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THE PRINCIPLE OF PROTECTION AS A GUIDE FOR LABOR LAW

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ABSTRACT

Labour law corresponds to the creation of an asymmetrical law, centred on the differences between individuals and on the structural situations of inequality that establish positions of power and subordination. In this sense, with regard to labor relations and labor legislation, the protective principle, or the protection of the worker, is the basic principle, which should guide this aspect of law. This article aims, therefore, to address this principle and its characteristics, as well as to explain its importance for the construction, interpretation and application of labor law. The theoretical framework used is represented by a collective of authors who work on the protective principle and the right to material equality in labor relations, as well as the norms related to labor protection within the scope of international law and the current Federal Constitution.

Keywords: Labor Law. Principle of Protection. Worker.

Revista ARACÊ
ISSN: 2358-2472

INTRODUCTION

This article aims to explain the principle of worker protection, a basic principle of labor law.

For this, first, an analysis will be made of the context of the emergence of labor law, in the midst of industrial societies; and, in a second moment, the principle of worker protection – its vectors of action and its guiding character – will be deepened.

The research will demonstrate that the observance of this principle is important to enable balance in labor relations, which are, by their nature, asymmetrical.

Regarding the methodology, it is clarified that, in order to achieve the proposed results, the research applies the dialectical approach method, which consists of the contradiction of ideas, provoking a debate on the subject, seeking a solution to the controversy. As for the object, the research is of the bibliographic-documentary type, considering that several authors who work with the theme are used and also jurisprudence and materials available on official websites. The development of the bibliographic research is based on predominantly national authors, using readings and research in books, magazine articles, official websites and national legislation. Documentary research aims to collect documents and data, which represent the basis of the research. Finally, regarding the methods of interpretation, the sociological method is adopted. This method considers that law is a cultural phenomenon, thought and conduct of man for the regulation of life in society, which is constantly changing.

THE EMERGENCE OF LABOR LAW

Labor law, in the words of Mário de La Cueva,[1] "was born, together with agrarian law, as a cry of rebellion by the man who suffered injustice in the countryside, in the mines, in the factories and in the workshops [...]. It sprang from the tragedy and pain of a people and was a natural, genuine and proper creation" of the workers.[2]

Before the emergence of a protective right for labor relations, as the aforementioned author points out, there was only its regulation by civil law. And "labor law has never been a part or a chapter of civil law; nor was he his continuator or his heir, but rather acted as his

[1]DE LA CUEVA, Mario. Panorama do Direito do Trabalho. Translated by Carlos Alberto Gomes Chiarelli. Porto Alegre: Livraria Sulina Editora, 1969. p. 45.
[2]In Mário Júlio de Almeida Costa's view, the emergence of social organizations and unions was linked to a principle of solidarity between individuals and groups, which began to assume a convergent and solidary action (COSTA, Mário Júlio de Almeida. História do Direito Português. 5th ed. Coimbra: Almedina, 2017. p. 560).

Revista ARACÊ
ISSN: 2358-2472

adversary and, in a way, even as his executioner."[3] Labor law was born as a new law, creating new ideals and new values; it was the expression of a new idea of justice, different from and often opposed to that established in the foundations of civil law.

Evidently, for the regulation of human labor, the common techniques of private law are not enough, based, in principle, on the concept of equality of all, which, in this case, does not find correspondence in economic and social reality. "Peculiar institutes are necessary, without any similarity with other patrimonial relations".[4]

For the conception of protective labor law as we know it today, it was necessary to break with the myth of the economic laws of the individualistic and liberal world, overthrowing the absolutist empire of companies – which occurred during the industrial period.[5] In Brazil, labor law arose from social movements (as it happened in Mexico, after the Mexican Social Revolution),[6] which supported the idea that workers should be elevated to the category of person and have their material and spiritual needs necessary for the dignity of the human person satisfied.

At the time of the industrial revolution, wage labor was governed by the common law applicable to any other relations between private subjects, that is, civil law. In practice, however – and as João Leal Amado points out[7] – the liberal legal model adopted had truly dramatic consequences with regard to the social and human plane. According to the author, this liberalism "made freedom and autonomy the monopoly of the privileged and made equality the law of the strongest". The workers were abandoned to the implacable logic of triumphant capitalism, without any measure of protection, which resulted in the misery and illness of the working class and the consequent outbreak of social movements.

