1 Introduction
During the past 45 years, we’ve witnessed an unprecedented evolution in human history. Information society, advancement of science-based knowledge, large-scale migrations and globalization have brought significant changes to lifestyles, ways of production and methodologies of work.

Next to that, the neo-liberal hegemony and the decline of the leftist ideologies, as much as the recent ‘robot revolution’, pose new challenges in the world of work and in human organizations on global, national and local scales.¹

Labour law was consolidated during the 20th century in developed capitalist countries. This law branch, compiled within the Universal Declaration of Human Rights, numerous international human rights treaties, and various constitutional texts, seemed a logical corollary to the capitalist advance, which was product of the second Industrial Revolution in late 19th century (characterized by advances as piston engines, synthetic chemistry and electric lighting).

If compared to the productive system, this type of regulation was also, in some way, standardized (Taylorism/Fordism). The workers in developed countries were getting some benefits from this continuously consolidating
capitalist system thanks to collective bargaining and protective laws with minimum rights.

On the other hand, some developing countries tried to proceed the same way, but based on mono-productive and less prosperous economies, granting their workers nonetheless some levels of protection, as in South America and, in some exceptional cases as in Argentina and Uruguay, recognizing the key role of labour unions.

However, this tendency starts mutating in the late 1970s. The changes in society have a bearing on labour law. Rich-country firms relocate to the third world, unemployment starts being an issue in developed countries, free trade reigns without counterbalancing weights, and the neo-liberal ideology permeates it all, even to the European countries developers of the welfare state. Moreover, the Unites States cultivates and exports its economic analysis of law (L&E), where values as justice are subordinated by economic efficiency and where worker protection is conditioned by growth, employment and labour flexibility. On the other hand, in developed countries the trade union movement loses power and members.2

Many problems of developing countries have begun to hit rich countries: unemployment, unequal income distribution and relative increases in poverty.

Other countries such as those in Southeast Asia and China made economic progress thanks to their low-cost labour. But the cost of economic progress often involves the expansion of child labour and significant instability. From this perspective, the advance of poor countries is characterized by an unequal distribution of wealth and by huge profits of European and US transnational companies.

It is true that during the 20th century cheap and child work did exist, but there was one big difference: this reality used to shock us. Today, this reality has been normalized. Almost 100% of our clothes are made under infamous labour conditions and very few are willing to do anything about it.

Within this context, labour law is very contested and we will attempt in this contribution to lay out how this reality affects the forms of regulation of labour law. For this objective, we will rely on the classic distinction of Robert Alexy between rules and principles and we will ask ourselves which is best to achieve worker’s protection. We will seek out tendencies and propose from our perspective what is more convenient to protect the weak contracting parties: rules or principles?

In addition, it is important to note that we support a traditional idea of labour law, as a normative system that aims to protect the weak contracting parties: the worker. Even though this idea may seem naïve.

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4 Scholars’ discussion at a global level about labour law’s purposes and future has been long and fruitful. We can quote the essays in the following books as examples: KVW Stone and H Arthurs (eds), Rethinking Workplace Regulation (New York, Russell Sage Foundation 2013); G Davidov and B Langille (eds), The Idea of Labour Law (New York, Oxford University Press 2011); JDR Craig and SM Lynk (eds), Globalization and the Future of Labour Law, (New York, Cambridge University Press 2006); G Davidov and B Langille (eds), Boundaries and Frontiers of Labour Law (Portland, Hart Publishing 2006); Conaghan, Fischl and Klare, Labour Law in an Era (2004); Bernard, Deakin and Morris, The Future (2004); and A Supiot (eds), Trabajo y Empleo. Transformaciones del trabajo y futuro del Derecho del Trabajo en Europa (Valencia, Tirant Lo Blanch 1999). – Furthermore, other papers and major works are: P Lokiec, Il Faut Sauver le Droit du Travail (Paris, Odile Jacob 2015); R Badinter and A Lyon-Caen, Le Travail et la Loi (Clamecy, Fayard 2015); J Barthélémy and G Cette, Réformer le droit du travail (Paris, Odile Jacob 2015); R Dukes, The Labour Constitution, The Enduring Idea of Labour Law (New York, Oxford 2014); U Romagnoli,
or outdated, we believe that the aims of labour law developed until the 1960s in the richest countries of our planet constitute a civilizing ideal as important as the idea of democracy. Beyond the patterns of the world or periods of barbarity, we have no doubt about the worth of defending the idea of protecting the weak.

