CONTAINED IN THE INTERNATIONAL STANDARDS OF LABOR AND SOCIAL SECURITY LAW. A LATIN AMERICAN COMPARATIVE VIEW. VENEZUELAN SITUATION.

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THE EFFECTIVENESS OF THE RIGHTS AND FREEDOMS CONTAINED IN THE INTERNATIONAL STANDARDS OF LABOR AND SOCIAL SECURITY LAW. A LATIN AMERICAN COMPARATIVE VIEW. VENEZUELAN SITUATION.

Summary-abstract:

This work reviews the application and development of some international labor and social security standards organized by topics that were considered of importance due to their frequency and relevance in Venezuela. These topics are: 1) freedom of association and collective bargaining, 2) equality of opportunity and treatment, 3) tripartite consultation, 4) administration and inspection, 5) guidance and vocational training, 6) employment security, 7) protection of wages, 8) working time, 9) safety and health at work, 10) social security, 11) maternity protection. Thus, while the issues were set forth individually by various participants, depending on the subject, all contributions are intended to describe or analyze the following: (i) the legislative development of the ILO Conventions, (ii) the use and cases of direct application of the ILO Conventions by the courts; and (iii) the effectiveness of the application of the ILO Conventions and compliance by the Venezuelan State. Given the large number of themes and space, contributions attempt to present a picture of the national situation, and express the opinions of each researcher. So, the valuations are personal. The report consists of two parts. In the first part it explains the system of sources of the Venezuelan Labor Law, and in the second part individual contributions are presented.

I System incorporating ILSs’ and formal sources of labor law.

II Contributions by individual topics:

1. Regarding Freedom of Association and Collective Bargaining, Marlon Meza and Sara Navarro consider that in Venezuela developing legislation and policies of the Venezuelan State for more than 25 years show a rigid model with excessive procedural formalities and regulations that restrict
the exercise of the rights to freedom of association; Additionally, the ILS regarding these rights (ILO Conventions 87 and 98) are only mentioned in the various statements, but not used as a basis for decisions. Even in the few cases where such an analysis is referred to, they are to counter the decisions and / or pronouncements emanating from the supervisory bodies of the ILO.

2. Regarding the **Tripartite Consultation**, according to Alexandre Marin, there is a serious weakening of the democratic model of labor relations from the moment they closed the formal channels and genuine dialogue with the organizations that oppose the government. The right to genuine tripartite dialogue and the recognition of the rights of the most representative organizations provided for in Convention 144 have not been effective. It is imperative that the Government recognize representation, collective autonomy, freedom of association and all public freedoms. Therefore, he concludes that the balance of the consultation process and dialogue in the period 1958 -1999 was significant compared with other countries in the region in those years. On the contrary, the balance from 1999 to date is negative and content-rights of the Convention 144 in Venezuela, are unfulfilled by the state.

3. With regard to **Equality of Opportunity and Treatment**, Daniel Jaime believes that a lot of the legislative development in this area is inspired by ILO Conventions 100, 111 and 156, especially during the last 20 years. However, when referring to the judicial precedents, he illustrates the low utilization of ILO Conventions as the basis for judgments, and how our judicial apparatus, if not exclusively, preferably applies the existing domestic legislation in this area.

4. In the field of **Vocational Guidance and Training**, Luis Fernandez believes that Venezuela has not achieved the objectives set by the ILO, despite efforts by state policies through the Sucre Mission and the Great Knowledge and Work Mission, dating from September 8, 2003 and June 15, 2012.

5. Regarding **Labor Administration and Inspection**, for Alexandre Marin labor inspection has numerous administrative powers that exceed their purpose and their main functions have a residual character. He further believes that the legal powers contained in Convention 81 have been incorporated into domestic legislation with disproportionate penalties, generating a highly punitive legalistic compliance model with a an inspector to whom great power is attributed, which power is used on a discretionary basis This, combined with the ideological character and
selective action, generates the negative balance for Venezuela under this Convention.

6. In the area of Employment Security, Marcial Mundaray considers that the guarantee of stability or job permanence, from the legislative and constitutional point, is prior to the ratification of the ILO Convention 158, and yet, the legislation is in harmony with it. However, like other previous authors, he illustrates the lack of or poor implementation of the ILS in judicial decisions.