As Riva Sanseverino points out,[8] industrial societies revealed the brutal differences between social classes. These differentiations continued to manifest themselves under deeper and more concrete aspects, systematized, albeit indirectly, with the liberal regime of the time. Thus, with the advent of the industrial revolution, situations and relations in

[3]DE LA CUEVA, Mario. Panorama do Direito do Trabalho. Translated by Carlos Alberto Gomes Chiarelli. Porto Alegre: Livraria Sulina Editora, 1969. p. 45.
[4]PASSARELLI, Francesco Santoro. Notions of Labor Law. Translated by Mozart Victor Russomano and Carlos Alberto G. Chiarelli. São Paulo: Revista dos Tribunais, 1973. p. 2.
[5]NASCIMENTO, Amauri Mascaro. Labor Law Course: History and General Theory of Labor Law. Vol. I. 2nd ed. São Paulo: Saraiva, 1981. p. 7-8.
[6]DE LA CUEVA, Mario. Panorama do Direito do Trabalho. Translated by Carlos Alberto Gomes Chiarelli. Porto Alegre: Livraria Sulina Editora, 1969. p. 46.
[7]AMADO, João Leal. Employment Contract: basic notions. Coimbra: Coimbra Editora, 2015. p. 13.
[8]SANSEVERINO, Riva. Labor Law Course. Translated by Elson Gottschalk. São Paulo: LTr; University of São Paulo Press, 1976. p. 9-10.

Revista ARACÊ
ISSN: 2358-2472

contradiction to the postulate of indiscriminate equality of individuals before the law were evidenced. The *"social question",* according to the understanding of the aforementioned author, revealed the need to protect and value a certain class of citizens – the workers.

The exploitation of the working class, caused by industrial societies, and its serious consequences, including social movements, thus opened space for the idea of establishing protective legislation to spread.[9] For Jorge Pinheiro Castelo,[10] labor law was inserted in the legal system as a branch of post-modern law, "in which the boldness and combativeness of progressive movements managed to impose norms of protection on workers". According to the author, these norms "represent social emancipation from the market obtained through the democratic space, the space of citizenship".

Manuel Alonso Olea,[11] in his work, corroborates the understanding that the emergence of labor law was occasioned when the dominant ideology energetically emphasized the need to weaken the powers of entrepreneurs and protect workers,[12] the weakest party in the labor relationship – especially to stop the serious consequences that social movements could continue to cause to capital.

The mitigation of this serious social issue then passed, at first, through the acceptance of the direct intervention of the State (and the legislator) in labor relations. The labor movement, resulting from the social issue caused by industrial societies, culminated in labor law as a legal branch protecting the relations between subordinate worker and employer. The idea that the free play of competition in the labor market and contractual freedom needed to be limited was wide open, to the extent that "the labor contract masks a pure relationship of domination".[13]

Labor law then emerged as a product of this *"social question",* as the situation became unsustainable and the public powers, under the pressure of the so-called workers'

[9]LANGILLE, Brian. Labour Law's Theory of Justice. In: DAVIDOV, Guy. LANGILLE, Brian (eds.). The Idea of Labour Law. Oxford: Oxford University Press, 2020. p. 104-105.
[10]CASTELO, Jorge Pinheiro. The Material and Procedural Law of Labor and Post-Modernity: the CLT, the CDC and the repercussions of the New Civil Code. São Paulo: LTr, 2003. p. 145.
[11]OLEA, Manuel Alonso. Introduction to Labor Law. Translated by C. A. Barata da Silva. Porto Alegre: Livraria Sulina Editora, 1969. p. 102-103.
[12]Protective rights were conquered and, later, enshrined in the Federal Constitution. It is noteworthy that not only in the case of Brazil, other modern constitutions include, in addition to precise and exhaustive legal rules, a series of principles – freedom, justice, equality, protection of the weak and so on – which indicate fundamental values that should serve as inspiration for the application of the rules. This was a historical transformation that occurred mainly in the second half of the twentieth century in several countries (SCHIOPPA, Antonio Padoa. History of Law in Europe: from the Middle Ages to the Contemporary Age. Translated by Marcos Marcionilo and Silvana Cobucci Leite. São Paulo: WMF Martins Fontes, 2014. p. 436).
[13]AMADO, João Leal. Employment Contract: basic notions. Coimbra: Coimbra Editora, 2015. p. 14-15.