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In Latin America, the future of labour law has also been discussed: O Ermida Uriarte, ‘Caracteres, Tendencias y Perspectivas del Derecho del Trabajo en América Latina y en Europa’ (2013) I (1) (continued)
In the next section we will discuss the distinction between rules and principles; then we will refer to how the rules and principles are linked to the pillars of labour law, employment law and collective bargaining, to finish with some tentative conclusions, doing so because the preference for rules or principles depend on different factors and contexts.

2 Rules and principles: an operative distinction

For Alexy, norms can be rules or principles. Rules are norms that can be respected or not (for example, the respect of a driver for a stop sign), in contrast to principles, which are optimization mandates, characterized by the fact that they can be fulfilled in different degrees, to the highest possible extent (like the principle of non-discrimination).
Principles have been characterized as contributive reasons, and not decisive because they have a dimension of weight and the principles-based reasons must be compared with conflicting principles.\(^9\)

It should be noted that this distinction between principles and rules is not absolute and it has also been criticized. It has been stated that rules can be very inaccurate because of their wording or the surprising and unpredictable in the situations where they apply. Meanwhile, the application of a principle can be quite conclusive, especially in limit cases.\(^10\) In contract law, the most important rules can be understood, if one stops to investigate, as options for a regulatory principle.\(^11\) Likewise, in the Postscript HLA Hart relativizes Dworkin’s distinction between rules and principles, stating that it is only a matter of degree: ‘principles are, comparatively to rules, broad, general, or unspecific, in the sense that often what would be regarded as a number of distinct rules can be exhibited as the exemplification or instantiations of a single principle’.\(^12\)

Genaro Carrió indicated that rules are not always applicable in a manner of ‘all or nothing’, and that conflicts between them are not always fixed by denying the validity of one in respect of the other, because very often the decision is founded on the relative weight of one or another pattern according to the context.\(^13\) More recently, it has been highlighted that one of the characteristics of norms (all kinds of norms, be it rules or principles) is their defeasibility, understood as meaning that the requirement that they should be fulfilled in the majority of cases, although they can be defeated in others; that is, there can be cases covered by the meaning of the rules, to which they cannot be applied.\(^14\) It is not about the rule having an exception, in which case there would be no


\(^11\) Ibid at 276.


\(^13\) Carrió talks extensively of the topic, quoting Hart and his book The Concept of Law, which Carrió translated into Spanish. See GR Carrió, Notas sobre Derecho y Lenguaje 4th edn (Buenos Aires, Abeledo-Perrot 1994) 226.

problem, but that the exception is created in the adjudication phase by the judge. This is a question of adapting general terms to the particular case. That rule cannot be properly applied, and therefore, it should be defeated.

It is logical, moreover, that no legal system can be built solely on principles or solely on rules. A system of principles would be extremely flexible, while one of rules would be too rigid. The first would lack clear conduct guidelines, which would cause problems with coordination, knowledge, costs and power control. A system of only rules would be too rigid because of the lack of valves for the harmonization of the solutions to concrete cases.\textsuperscript{15}

This relativity to distinguish between principles and rules can be obscure within labour law, because parts of its ‘rules’ are behavioural standards. In other words, proper rules are often found in labour law regarding minimum wages, working days, or paid leave, that are applicable in an ‘all or nothing’ manner in the words of Alexy, along with open rules that grant powers to the employer\textsuperscript{16}, for example to discipline the worker, or to organize tasks or dictate internal regulations (rules of procedure).

Although the law protects the worker, an important hierarchy remains within the workplace, where the employer holds a power of command and discipline in respect of the worker. In fact, an intense relation of unequal power operates between them in favour of the employer, and with the law, this power is limited and regulated but not extinguished. It is for this reason that these rules establish standards.

The powers of the employer in respect to direct and coordinated work, recognized by all labour systems, have fuzzy boundaries because they are formed as standards or notions of variable and undetermined content.\textsuperscript{17} Those open standards demonstrate the internal tension of labour law between the free initiative of the employer and the necessary balance that prevents the exploitation of workers.\textsuperscript{18}

\textsuperscript{15} H Ávila, \textit{Teoría de los Principios} (Madrid, Marcial Pons 2011) 107.
\textsuperscript{16} Powers in the sense of Hohfeld, that is, the power of one person to make a change in the legal relationship of another; See WN Hohfeld, \textit{Conceptos Jurídicos Fundamentales} (México, Fontarama 2001) 67.
\textsuperscript{17} A Lyon-Caen, ‘Politique(s) Jurisprudentielle(s) et Droit du Travail: quelques Réflexions a partir de l’ Experience Française’, in P Auvergnon (ed), \textit{Les Juges et le Droit Social} (COMPTRASEC, Université Montesquieu-Bordeaux IV 2002) 23.

