social legislation. In fact, the interplay and closer integration of labour law and social protection create opportunities “for the future *relevance* of labour law” (Sankaran 2011, 233, *my italics*) and for the “development functions of labour law” (Deakin 2011, 164).

Conclusion

The fact that under current conditions many Latin Americans are forced or incentivized to labour at least to some extent outside the law has dire consequences for their very own livelihoods, as well as for social cohesion within societies, the sustainability of social protection, and the trust placed in the protective elements of labour law. Nevertheless, several years after a consensus on the need for publicly-funded social protection emerged via fierce political contestation, a considerable number of individuals in the region are still not able to find decent work or to receive insurance against personal life risks and “Black Swan” events in the wider economy.

Moreover, the regulatory framework in many respects undermines an individual’s abilities to engage in entrepreneurship that makes ample as well as productive use of a country’s human and natural resources. In other words, the substantive policy goals of social and labour regulation are most likely met by enhancing capabilities and by empowering individuals to utilize those capabilities. In particular, the continued presence of structural, i.e. non-temporary occurrences of unemployment, often makes state intervention in the form of empowering social policy, protective labour legislation, and public spending a crucial matter for maintaining social peace and providing a minimum level of domestic demand.

Although advances have been made in social policies since the 1990s, employment creation in terms of quality rather than quantity still lags behind most other economic indicators, and labour law hence has limited applicability. Notwithstanding this fact, the legal codes of the Latin American countries studied here still maintain some relevance today, although they have certainly not fulfilled the hopes that have been invested in labour law throughout history.

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