Revista ARACÊ
ISSN: 2358-2472

movement, ended up modifying the way they framed the relations between capital and labor. The formation of this branch of law, therefore, is based on the historical observation of the insufficiency/inadequacy of the free play of competition in the field of the labor market and on the inadequacy of freedom with greater predominance in the bargaining power of labor relations, in order to establish working and living conditions minimally acceptable to the proletarian strata.[14]

It is possible to affirm, therefore, that the response to the alarming state of affairs caused by massive industrialization was obtained through two historical processes (crucial to understand the genesis of labor law): (1) the organization and mobilization of the proletariat, known as the "workers' movement", resulting from "class consciousness",[15] which articulates a reaction of self-tutelage of the workers in the face of their unjust situation;[16] and, (2), by the defense of protection for this social class, which arose from a movement of ideas[17] and resulted in the intervention of the State through legislation protecting wage labor, based on the protective principle.[18]

THE PRINCIPLE OF WORKER PROTECTION

Maria do Rosário Palma Ramalho understands[19] that the principle of protection can be understood as a fundamental and unitary principle belonging to labor law. For the author, this general principle of compensation for the worker's situation of dependence that singularizes and distances labor law from the common law.

It should be clarified, prior to the analysis of the protective principle, that the law

[14]AMADO, João Leal. Employment Contract: basic notions. Coimbra: Coimbra Editora, 2015. p. 13.
[15]Term used by Karl Marx. According to the author, "economic conditions transformed, in the first place, the mass of the people into workers. The domination of capital over the workers created the common situation and the common interests of this class. Thus, this mass is already a class in relation to capital, but not yet a class for itself. In the struggle [...], this mass unites and forms a class for itself. The interests it defends become class interests." With this, the notion of "class consciousness" begins to be formed (MARX, Karl. Misery of Philosophy. Translated by José Paulo Netto. São Paulo: Global, 1985. p. 90).
[16]LOPEZ, Manuel Carlos Palomeque. Labor Law and Ideology. Translated by António Moreira. Coimbra: Almedina, 2001. p. 24.
[17]John Gilissen states that, in the second half of the nineteenth century and, above all, in the twentieth century, the abuses of contractual freedom began to be denounced and evidenced by a series of thinkers – such as Comte, Saint-Simon and Karl Marx – who rebelled against the total absence of protection for the weak. (GILISSEN, John. Historical Introduction to Law. 4th ed. Translated by A. M. Hespanha and L. M. Macaísta Malheiros. Lisbon: Calouste Gulbenkian Foundation, 2003. p. 739). Anton Menger, in his work, also defended the protection of the weakest (MENGER, Anton. El Derecho Civil y Los Pobres. Madrid: Victoriano Suárez, 1898).
[18]SANSEVERINO, Riva. Labor Law Course. Translated by Elson Gottschalk. São Paulo: LTr; University of São Paulo Press, 1976. p. 9-10.
[19]RAMALHO, Maria do Rosário Palma. On the Dogmatic Autonomy of Labor Law. Lisbon: Almedina, 2000. p. 415-416.

Revista ARACÊ
ISSN: 2358-2472

encompasses principles and rules and, according to Ronald Dworkin,[20] principles must be treated in the same way as legal rules: they must be taken into account by judges, legislators and jurists. In the author's understanding, the rules must be interpreted in the light of the principles.[21]

José Joaquim Gomes Canotilho[22] understands that principles are even hierarchically superior to rules, insofar as they characterize the genesis of law.[23] According to the author,[24] principles should guide the creation and interpretation of all legal norms. Lenio Luiz Streck, on the other hand,[25] understands that "the principle is an instituting element, the element that existentializes the rule that he instituted". In other words, the principle is only "realized" from the establishment of rules; there is no effectiveness of the principle without a rule corresponding to its legal logic. In this sense, the rules of labor law only make sense to the extent that they incorporate the commandment of its founding principle: the protection of the worker, who is always hyposufficient in the employment relationship.