Another important area of private law with open standards is family law. As stated by Glendon, in the law in general, the regulation must find an optimal balance between fixed rules and discretion regarding each context, without losing its consistency and predictability; that is, with adequate degrees of certainty but without losing flexibility. See MA Glendon, ‘Fixed Rules and Discretion in Contemporary Family Law and Succession Law’ (1986) 60 \textit{Tulane Law Review} 1165, 1166.
David Cabrelli has stated that labour standards may be of conduct or/and of control. ¹⁹ Those standards can be described as general legal orders for the employer regarding the type of acceptable management behaviour expected by the law. ²⁰

Standards of conduct are directed to the employer and determine the nature of the conduct that the law has anticipated in its respect, constituting an internal test for the same employer to assess the legality of their decisions. Standards of control represent an external scrutiny of business activity destined to be performed by the judicial authority or law enforcement. ²¹ These standards are directed towards the judge. Examples of standardized language of labour laws are the voices: reasonable, proportional, rational, with due care, equitable, adequate, appropriate, etc.²²

For the purpose of the thesis we will sustain in this work, we will consider the standards of conduct and control as ‘special rules’, typically found in the power relationship that underlines the contract of employment.

In consequence, for us ‘rules’ include the proper standards of the employer’s power of command and discipline, and those standards are not the same as the principles, that is, they are not maximums of optimizations in Alexy’s words.

From another perspective and going back to the idea of ‘principles’, it is obvious that, as seen repeatedly between jurists, language can have different meanings. That is how it is often spoken of in principles, not only in the meaning given by Alexy, but also in many others in the one given by Riccardo Guastini²³:

I. Fundamental and general principles of the legal system, that means, ethical political values that inform the system and grant the basis or justification, for example, the principle of popular sovereignty and equality.

II. General principles of a sector of a legal discipline, understood as ethical-juridical values that inform only one sector of a legal discipline, for example, the principle of private autonomy of private law, due process in administrative law, ‘in dubio pro operario’ in labour law or ‘favor rei’ in criminal law.

¹⁹ D Cabrelli, ‘Rules and Standards in the workplace: a perspective from the field of labour law’ (2011) 31 (1) Legal Studies 21, 21 et seq.
²⁰ Ibid 22.
²¹ Ibid 22.
²² Ibid 23. It is often not entirely simple to determine the differences between both types of standards. Standards of conducts are also standards of control. Both can be determined by the legislator or by the judges themselves. Although the standards of control per se – that is, those not derived of one of conduct – are usually created by the courts. On the other hand, a standard of conduct can be smoothed or strengthened in the control stage. Ibid. 24 and 28 et seq.
²³ R Guastini, Distinguiendo, Estudios de teoría y metateoría del derecho (Barcelona, Gedisa 1999) 152–153.
III. Fundamental principles of a particular legal matter, the scope of which is specifically delimited to that subject, such as urban planning, river navigation and tourism.

IV. Principles (with no last name) denoting the *ratio*, the *raison d’etre*, the underlying objective of a rule or normative provision. This definition implies that any normative provision has an immanent purpose susceptible to be known through interpretation and this ratio is the principle that justifies it. To recapitulate, in labour law we will distinguish between rules and principles. The rules, in the meaning of Alexy, give rights to the workers that must be granted without any weighing, as it happens – for example, with the minimum wage or paid leave. We will also include the standards of conduct characteristic of labour law as special rules related to the employer’s power of command and discipline.

On the other hand, principles in labour law refer to norms that act as mandates of optimization that must be met as far as possible, in the terminology of Alexy. So it is with principles, such as non-discrimination (its application will depend on whether the distinction is arbitrary or not, whether the person is a national, an immigrant or undocumented, etc.), or the protection of the employee (which will depend on the context, economic level of the country and the economic viability of the company whether its big or small).

In addition, scholars tend to synthesize certain main ideas or guidelines from the study of positive law, as stated by Guastini, regarding values that inform a legal discipline. Examples include the freedom of contract in private law, the best interest of the child in family law, or the protection of the weak contracting party regarding the rights of the consumer or due process, etc.

In labour law, we also find those guiding values, as seen in the idea of the protection of the employee: the weak contracting party before the employer. In this point, Alexy’s and Guastini’s definition tend to coincide; that is, many principles understood as ‘values that inform positive law’ can be seen as Alexy’s principles understood as ‘mandates of optimization’.