7. Concerning the Protection of Wages, Marcial Mundaray considers that the fact that the internal regulations refers to the "equality of conditions" to the same remuneration and not to the "work of equal value" in the sense of the ILO Conventions 95 and 100. This Automatically translates into the ability to generate wage discrimination. Also, again, he illustrates that there little or no evidence of the implementation of the ILSs´ in this matter by national courts.

8. Regarding Working Time, the report by Daniel Jaimes, estimates that the Workers Organic Labor Law (LOTTT) provides for a system in this regard that, though based on the conventions ratified by Venezuela, seems to be more beneficial than that established in the ILS which are in force. Therefore, these conventions are considered to only be references that reinforce the contents of domestic legislation.

9. Safety and Health at Work, Nelson Camba believes that the ILSs´ inspired domestic legislative development in this area, especially ILO Conventions 155 and 161 (the latter, despite not having been ratified by Venezuela), with contents that are evident in our current Organic Law on Prevention, Conditions and Work Environment (LOPCYMAT).

10. With regard to Social Security, Nelson Camba considers that even though Venezuela has ratified several of the ILO Conventions on the topic, legislatively, just some of the principles contained in these ILSs´ have been developed.

11. Concerning Maternity Protection, Reinaldo Guilarte notes that the Constitution recognizes the maternity protection on the same terms provided in the ILO Conventions 3 and 183, and that the national legislative development from there, especially in the last 15 years, has been profuse. However, he categorically states that these agreements have not been used by the judiciary for the foundation of any decision, but other agreements emanating from other bodies and treaties signed by the country have been used.
THE EFFECTIVENESS OF THE RIGHTS AND FREEDOMS CONTAINED IN THE INTERNATIONAL STANDARDS OF LABOR AND SOCIAL SECURITY. A LATIN AMERICAN COMPARATIVE VIEW.

VENEZUELAN SITUATION

I. INTRODUCTION

This paper reflects on the implementation and development in Venezuela of certain international labor and social security standards. However, given the large number of NITs, the analysis was limited to only reviewing the contents that reflect the conventions adopted by the International Labor Organization and the most recent reports of its monitoring bodies, excluding the Recommendations and other international or regional instruments. These contents follow the same classification made by the ILO and based on that classification, this paper sets forth the topics that were considered most important in Venezuela, namely: i) Freedom of Association ii) Collective Bargaining iii) Equality of opportunity and treatment, iv) Tripartite Consultation, v) Administration and Inspection vi) Orientation and Training, vii) Employment Security viii) Protection of Wages, ix) Working Time, Health and Safety at Work, x) Social Security xi) Maternity Protection. The choice of topics selected does not ignore the importance of other matters, but they were considered themes that dealt with situations that are less frequent in our country. Given space constraints, we chose to work only on the matters indicated in the list so that this work does not exhaust all the themes and all ILO Conventions signed and ratified by Venezuela. In addition to specific issues, the system of incorporation of international standards is summarized and the system of sources of labor law is synthesized. In terms of methodology, each contribution was made separately and individually so that the opinions, assessments and analysis pertaining to each participant in no way reflect a position or view of the section of Young Lawyers of Venezuela.

The focus of each contribution varies depending on the topic and the participant’s approach, but, broadly speaking, the project describes and reflects on: (1) the legislative development of the ILO Conventions. (2) the use and cases of direct application of ILO Conventions; and (3) the effectiveness of the application of the ILO Conventions and compliance by the Venezuelian State. At the end of each report a specific balance of the issue addressed summarizes the situation in Venezuela, according to the author’s vision.
II. SYSTEM OF INCORPORATION OF INTERNATIONAL LABOR STANDARDS INTO VENEZUELAN LAW

According to the Constitution of the Bolivarian Republic of Venezuela, the system of incorporation of treaties, conventions or agreements depends on the willingness of the Venezuelan State, through its executive and legislative powers. Thus, it is the President who holds the attribution of signing and ratifying treaties, conventions or agreements (Article 236, paragraph 4, CRBV), and the National Assembly - the legislative organ- to approve treaties or international agreements that have been signed as law, (Article 187, section 18, CRBV).

In any case, the Constitution provides that for treaties which the Republic has signed to have any validity in the Venezuelan legal system, they must be approved by the National Assembly before ratification by the President (Article 154, CRBV). Thus the President has the discretion to enact a law approving a treaty, an agreement or an international agreement at the President’s discretion, in accordance with international practices and at the convenience of the Republic (217, CRBV).