Labor law, in the understanding of Bernardo da Gama Lobo Xavier,[26] "intends to achieve substantial equality (not just formal) between the contracting parties", opposing the existing inequality in the labor relationship and creating conditions of practical equality by granting the worker a legally protected status, unlike what occurs in the case of traditional

[20]DWORKIN, Ronald. Taking Rights Seriously. 3rd ed. Translated by Nelson Boeira. São Paulo: Editora WMF Martins Fontes, 2010. p. 47.
[21]It is necessary to distinguish the principles, in a generic sense, from the rules. Ronald Dworkin, in the work "Taking Rights Seriously", brings the example of "Riggs v. Palmer", from 1889, in which a New York court had to decide whether an heir named in his grandfather's will could inherit what he was willing to do, despite having murdered his grandfather for this purpose. The court concluded—despite all laws granting property to the murderer—that "all laws and contracts may be limited in their execution and effect by general and fundamental maxims of customary law," and that "no one shall be permitted to profit by his own fraud, to benefit by his own unlawful acts, to base any claim on his own iniquity, or to acquire property as a result of his own crime." The killer then did not receive his inheritance. It should be noted that the standard used in this decision is not that of a legal rule. The legal rule is specific, such as, for example, a certain speed limit on a road. The pattern used in the example above is one principle. In this line of reasoning, Ronald Dworkin states: "The difference between legal principles and legal rules is of a logical nature. The two sets of standards point to particular decisions about legal obligation in specific circumstances, but differ in the nature of the guidance they offer." Thus, legal rules are applied immediately, like the rules of a game, unlike principles, which guide rules, interpretations and consequent decisions (DWORKIN, Ronald. Taking Rights Seriously. 3rd ed. Translated by Nelson Boeira. São Paulo: Editora WMF Martins Fontes, 2010. p. 43-40).
[22]CANOTILHO, José Joaquim Gomes. Constitutional Law and Theory of the Constitution. 5th ed. Coimbra: Amedina, 2002. p. 1144.
[23]In the words of Miguel Reale, principles are, therefore, "fundamental truths or judgments, which serve as a foundation or guarantee of certainty to a set of judgments, ordered in a system of concepts related to a given portion of reality" (REALE, Miguel. Philosophy of Law. 11th ed. São Paulo: Saraiva, 1986. p. 60).
[24]CANOTILHO, José Joaquim Gomes. Constitutional Law and Theory of the Constitution. 5th ed. Coimbra: Amedina, 2002. p. 1144.
[25]STRECK, Lenio Luiz. Dictionary of Hermeneutics: 50 fundamental entries of the Theory of Law in the light of the Hermeneutic Critique of Law. 2nd ed. Belo Horizonte: Letramento; House of Law, 2020. p. 374-375.
[26]XAVIER, Bernardo da Gama Lobo. Manual de Direito do Trabalho. 2nd ed. Lisbon: Babel, 2014. p. 57-58.

Revista ARACÊ
ISSN: 2358-2472

contracts. Due to the real situation of inequality between parties, labor law moves away from a contractualist perspective in which the parties are considered equal and free (as occurs in civil law). According to the aforementioned author,[27] in order to guarantee practical equality (i.e., material equality), labor law is guided by the protective principle, which gives rise to the establishment of norms that enshrine a standard of guarantees for the worker – which cannot be diminished, not even by the common will of the parties (i.e., these norms even result in inalienable rights).