Therefore, we return to our initial question: What is more convenient to protect the weak contracting party: rules or principles?
3 Two souls of labour law

Two of the most famous former labour lawyers are relevant when explaining the pillars of labour law. On one hand, Hugo Sinzheimer explained that the law serves human freedom, because it opens the path to self-determination that, in the early twentieth century, the individual had only formally.24

Years later, his disciple Otto Kahn-Freund, based in Oxford, told us that the law is a limited technique of social power regulation. The laws can, on occasion, support, restrict and even create this regulation, but the laws are not the principle source of power in society.25

These two ideas frame what we might call the two souls of pillars of labour law: employment law with its epicentre in the law and collective bargaining with its epicentre in the union.

Employment law elaborates laws with indispensable minimum rights that seek to protect the employee, who is the weaker party in the employment contract. In the last three decades, these minimums have been adjusted in certain cases through collective or individual agreements.26

Collective bargaining constitutes the sophistication of labour law. In more democratic and more economically developed societies, the limits of the law (necessarily general) are complemented by collective norms, at the branch and enterprise level, and raising the legal standards (minimum).

In addition, workers grouped on a national and sectorial level have much more power to balance the working relationship and negotiate on an equal footing with their employers. Collective development also occurs in developing countries, for example in Latin America but with much less coverage. For several decades, we have witnessed the loss of union power on a global level. Nonetheless, worker protection still is important to the law and the world.

That being said, we can observe some tendencies in the development of labour law. In countries with advanced economic development, until the 1970s and in some cases to the present day, the defence of the worker has been achieved mainly through collective bargaining. This is the case of Great Britain and United States (both until the 1980s), other Anglo-Saxon countries, Germany, Italy, France, and northern Europe. It is an instrumental tutelage,

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24 H Sinzheimer, Crisis Económica y Derecho del Trabajo (Madrid, Instituto de Estudios Laborales y de la Seguridad Social 1984) 63.
given that there are no minimum rights established by law (or if they exist they tend to be irrelevant), but rather a set of tools that allow workers to negotiate with equal power with their employers: in essence, the union and the right to strike.

However, the recent decades have been difficult for unions. Offshoring and the power that transnational corporations have accumulated have seriously affected union power and the possibility for workers to present their points of view.27

On the other hand, the individual pillar or soul has developed more in the systems primarily based on the protection of the worker in the labour contract. This is the protection granted through public order legislation, with indispensable minimums for workers. Countries with low unionization have chosen this route: individual labour law – for example, Latin America and, most recently, countries in Africa and Asia.

Until the 1980s, there was some convergence between the evolution of Latin-American countries and developed countries. The first comprised individual protection but aspired to the collective protection of the latter. We could say that this was an upward convergence: to raise the worker’s rights.

Since the late 1980s, flexibilities have spread throughout the whole world, collective protection has begun to decline and even individual protection has decreased in countries with high economic development, and also in poor countries.28 This can be characterized as a downward convergence.

Of the souls of labour law, the collective is the most disputed. The individual one has been attacked but nothing seems to eradicate it, and even more, many developing countries have been strengthening this individual pillar. However, and despite the questionings, the collective pillar has remained in effect for the OECD countries.29

In Latin America, labour law has improved and it has favoured the worker since the 1990s, especially through the application of numerous international and regional human rights instruments.30 In Asia, emerging countries such as China have enacted new legislation on employment contracts, mediation and

27 Atleson, ‘Reflections on Labor’ 842 et seq.
29 The average of the collective bargaining coverage in the Western Europe countries is around 70% (https://izajolp.springeropen.com/articles/10.1186/s40173-016-0061-1). In 28 EU states plus Norway this average is around 62% (http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Collective-Bargaining).
arbitration, hygiene and security and minimum income. The same path has been followed by Taiwan and South Korea, which have begun to adopt and promote protective labour standards. In Africa, since the 1990s, South Africa and other countries from southern Africa such as Namibia, the United Republic of Tanzania, Swaziland and Lesotho have adopted norms regarding protection and contract termination.33

Countries of Eastern Europe such as Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovakia, and Slovenia, have adopted a labour law based on the European model.34

Finally, in both New Zealand in 1991 as well as Australia during 2006, legislation deregulating labour law was approved, and later the two countries re-established labour protection partly reverting neoliberal reforms.35

From the regulatory perspective, labour law tends to be governed by laws that contemplate rules in the broad sense used in this contribution. And from those rules tends to emerge principles as values that inform and that, in the words of Américo Plá, help the judge interpret the regulations and loopholes.36 These principles are often optimization mandates, as stated by Alexy. For example, laws in Latin America frequently recognize a catalogue of principles such as protection, and not waiver or the primacy of reality.37 Those principles have allowed interpreting labour laws in favour of the worker, even when they have been inherited from a neoliberal dictatorship, as seen in the case of Chile.38