Once an agreement or international treaty is approved and ratified, these will be considered as part of the current legal system, applied directly and on occasion in preference to domestic legislation, as with the rules adopted in the framework of agreements of regional integration (Article 153, CRBV), provided that the treaty that originated those rules is still in effect.

The Constitution also provides that treaties, pacts and conventions on human rights signed and ratified by Venezuela, have constitutional status. Therefore, they prevail in the internal order, insofar as they contain provisions concerning the enjoyment and exercise of human rights which are more favorable than those established by the Constitution and the law; and they are immediately and directly applicable by the courts and other public bodies (Article 23, CRBV) This means that they are to be treated as fully effective standards in and of themselves and

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2 The Constitutional Court (SC), as the highest interpreter of the Constitution, considered that the rules adopted in the framework of integration agreements are considered an integral part of the legal system and are of direct and preferential application to domestic law, while the treaty that originated them are in effect. (SC-TSJ No. 967 dated July 4, 2012, case: action for constitutional interpretation on the content of Article 153 of the Constitution, brought by PERERA RIERA PEDRO PARRA and INÉS PARRA WALLIS)

3 The Constitutional Court has held that for treaties, covenants and conventions on human rights to have constitutional status and to be able to be applied in preference to domestic law, it is necessary that those international instruments are "signed and ratified by Venezuela," which is fully consistent with the scope and content of Articles 152 to 155 of the Constitution in the terms outlined above, and the list of fundamental rights that the Constitution or international instruments has included should not be construed as a denial of others which, being inherent in the person are not expressly mentioned in them (SC-TSJ No. 967 dated July 4, 2012, case: action for constitutional interpretation on the content of Article 153 of the Constitution, brought by PERERA RIERA PEDRO PARRA and INÉS WALLIS).
they need not be substantially or formally developed by any instrument to be immediately enforceable.  

Consequently, an international convention adopted within the General Conference of the International Labor Organization can only become incorporated into Venezuelan Labor Law after it has been approved and ratified by law and considered part of domestic law with constitutional status to the extent that it contemplates human rights. Among those conventions are the eight core fundamental conventions, all of which have been ratified by Venezuela.

III. SYSTEM OF SOURCES OF LABOR LAW IN VENEZUELA

The Organic Labor and Workers Law (hereinafter LOTTT), unlike its predecessor – the Organic Law of Work- only contains a list of the sources of the Venezuelan labor law and not an order of application. However, the order in which they are listed allows one to deduce the existence of a certain hierarchy. Article 16 of the LOTTT reads the sources of labor law are: a) The Constitution of the Bolivarian Republic of Venezuela and social justice as a founding principle of the Republic. b) Treaties, pacts and international conventions signed and ratified by the Republic. c) Labor laws and the principles that inspire them. d) The collective agreement or arbitration award, where applicable, provided they are not contrary to the mandatory rules of constitutional and legal character. e) The uses and customs as they are not contrary to mandatory rules of constitutional and legal character. f) The jurisprudence on labor matters. g) Application of the rules and the most favorable interpretation. h) Equity, equality and the Bolivarian, Zamoran and Robinsonian ideology.

In this list, the LOTTT begins with the standard on which the whole system is founded, the Constitution, and continues to treaties, agreements and international conventions signed and ratified by the Republic, which as it has already stated, are of immediate and direct application. The terms of labor laws and principles that inspire them follow. However, here regulations and decrees are included, but which are subordinated to the law. With regard to principles, it is understood that they are set forth in the Constitution and in legal texts as well as recognized by case law. Those principles recognized by the doctrine could also be included; however, the LOTTT eliminated the doctrine as a source of law.

The collective agreement, although a particular source of labor law, is located under the law, which shows a prevalence of Law in content and formation thereof.

The list continues with the customs and jurisprudence in labor matters. The latter has taken a key role in the Venezuelan Labor Law from the entry into force

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of the Labor Procedure Law (hereinafter, LOPTRA) and the dissemination of sentences through the Supreme Court’s web site.

Even when it is not a source of labor law, the LOTTT includes the principle of application of the most favorable rule in this category.