With regard to labor relations and their regulation, the protective principle, or the protection of the worker, is the most important and fundamental for the construction, interpretation and application of labor law. Social protection for workers constitutes the sociological root of labor law and is inherent to its entire legal system.[28]

As explained, historically, this branch of law arose as a consequence of the fact that the freedom of contract between people with unequal powers and capacities led to different forms of exploitation – among them, the most abusive. Faced with the impossibility of assuming equality between the parties to the employment contract, the legislator sought to mitigate the inequality unfavorable to the worker through legal protection favorable to him.[29]

The principle of protection, therefore, refers to the fundamental criterion that guides labor law, insofar as it, instead of being inspired by a purpose of formal equality, responds to the objective of establishing a preferential protection for one of the parties: the worker.[30]

Labor law responds, therefore, to the purpose of leveling inequalities. The central idea of this right is not inspired by formal equality between people, but by the leveling of the inequalities that exist between them.[31]

In this sense, referring to the natural Aristotelian inequality, Manuel Alonso Olea[32] points out that the obligation of equal treatment of all is waived in certain cases and with respect to certain categories of people, to the extent that it is necessary to recognize the existence of powers of those who are in superior positions (employer) to the detriment of others (workers).

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[27]XAVIER, Bernardo da Gama Lobo. Manual de Direito do Trabalho. 2nd ed. Lisbon: Babel, 2014. p. 57-58.
[28]SÜSSEKIND, Arnaldo. The Social-Labor Principles in the Brazilian Constitution. In: Revista do TST, vol. 69, nº 1. Brasília: Lex, jan./jun. 2003. p. 43-44.
[29]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 30.
[30]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 28.
[31]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 30.
[32]OLEA, Manuel Alonso. De la Servidumbre al Contrato de Trabajo. Madrid: Editorial Tecnos, 1979. p. 47.

Revista ARACÊ
ISSN: 2358-2472

The asymmetry between employee and employer corresponds, as a general rule,[33] to a situation of economic subordination of the worker, in the sense that the income from work is equivalent to his main means of subsistence and that the employer is the holder of the means of production and the power to manage the productive unit. Thus, the imbalance, in addition to being social, is a legal and economic imbalance, so that the worker remains in a contractual situation of inferiority in relation to the employer. In the face of this scenario of inequality – which was evidenced especially during the period of industrialization of society – the need to promote a certain balance in labor relations became clear.[34]

Labour law can be understood as a unilateral right, because at its starting point there is a deliberate purpose, a definite concern to favour, exclusively, or at least principally, certain categories of people. "The principle of legal equality",[35] that is, of formal equality (in the sense that "everyone is equal before the law") is decisively abandoned.

The inequality that exists between the parties to the employment contract concerns several spheres – contractual, legal, social and economic[36] – so that ignoring this asymmetry is inconsistent with the very idea of law. On the one hand – and in a position of clear supremacy – there is the employer, who allows himself to refuse to hire someone and who has the possibility of imposing the content of the potential individual employment contract in the way that best suits him; On the other hand, there is the worker, who makes his labor force available according to his essential needs and those of his family – and who is generally in a situation that does not allow him to make demands regarding the contractual content offered to him. This asymmetry jeopardizes the individual freedom of the weaker party, and, with rare exceptions, gives an air of adherence to the acceptance of the employment contract.[37]

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[33]Leandro Dorneles identifies, in the employment relationship, a set of vulnerabilities in the negotiating, hierarchical, economic, technical, social and informational spheres (DORNELES, Leandro. Hyposufficiency and Vulnerability in the General Theory of Contemporary Labor Law. Available at: <https://juslaboris.tst.jus.br/handle/20.500.12178/158932>. Accessed on: 08 set. 2024).
[34]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 46-47.
[35]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 31.
[36]For José de Souza Martins, "it is necessary to distinguish legal equality from social equality" – what we call formal and material equality here. For the author, "this is a society in which people are legally equal, but, in fact, economically unequal, which also makes them socially unequal. In addition, the imaginary of equality is derived from the mediation of things and, therefore, from the objectification of people. It is, therefore, an essential imaginary for the realization of the exploitation of labor and the inequality that results from it" (MARTINS, José de Souza. The Difference against Inequality: dynamic social identities. In: CAVALCANTI, Josefa Salete Barbosa. WEBER, Silke. DWYER, Tom (eds.). Inequality, Difference and Recognition. Porto Alegre: Tomo Editorial, 2009. p. 49-50).
[37]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 45-46.