Collective bargaining generates regulations – the collective agreement – with rules that are later administrated by the employer together with the union. This is why this system is the best for the workers. The power of the employer is contrasted with the united power of the workers, represented by the union. If unions are powerful, the question of rules or principles tends to be irrelevant, since workers have real bargaining power. Therefore, when unionism is strong and powerful, we cannot but agree in principle with Kahn-Freund, in the sense

32 Ibid at 494 et seq for the case of Taiwan and 368 et seq for South Korea.
33 Bronstein, *Derecho Internacional y* 286 et seq.
34 Ibid at 224 et seq.
38 Gamonal and Rosado, ‘Protecting Workers as a Matter Principle’ 622–625.
that it is best for the legislator not to intervene: inevitably and invariably labour laws result in an increase of the political power of the courts, because the power to interpret is the power to destroy and reconfigure the norm to the content of the ideology of the judge. But the context that allows taking distance from state law is the one from Britain with great union power, before the Thatcher era.

On the contrary, in the majority of the labour systems and modern-day Great Britain, the ‘law’ plays a major role in the protection of the worker and even regarding the unions.

Therefore, we estimate that it is within labour law that it is more relevant to ask the regulatory question: Rules or principles?

Rules can be very important, as long as they favour the workers. Principles, on the other hand, can play an interpretative role of importance for workers if rules are pro-employers.

Both rules and principles can play in favour of or against the protection of workers.

Neoliberal rules that make the system more flexible can gravely affect the protection of the worker. In this case, the principles can be values or guidelines that allow interpretation of these rules with the least harm to the worker, but this will depend on the courts. In Latin America, the interpretation has been in favour of the worker, based on principles such as protection, not

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40 Ibid at 244, quoting Marshall C.J.
41 Kahn-Freund speaks of the catalogues of fundamental rights being blank checks to the courts, given that the meanings the judge attributes to those rights invade, in practice, the political effects of those declarations. Ibid at 262 and 269.
Kahn-Freund was always a believer in unrestricted civil society, and his analysis was based on sociological findings, since the British law of his time was a product of social actors and not the legislator. It is therefore not surprising that, for example, this author emphasized that the enforceability of contracts (Pacta Sunt Servanda) would be inversely proportional to the expectations of social and moral sanctions for breach of the given words. That is, the law arises when society and social morality fail. See O Kahn-Freund, ‘Pacta Sunt Servanda – A Principle and its Limits: Some Thoughts Prompted by Comparative Labour Law’ (1974) 48 Tulane Law Review 894.
42 As stated by Collins: ‘The lesson one draws from this history must be that collective labour law can only survive with strong laws that create a secure exception to the economic constitution that protects a market economy.’ See H Collins, ‘Theories of Rights as Justifications for Labour Law’ in Davidov and Langille The Idea of 139.
43 See n 38.
44 As is the case of Chile under Pinochet and other 1980s Latin-American dictatorships. See S Gamonal C., ‘La Flexibilidad Laboral’ (1996) 5 Cuadernos jurídicos Universidad Adolfo Ibáñez 1, 21 et seq.
waiver or primacy of reality, derived from constitutional and legal texts.\textsuperscript{45} On the contrary, in Great Britain judges have been conservative and pro-employer in their interpretation of labour legislation.\textsuperscript{46}

In the case of the ILO, principles play an inverse role. The ILO, after the post-war consensus of 1919, managed to issue a series of international agreements with rules regarding child and nocturnal labour, working time, security measures, etc. After the second post-war period, the ILO increased its power. Then, from the 1990s and the prevailing neoliberal hegemony and the end of the Cold War, we see the ILO weakened and its answer to globalization is a declaration of principles in 1998, which for some critics are clearly insufficient and minimal.\textsuperscript{47} Here we would prefer clear rules regarding minimum income, Sunday rest, annual leave, security, etc., and not an ambiguous concept like decent work.

The same can be said about the proposal of flexible principles of Robert Badinter and Antoine Lyon-Caen\textsuperscript{48} for French law. Simplifying the French legislation with pro-business principles can destroy labour law.

In consequence, regulating employment law or the individual soul or pillar, will depend on the context with regard to whether a rule or a principle is better.

On the other hand, a principle such as the ‘protection of the worker’, commonly used in Latin America\textsuperscript{49}, derives not only from constitutional or legal texts, but also from international texts about human rights. For instance, The Universal Declaration of Human Rights of 1948 states:

‘Article 4
No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’

‘Article 23
1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.

\textsuperscript{45} Gamonal and Rosado, ‘Protecting Workers as a Matter Principle’ 616–632.
\textsuperscript{48} See Badinter and Lyon-Caen, Le Travail.
\textsuperscript{49} See Gamonal and Rosado, ‘Protecting Workers as a Matter Principle’ 616–632.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.’