Finally, and in an unprecedented way, the LOTTT includes the Bolivarian, Zamorán and Robinsonian ideology as a source. While it is understood that such an inclusion can serve a political process based on socialist doctrines, it is difficult to understand how the Bolivarian and Robinsonian (relating to the pseudonym of Simon Rodriguez) liberal thought can be identify as sources. In any case, these principles require a jurisprudential development in order to determine their applicability as a source of Venezuelan Labor Law.

IV. CONTRIBUTIONS BY INDIVIDUAL TOPICS

1. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Marlon M. MEZA SALAS y Sara L. NAVARRO PESTANA

i. Conventions signed by Venezuela

Venezuela has ratified the fundamental conventions on this subject, namely the Convention concerning Freedom of Association and Protection of the Right to Organize, 1948 (No. 87), dated 20 Sep 1982, and the Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, 1949 (No. 98), dated 19 Dec 1968. In addition to Conventions 87 and 98, Venezuela also ratified another ILO Convention dated 5 Jul 1968 containing some provisions in the areas covered by Conventions 87 and 98, such as the Convention concerning Organizations of Rural Workers and Their Role in Economic and Social Development, 1975 (No. 141).

However, it did not ratify other conventions that also regulate some of the content of freedom of association, or do so for specific activities and sectors, including the Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 1971 (Nro. 135), the Convention concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service, 1978 (Nro. 151), and the Convention concerning the Promotion of Collective Bargaining, 1981 (No. 154).

ii. Legislative development and State Policy

In Venezuela, collective rights first appeared in the Law (1936), prior to the constitution (1947). Thus people usually say that constitutionalization of those rights in our country was late, as well as selective since Venezuela did not regulate all content of freedom of association but only some of them. In the Labor
Law of 1936 two titles governing trade unions and collective disputes were included, respectively, which contain some regulations on collective bargaining agreements. It was the Regulation of the Law from 1973, though, which regulated collective rights in greater detail in order to increase guarantees, expanding upon the rights set forth in the law. At the same time, though, the Regulation permitted lockouts (*huelga patronal*).

In the Venezuelan Constitution of 1961, collective rights achieved a solid constitutional regulation. Then, the Labor Law enacted in 1991 developed the constitutional model, extending it, in relation to the right to collective bargaining as well as the policy and expansive character of the collective bargaining agreements, the right to strike (eliminating the possibility of lockouts), the protection of trade union leaders and the workers themselves during the negotiation of industrial disputes with the so-called “trade union immunity”. Additionally, it instituted a preference for the peaceful resolution of conflicts, entrusting the solution of conflicts as one of the main tasks of the labor administration through excessive procedural regulations. And it regulates, in excessive detail, the formation and registration of trade unions, as well as the purposes and powers of those unions, as well as establishing precise rules on the election of union leaders.

Those regulations led to the filing of several complaints against Venezuela before the Committee on Freedom of Association. The Committee ruled in some of those cases concerning Venezuela (See: cases 1612 and 1797), since certain legal provisions contravened principles and interpretive criteria emanating from the Committee on the meaning and scope of the Conventions on freedom of association and collective bargaining, among others. For example, legislative requirements which are too lengthy and detailed for the existence of trade unions or a the inclusion of a list of functions and aims of unions that is too detailed and strict may, in practice, hinder the creation and development of trade unions. Also, the existence of such organizations should not be subject to any kind of registration, license or permit, or subject to compliance with too many formalities that might avoid or delay the formation of such organizations, but such formalities should simply be for publicity. Additionally, discretionary powers should not be provided to the competent authorities to deciding whether an organization meets the requirements for registration. Likewise, the regulation of procedures and methods for the election of trade union leaders should be primarily regulated by the organizations of workers and employers union rules.

The Constitution of 1999, the reform of the Regulation of the Labor Law of 2006 and the Workers Labor Law, enacted in 2012, apparently expand both individual and collective rights of workers while reducing to a minimum any vestige of capitalist enterprise, which is branded by the law as exploitative. The term enterprise is changed to work entity, and the law contemplates imprisonment for employers in cases of refusal to obey an order to reinstate a worker covered by trade union immunity. However, both the Constitution and the existing law also
contain a number of provisions that have been cataloged as contrary to the freedom of association and the right to collective bargaining, because they restrict to a greater or lesser extent the exercise of those rights.