Revista ARACÊ
ISSN: 2358-2472

In this sense, as Américo Plá Rodriguez points out,[38] the special need for worker protection has two foundations:

> 1) The distinctive sign of the worker is his dependence, his subordination to the orders of the employer. This dependence affects the worker's person;
> 2) economic dependence, although not conceptually necessary, is present in the vast majority of cases, since in general only those who are forced to do so in order to obtain their means of subsistence only put their labor power at the service of others. The first and most important task of Labor Law was to try to limit the inconveniences resulting from this personal and economic dependence.

Labor law, then, corresponds to a legal system that intervenes in favor of the hyposufficient party in the relationship (which is always the figure of the worker), appearing "as an instrument for the realization of the fundamental rights and citizenship of the worker".[39]

With respect to the purpose of protecting the worker, labor law began to operate in different ways and by different means: through the consecration of imperative norms; operational principles aimed at resolving certain conflicts of sources; the creation of special rules of interpretation; certain limits imposed on the legislator and intended to guarantee the very preservation of labor law. According to Guilherme Machado Dray,[40] it is possible to identify, especially, four "vectors of action" of the principle of protection, which guide labor law – which are now analyzed.

3.1 VECTORS OF ACTION OF THE PROTECTIVE PRINCIPLE

The first is the creation of a set of norms of an imperative nature – intended, in the first instance, to protect the worker. These rules, it is clarified, can be intended to protect each and every employee, as well as they can protect specific categories,[41] as is the case of legislation aimed at women workers, for example.

The second vector corresponds to the use of operational principles, such as the principle of the most favourable treatment, the principle *in dubio pro operario* and the principle of the most beneficial condition.[42]

The principle of most favorable treatment is intended to resolve especially

[38]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 32.
[39]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 32.
[40]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 47-48.
[41]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 47-48.
[42]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 47-48.

Revista ARACÊ
ISSN: 2358-2472

hierarchical conflicts between sources. Thus, in the event that there is more than one applicable norm, the one that is most favorable should be chosen – even if it is not the one that corresponds to the classic criteria of hierarchy of norms.[43]

The principle *in dubio pro operario* refers to the criterion for using the judge or interpreter to choose among the various possible meanings of a rule: the one that is most favorable to the worker.[44] In this sense, Arnaldo Süssekind[45] points out that, aiming at the protection of the underprivileged, that, obviously, in case of doubt, the interpretation must always be in favor of the economically weak, which is the employee, if in litigation with the employer.

The principle of the most beneficial condition is not to be confused with the principle of the most favourable treatment, previously analysed. This principle expresses that the application of a new labor standard should never serve to reduce the most favorable conditions in which a worker found himself.[46]

The third vector, in turn, is the creation of rules of interpretation, which concern the intervention of collective regulation documents. And the fourth, finally, corresponds to the consecration of certain internal or external limits regarding the possibility of modifying labor law – in other words, by creating an irreducible core of rights.[47]

The protective principle (and its "vectors of action") has historical roots, as labor legislation was born as a reaction to the exploitation of workers, at a time when the industrial revolution favored the strengthening of companies. As Arnaldo Süssekind points out,[48] experience has shown that classical contractual freedom is not enough to ensure equality, because the strongest quickly become oppressors. Hence the need to establish protective rights.

In respect to the principle of protection, therefore, labor legislation emerges as a legislation that objectively protects the worker in general, seen as the weakest party in the legal-labor relationship, as well as the most threatened social categories, in view of their

[43]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 43.
[44]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 42.
[45]SÜSSEKIND, Arnaldo. The Social-Labor Principles in the Brazilian Constitution. In: Revista do TST, vol. 69, nº 1. Brasília: Lex, jan./jun. 2003. p. 30.
[46]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 43.
[47]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 47-48.
[48]SÜSSEKIND, Arnaldo. The Social-Labor Principles in the Brazilian Constitution. In: Revista do TST, vol. 69, nº 1. Brasília: Lex, jan./jun. 2003. p. 43-44.

Revista ARACÊ
ISSN: 2358-2472

greater fragility in the economy of the relationship.[49]

THE PRINCIPLE OF PROTECTION AS A GUIDING CRITERION

Américo Plá Rodriguez[50] understands that it is not necessary to enshrine the principle of protection in legislation, insofar as the very nature of the principle places it above positive law. In this sense, José Joaquim Gomes Canotilho[51] states that the protective principle corresponds to the "orientation of the entire set of norms, of the purpose that inspires them, of the central idea that operates as an essential reason for being".