‘Article 24
Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.’

‘Article 25
1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.’

There are numerous international human rights treaties that envisage labour rights both at a UN or regional level, in addition to the ILO conventions, such as the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; American Convention On Human Rights ‘Pact of San Jose, Costa Rica’ and the European Convention on Human Rights.

From their provisions it is easy to deduce principles such as the protection of the worker: slavery and servitude are prohibited, the right to work and equitable labour conditions are enshrined, and it also enacts non-wage discrimination, the right to fair remuneration, freedom of association, rest and paid annual leave and the protection of motherhood.

Almost every country is party to these declarations and treaties, and in the comparative analysis it is possible to conclude that, beyond national differences, it is recognized that workers have certain basic human rights derived from international treaties.50

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It is true that not all of these instruments enshrine these rights in the same way\textsuperscript{51}; that there are relevant institutional and traditional differences\textsuperscript{52}; that in cases such as South Africa where compartmentalization has emerged between the Constitutional Court and local labour tribunals, and the former are more respectful of labour human rights than the latter\textsuperscript{53}; that it is possible to discuss the status of labour rights, that is, whether they are civil and political rights, or rather socio-economical or cultural\textsuperscript{54}; whether the State has a positive obligation before the workers\textsuperscript{55}; or whether Hayek’s ideas constitute consistent criticism of labour rights.\textsuperscript{56}

\textsuperscript{51} Ibid. at 596.
\textsuperscript{52} Ibid. at 597.

Hugh Collins precisely explains the contrast between universal human rights (applicable to all humans), and some of the labour rights enshrined in the Universal Declaration of Human rights, such as the right to holidays, or just remuneration, applicable only to subordinate workers, based on more particular interests and not universal ones such as the right to dignity and freedom, limited to each society’s (economic) capacities and possibilities, and founded on the production system linked to work and not to timeless basic needs. See Collins, ‘Theories of Rights’ 142. Collins try to give a historical explanation stating that these rights come from the Treaty of Versailles in which the ILO was created (ibid 143). Then it analyses and tries to justify labour rights in the light of John Rawls’s theory of justice and the ideas of Jeremy Waldron (ibid 144 et seq.). He concludes that employment law is more fit than collective bargaining such as the right to strike, in a liberal theory of justice (Ibid. 150, 154–155).

In this era of neoliberal hegemony, Collins’ efforts to justify human rights form a liberal perspective are challenging.

From a more pragmatic perspective and considering that in today’s world the only right that is being used is free trade, although it is not found in any universal declaration (see infra n 65), the defence of labour rights must be more robust and less centered on its basis but rather on the precise political fact that these rights are positively covered by the Universal Declaration of Human Rights and in several human rights treaties. Their inclusion in these texts is not only because of the legacy of the Treaty of Versailles, but also from the Second Declaration of Rights of Franklin D. Roosevelt. In fact, Roosevelt advocated four freedoms: freedom of speech, freedom of religion, free from want and freedom from fear. Those four freedoms directly affect the Universal Declaration of Human Rights, adopted in 1948, three years after his death (thanks to the work of among many others his widow Eleanor Roosevelt). See MA Glendon, Un mundo nuevo, Eleanor Roosevelt y la Declaración Universal de Derechos Humanos (México D.F., Fondo de Cultura Económica, 2011) 29, 36 and 46.

The second Declaration of Rights contemplated several labour and social rights, for instance: the right to useful and remunerative jobs in the industries or shops or farms or mines of the nation; the right to earn enough to provide adequate food and clothing and recreation; the right of every family to a decent home; the right to adequate protection from the economic consequences of ageing, sickness, accidents, and unemployment; and the right to a good education. See CR. Sunstein, The Second Bill of Rights (New York, Basic Books 2004).

On the other hand, what do we understand as universal? That it is applicable for everyone with no exception? Such a thesis would mean that the rights of children, migrants or pregnant women are not human rights, as stated in Art. 25.2. The Universal Declaration of Human Rights: (continued)
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But beyond these questions, these rights are applicable in several systems and in international human rights law there are maxims of interpretation that suggest an extensive interpretation in favour of people: *in dubio pro libertate*. That is, the interpreter must choose the most favourable interpretation of the

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‘Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.’ We believe that universality has another meaning. Every working person should be attributed some rights, independently of whether they are rich or poor, man or woman, or employer (the employer of a domestic worker can be a worker at the same time), etc.