For example, the election of trade union leaders is carefully regulated, while organizing the elections of trade unions is attributed to the state by the National Electoral Council (Consejo Nacional Electoral) (when not organized by the National Electoral Counsel, they are controlled by it: any call for elections must be notified to it, for publication in the Electoral Gazette. It ensures the normal progression of elections, it can intervene to resolve any situation, and all documentation relating to the process must be submitted for publication of the results, etc.); Provisions are included that are often associated with the so-called corporatism, by requiring affidavit regarding ownership of goods from union leaders as if they were public officials in civil service. Professional Associations (Colegios Profesionales) were excluded from the enumeration of collective subjects in order to prevent them from exercising trade union activity, even though these organizations have traditionally negotiated collectively with and have posed conflicts against the government it, such as medical and other health professionals, education, etc. The re-election of union representatives is prohibited, as is any act on behalf of the union of these individuals, when their periods are expired; there is also an obligation to alternate union leaders, etc.

iii. Use of the Conventions on Freedom of Association and Collective Bargaining by the courts

There are numerous decisions of the Venezuelan courts, specifically the Supreme Court, where Conventions 87 and 98 of the ILO are mentioned, but they are not applied, nor are they used for interpretation. There are cases in which those Conventions are invoked by the petitioners (unions, workers and employers) within the foundations of their claims or demands, but the courts are not basing their decisions on those Conventions, not even on the principles they contain or develop, but the courts are ruling based on national legislation, either the Constitution or the laws of the Republic.

However, in the few cases where the Venezuelan courts, particularly the Constitutional, Electoral and Political-Administrative Chambers of the Supreme Court, have analyzed Conventions 87 and 98, it is usually to reject their application or to use very questionable reasoning to declare in their sentences that those Conventions have not been violated, but instead are fully implemented and

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5 This is in accordance with article 23 of the Venezuelan Constitution, which sets forth that treaties, pacts and conventions regarding human rights agreed to and ratified by Venezuela have constitutional status and take precedence over domestic law insofar as they contain provisions concerning the enjoyment and exercise of said rights which are more favorable than those established by the Constitution and laws of the Republic and they are immediately and directly applicable by the courts and other public bodies.
respected by government authorities (which usually have been denounced as the transgressor), and usually contradict the interpretations of the same facts and cases by the supervisory bodies of the ILO, when they were also brought before them.

This also poses a double contradiction, by virtue of the provisions of Article 31 of the Venezuelan Constitution, according to which everyone has the right to address petitions or complaints to the international organs or bodies created for that purpose, in order to request protection of their human rights, and the Venezuelan State is required to take the measures necessary to comply with the decisions of the supervisory bodies of international organizations. In other words, the decisions of the supervisory bodies of the ILO, either the Committee of Freedom of Association or the Committee of Experts on the Application of Conventions and Recommendations, are not only not fulfilled and respected in our country, but they are expressly contradicted by the Supreme Court itself through its various chambers, despite being part of the Venezuelan State and obligated to execute and enforce those decisions.

For example, in a lawsuit for constitutional protection (amparo constitucional) brought by several union federations (Fedepetrol, Fetribev, Fetra Construcciones, Fetra Enseñanza) and Provea, in relation to a referendum called in 2000 by a Decree issued by the Constituent National Assembly of Venezuela that drafted the current Constitution, entitled "Measures to Ensure Freedom of Association" ("Medidas para Garantizar la Libertad Sindical") and by a resolution of the National Electoral Council, by which the Venezuelan electorate was invited to participate in a union referendum process to be held on 3 Dec 2000 in order to remove the heads of the union federations and confederations from their positions to "re-legitimize" all union officials through an open participation by all citizens, not only by workers. In its judgment dated 28 Nov 2000, the Constitutional Court fully justified the organization of the referendum process by the National Electoral Council because the organization of the election and other electoral processes were part of the "powers" of that body under the Constitution, that such actions did not constitute an "intervention" by the state but an act by the state to "protect" workers rights, which was a "democratic" and "sovereign" process because it would ultimately depend on the popular will, and therefore what is decided would constitute a "constitutional mandate of the Venezuelan people". Finally, it decided that unions were not private associations, but, instead, were "social law" entities in order to justify the interference the wider popular universe in a private matter of the trade union organizations.