The principle of protection, therefore, corresponds to a guiding criterion (to the legislator, the judge, the interpreter and the legal system), in defense of the party considered, from a logical perspective, the weakest in the legal-labor relationship, with the objective of reducing the asymmetry (in other words, the social inequality) existing between employee and employer.

The role that the principle assumes is decisive in the argumentation and in the search for a concrete solution, making the solutions supported in the light of this structuring principle of labor law more consistent. A solution based on the principle of protection can decisively support the resolution of concrete cases.[52]

The principle of worker protection corresponds to a historical-cultural and ethical reference of labor law, that is, it is a "determining element in the evolution of the normative system and in the internal development of the labor law system".[53] This principle functions as an internal and external limit to the modification of labor law, as an instance of axiological or evaluative control of the normative system itself and as a conductor that can guarantee the preservation and evolution of this branch of law within the legal system.

As explained earlier, labor law arose as a reaction to the enormous social injustice caused by the advent of mass production, and therefore aimed to humanize labor relations. In this sense, Guilherme Machado Dray points out:[54]

> Labour law was finalistically conceived to mediate or rebalance the secular conflict between capital and labour and to protect the person who lends his or her labour

[49]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 48.
[50]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 39-40.
[51]CANOTILHO, José Joaquim Gomes. Constitutional Law and Theory of the Constitution. 5th ed. Coimbra: Amedina, 2002. p. 1144.
[52]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 120.
[53]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 267-268.
[54]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 50.

Revista ARACÊ
ISSN: 2358-2472

> power to others, which is why it is a branch of law that, in its genesis, is essentially the protection and defence of one of the parties to the contract – the worker.

The evolution of labor law has historically focused on the purpose of defending the worker against the possibilities of abuse by the employer in the exercise of the power of direction (to the extent that the employment relationship is one of the social structures that implies domination of one party over another).[55] The defence of the worker's position, in turn, was essentially centred on the protection of his dignity and his personal rights, in order to prevent the availability of the workforce from becoming, after all, the availability of his personal life in favour of the employer. [56]

The result was, above all, the creation of imperative norms – therefore, of public order, which characterize the basic intervention of the State in labor relations – aimed at opposing obstacles to the autonomy of will. These cogent rules form the basis of the employment contract[57] and must always be applied in the light of the principle of protection. According to Américo Plá Rodriguez,[58] "if the legislator proposed to establish through law a system of worker protection, the interpreter of this right must place himself in the same orientation as the legislator, seeking to fulfill the same purpose".

The flexibilization of labor law in no way represents its improvement. These are economic objectives and dynamics that focus on the competitiveness of the economy through the flexibility of labour relations[59] and that, therefore, are not oriented towards the protection of the worker, but towards the competitiveness of the business fabric.

Although there is a need to update labor standards, and consequently the principle of protection, it should always remain a timeless principle, and should function as an irreducible core (at least as long as economic relations are capitalist), under penalty of labor law running the risk of extinction or implosion.[60] As Celso Antônio Bandeira de Mello warns:[61]

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[55]WEBER, Max. Economy and Society. Vol. 2. Translated by Regis Barbosa and Karen Elsabe Barbosa. Brasília: Editora UNB, 2009. p. 188.
[56]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 402.
[57]SÜSSEKIND, Arnaldo. The Social-Labor Principles in the Brazilian Constitution. In: Revista do TST, vol. 69, nº 1. Brasília: Lex, jan./jun. 2003. p. 43-44.
[58]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 30-31.
[59]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 194-197.
[60]DRAY, Guilherme Machado. The Principle of Worker Protection. São Paulo: LTr, 2015. p. 506.
[61]MELLO, Celso Antônio Bandeira de. Administrative Law Course. 12th ed. São Paulo: Malheiros, 2000. p. 747-748.