Moreover, the collective rights, including the right to strike, derive from the freedom of association, and several international and constitutional courts have held that they are human rights – including the right to strike. In the case of the European Convention on Human Rights see Filip Dorssemont, ‘The Right to Take Collective Action under Article 11 ECHR’ in The European Convention on Human Rights and the Employment Relation 333–365 (Filip Dorssemont, Klaus Lührcher and Isabell Schömann (eds), Etui, Hart 2013). The right to strike clearly is a civil and political right. To conclude this point, it is interesting to remember the thirteenth amendment of the North American Constitution of 1865, to forbid slavery and involuntary servitude, because the approach of anti-slavers was that the right of workers to strike (former slaves) constituted a key component to prevent involuntary servitude. See R E Zietlow, ‘The Ideological Origins of the Thirteenth Amendment’ (2012) 49 Houston Law Review 393, 452. Other interesting approaches on whether labour rights are human rights can be found in V Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) 3 European Labour Law Journal 151, 163–172.

55 C Fenwick and T Novitz, ‘The Application of...

From the classic work of Holmes and Sunstein it is clear that civil and political rights demand both negative and positive actions from the State. See S Holmes and C R Sunstein, *El costo de los derechos, por qué la libertad depende de los impuestos* (Buenos Aires, Siglo XXI Editores 2011).


However, many of Hayek’s omens, for example that any kind of planning would end with the extinction of freedoms and democracy, have not been fulfilled. See B Caldwell, ‘Hayek and Socialism’ (1997) XXXV Journal of Economic Literature 1856.

If Hayek were right, countries like Germany, Norway, Denmark, Finland or Switzerland would be in the middle of a dictatorship or absolute economic bankruptcy because of the power of their unions. In short, either the laws of economics are not applicable in these countries, or Hayek was mistaken. One of the first commentators on Hayek, Professor Durbin from the London School of Economics, criticized the horrific predictions of Hayek’s *The Road To Serfdom*. The book focused on the impossibility of planning, which would result in discrediting the democracy and therefore the rise of tyranny. Hayek also predicted that the planning effort would end with the right to property and that the discrediting of the democracy would make the worst people take the power, establishing concentration camps and torture as instruments of the government. Given these apocalyptic predictions, Durbin shows the amplitude and lack of clarity with which Hayek talks about “planning”. He adds that while the freedom of business must be defended in a context of perfect competition, in the case of monopolies, the social good is affected. Finally, he criticizes Hayek’s idea that political freedom arises in the history of mankind only when economic freedom is established. Durbin concludes by recalling the last decades of English history between the wars, in which they had successfully combined a greater development of democracy with greater state action. E.F.M. Durbin, ‘Professor Hayek on Economic Planning and Political Liberty’ (1945) 55 (220) The Economic Journal 357.


analysed human right. A similar rule has been developed in labour law in Latin America (although it comes from the European law of contracts: *favor debilis*), known as *in dubio pro operario*, or rather: when faced with several interpretations of labour rights, the most favourable interpretations for the employee must be preferred. It is possible to appreciate the application of this rule even by the Supreme Court of the United States.

In this context, we estimate that before neo-liberal rules and the flexibility of the courts it is possible to elaborate a pro-worker interpretation based on those international human rights instruments. The weakness of this approach is that it depends on the judges and its interpretation does not always benefit the worker. On the other hand, in the current state of the world, there is little we can expect from legislators, if we agree with Keith Ewing about the political process being captured by economic power.

Inequity and democracy are closely linked issues. As emphasized by Jacob Hacker and Paul Pierson, the idea of democracy and market are in constant tension, given that democracy is based on the ideal of politics and the market; on the other hand, it is based on money and demand. In other words, rich and poor people are equal before the State but not within the market.

Given the market’s failures, politicians have adopted several steps to correct them, but market participants have strong incentives to resist these corrections or regulations by a democratic government. Without strong protections for interim political equality, or firewalls between the market and the democracy, those most powerful within the market usually have stronger power over politics, undermining the foundations and ideals of the political democracy. As stated by Otfried Höffe, the free market should always deal with the ‘law

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58 Under common law, in constitutional matters, rules in favour of the weaker contracting party are not unheard of, as seen in the *contra proferentem* and *contra stipulatorem* interpretation, in the sense that the interpretation should not benefit the person who wrote the obscure clauses (in the first case) or when that interpretation is in favour of the debtor (in the second). The *contra proferentem interpretation* is used primarily for standard contracting, although that it has been questioned and it is not always followed by the courts. See D Horton, ‘Flipping the script: *contra proferentem* and standard form contracts’ (2009) 80 *University of Colorado Law Review* 431, who defines the application of this rule in contracts of adhesion, and D LLuelles, ‘Les régles de lecture forcee <<contra proferentem>> et <<contra stipulatorem>>: du reve à la réalité’ (2003) 37 (2) *Revue Juridique Themis* 235, who presents the application difficulties of *contra proferentem* and *contra stipulatorem* rules in Québécois law.