Revista ARACÊ
ISSN: 2358-2472

> Violating a principle is much more serious than transgressing any norm. Failure to pay attention to the principle implies offense not only to a specific mandatory commandment, but to the entire system of commands. It is the most serious form of illegality or unconstitutionality, depending on the level of the principle affected, because it represents an insurgency against the entire system, subversion of its fundamental values, irremissible contumely to its logical framework and corrosion of its master structure. This is because, by offending him, the beams that support them are felled and the entire structure striving on them is collapsed.

Américo Plá Rodriguez argues[62] that this principle is in force and accepted in all labor law, without being linked or conditioned to a certain ideological or political conception. This is a general principle that must inspire all rules pertaining to labour law[63] and must always be taken into account in its application.[64]

The compensatory function of the principle recognizes that labor law starts from a situation of legal inequality between two private subjects, in a private law bond, which contradicts the axioms of common law. Assuming this inequality, the principle of protection has, therefore, an undeniable dogmatic content, as a specific core valuation of labor law, which makes it a tutelary right, which has as its direct projections the protections that are applied to the figure of the worker, the minimum working conditions that are fixed.[65] It is, therefore, the function of labor law "to compensate for the worker's original contractual weakness, at the individual level".[66]

Finally, it should be noted that, in Mario Elffman's understanding,[67] labor law corresponds to a right of social inclusion, based on the protective principle, and is perfectly compatible with the "segregating principle of non-discrimination" – insofar as it aims to reduce the existing asymmetries between the figures of employee and employer, with the

[62]RODRIGUEZ, Américo Plá. Principles of Labor Law. Translated by Wagner D. Giglio. São Paulo: LTr, 1978. p. 33-37.
[63]"The effective application of fundamental principles and rights at work is a primary aspect of any proposal aimed at promoting decent work" (INTERNATIONAL LABOUR ORGANIZATION. ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN. UNITED NATIONS DEVELOPMENT PROGRAMME. Employment, Human Development and Decent Work: the recent Brazilian experience. Brasília: Prima Página, 2008. p. 112).
[64]For Adriana Wyzykowski, "[...] to admit vulnerability as a legal category within the logic of contract law is to admit the challenge that the Social State encounters in not only being a guarantor of freedoms and contractual autonomy of individuals, but also being a State capable of promoting social justice, transforming and reducing social inequalities, as taught by the Federal Constitution in articles 3, III and 170, VII" (WYZYKOWSKI, Adriana. Private Autonomy and Vulnerability of the Employee: criteria for the exercise of individual bargaining freedom in labor law. Rio de Janeiro: Lumen Juris, 2019. p. 75-76).
[65]RAMALHO, Maria do Rosário Palma. On the Dogmatic Autonomy of Labor Law. Lisbon: Almedina, 2000. p. 416-417.
[66]FERNANDES, António Monteiro. Labor Law. 17th ed. Coimbra: Almedina, 2014. p. 25.
[67]ELFFMAN, Mario. From Labor Law to a Right of Social Inclusion. Translated by Evaristo Gallego Iglesias. In: VARGAS, Luiz Alberto de. FRAGA, Ricardo Carvalho (coords.). Advances and Possibilities of Labor Law. São Paulo: LTr, 2005. p. 132.

Revista ARACÊ
ISSN: 2358-2472

objective of providing material equality.

CONCLUSION

Based on considerations about the principle of protection – a guiding principle of all labor law, which aims to level the asymmetrical relationship between worker and employer – , it is evident that labor law aims to provide material equality between individuals, by considering legitimate and necessary the differentiated treatment directed to those who, for certain reasons (especially economic), are unequal. In this way, balance between unequal parts is sought, the leveling of asymmetries, which is fundamental to provide material equality (balance in relationships). In view of this, the guarantee to employees of the protective rules of labor law also corresponds to the guarantee of the right to equality and non-discrimination – civil and political rights enshrined in the scope of international human rights law.

However, the concept of material equality does not presuppose that the parties are – or become – equal to each other. In this sense, it is not possible to affirm that the right to labor protection (whose objective is to establish material equality in the employment relationship) implies that employee and employer automatically become identical parties. On the contrary, material equality presupposes the existence of unequal parties who, through the establishment of differentiated treatment to one of them (in this case, labor protections), come to have a more balanced relationship, that is, less asymmetrical in terms of power.

Revista ARACÊ
ISSN: 2358-2472

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