59 See Gamonal and Rosado, ‘Protecting Workers as a Matter Principle’ 638 et seq.

60 It is increasingly more common that rules issued by the legislature, instead of representing the interests of the voters, represent the interests of those financing politics. See K D Ewing, ‘Foreword’ in Fenwick and Novitz, *Human Rights at Work*.

61 Hacker and Pierson, *Winner-Take-All* 74.

of rational distortion of competition'; namely, that for the *Homo Oeconomicus* it is rational to distort the competition in favour of his own interest. 63

This political process that operates globally must be fought on several fronts, among others in the application of protective principles and an interpretation in favour of labour human rights.

4 Conclusions: labour law in an ideal world and in the real world

In an ideal world, unions would be strong and organized, accomplishing a balance between corporate power and workers’ defence. In this world, rules and principles matter very little, considering that the protection of the weak would depend basically on power and union calls for action. In any case, it would be vital that consideration be given to unions at least in respect of the right to strike. 64

But as we know, utopias don’t exist.

Nowadays, large multinational corporations have control, and on a global scale the World Bank, the IMF and the WTO have as much if not more influence as any international court. 65 The need to constitutionalize multinational corporations has been highlighted, as it was for the state 200 years ago. 66 All political efforts are in the service of free trade and the persecution of those who infringe intellectual property rights and trademarks. But if a company engages third-world employers who abuse their employees, it is almost impossible to follow the trail to the main beneficiary. 67

In this context, an ideal regulation would be one with rules favouring the weak contracting party: the worker. Additionally, there is no problem with having principles that would fortify these rules when it becomes necessary to interpret them or in case of regulatory gaps. That is to say, even if the rules

64 See Collins, ‘Theories of Rights as’.
66 O Favereau, *Entreprises: La Grande Déformation* (Paris, Parole et Silence 2014) 104 et seq. For this author, the state must currently compete with transnational companies, for which a constitutional process for this new private power is essential – similar to the process of the state in past centuries, where the individual was protected from state power and natural persons were granted protections by public powers. Now, it is not about the state but rather about private power and that of stock corporations. Ibid 90 y ss.
favour the worker, the same nature of the law carries interpretive doubts and gaps and, in these cases, the principles orientate judges in their decisions.

But the same political environment prevents the former, and the rules dictated by governments of both right and left tend to be neoliberal and be more flexible with each revision. This is why it is useful to resort to principles, as has been done in Latin-American law, even more so when these principles can be sustained for international human rights. Still, our politicians do not dare to derogate such instruments. There is no doubt that if it was 1948 today, there would be no agreement to adopt the Universal Declaration of Human Rights.

The protection through principles has limits and the most important one is that it depends on the judges, and as we have shown before, there are opposing experiences regarding this issue.

There can also be neoliberal principles or more flexibility that come into play, or that represent a setback for the protective rules, as occurred with the ILO and its 1998 Declaration or with recent proposals for French law.

Let’s retake our initial question. What is more convenient for protecting the weak contracting party: rules or principles?

It depends. Structurally, we cannot assure that principles or rules would be more protective ‘by themselves’. The preference for one or another will depend on different factors and contexts. In an ideal world, unions are strong and counterbalance the power of the employer. But in the real world, principles or rules work based on the context.

In Latin America, principles have been useful in hands of judges with sensitivity towards the tragedy experienced by workers, to temper neoliberal rules laid down under dictatorship and democracy. The latter has been captured many times by economic power, which means that even progressive forces that win elections with social democratic speeches think exclusively of the wellbeing of business when they legislate (business, after all, finances their campaigns and appoints retired politicians as managers of their corporations).

On the other hand, in Great Britain, with the judge’s self-restraint with the employer 68, clear and precise rules in favour of the worker are preferred. Therefore, in the British context, the Human Rights Act 1998 had important impact in favour of workers, not only by the principles that the discourse of

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68 See n 46.
human rights carries but also by its rules. A similar case would be that of Canada and its Charter of Rights, and in the province of Ontario.

In consequence, in the real world, factors such as legislator’s and judge’s ideologies will be essential before choosing between rules or principles.

There is no doubt that the ‘subversive idea’ of labour law – protection of the weak – has not been outmoded and should be defended by our political representatives. For the moment, we should wait for a new balance and maybe an ‘epic moment’ like the one in 1948 to rebalance and democratize work relations. This new balance should be composed of rules aiming to protect the worker, given that the principles are already present in human rights declarations and treaties as already mentioned. As for now, and as long as the political panorama does not change and the democracy frees itself from economic power, the judges will have the last word based on current principles on a national and international level.

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