In almost identical terms to the above judgment, the same Constitutional Court ruled in a judgment dated 1 Dec 2000, in another constitutional complaint brought against the trade union referendum by Froilan Barrios in his capacity as Coordinator of the trade union organization “Frente Constituyente de Trabajadores”. The Constitutional Court ruled in the same sense in a decision dated 8 Feb 2002, in deciding an appeal for annulment for reasons of
unconstitutionality together with an action for constitutional protection, sought by the Confederación de Trabajadores de Venezuela (CTV).

It is important to note that the judgments above mentioned are related to the cause that motivates a grievance procedure (case 2067) before the Committee on Freedom of Association since 2000, initiated by the International Confederation of Free Trade Unions (ICFTU), the Confederación Internacional de Organizaciones Sindicales Libres (CIOSL), the Confederación de Trabajadores de Venezuela (CTV), the Central Latinoamericana de Trabajadores (CLAT), and other trade union organizations, which asks for the repeal or modification the set of rules and decrees which regulate union affairs which have been adopted since the arrival of the current Government that are contrary to Conventions 87 and 98. The Committee also observed that despite having urged the government to revoke the powers of the National Electoral Council over union elections, that the National Electoral Counsel instead decided to enact a Special Statute for the renewal of the union leadership, having removed union leaders who had been previously elected as a result of the trade union referendum, which was also heavily criticized by the Committee of Experts on the Application of Conventions and Recommendations at its November-December 2000 meeting.

The Electoral Chamber of the Venezuelan Supreme Court of Justice used similar arguments to those used by the Constitutional Chamber to reject two lawsuits for Electoral-Administrative annulment exercised by various trade unions against the elections where union leaders had been renewed due to the trade union referendum mentioned above, as it did in statements dated 7 Dec 2000 (case Sindicato Único de Trabajadores de Alcaldías, Aseo Urbano y Similares del Estado Carabobo –SUTRAALADOSE–), 19/07/2001 (case Industria Láctea Venezolana C.A. –INDULAC–) and 23 Jul 2002 (case brought by 50 unions affiliated to the Federación de Trabajadores Petroleros, Químicos y sus similares de Venezuela –FEDEPETROL–). In a ruling dated 20 Oct 2003 (case Milady Oropeza and other members of the Sindicato de Trabajadores de la empresa Telenorma –SITRATEN–), the Electoral Chamber of the Court used the same arguments to order the call for elections in a union for failing to participate in the general process of trade union “re-legitimization” by government authorities which took place in 2001, after the 3 Dec 2000 trade union referendum which was organized and supervised by the National Electoral Council.

There is a case in which the High Court of the Republic, through its Political-Administrative Chamber, did acknowledge that an act issued by the Ministry of Labor violated freedom of association and the right to protection, and violated the principles and obligations assumed by Venezuela under Convention No. 87. In a sentence dated 8 Feb 2001 (published 13 Feb 2001) the court confirmed the nullity of the act, by which the unification of the two unions of Compañía Anónima Metro de Caracas and the election of the new Board the resulting union had been ordered. In this case the sentence of the Supreme Court was in line with the decision of the Committee of Freedom of Association when hearing a
complaint filed with the same facts, case No. 2080, in which the Committee concluded that the act of the Ministry of Labor had violated the most elementary principle of freedom of association, namely that only trade unions affiliates should decide on their union structures and on the composition of the organs of such organizations. The Committee strongly rejected this type of approach and urged the Venezuelan government to comply with the Convention 87 and not to interfere in the internal affairs of trade unions.

iv. Balance

Numerous complaints against Venezuela have been brought before the Committee on Freedom of Association since September 1999, mostly for violations of Conventions 87 and 98 (a number of complaints were also made from 1990 after the enactment of the Labor Law of that year). In addition, in recent years, Venezuela has received numerous individual observations by the Committee of Experts on the Application of Conventions and Recommendations regarding breaches or non-application of several Conventions, especially in relation to Conventions 87 and 98, most of which the ILO expressed regrets or astonishment that the government has not enacted the appropriate corrections in accordance with the legislation and practices of our country.

In recent years, trade unions and organizations that bring together employers have consistently been accusing the Venezuelan government of promoting violence against unions, seeking to annihilate or neutralize them through various means, including intimidation against workers and entrepreneurs’ organizations, among other complaints. There are many complaints filed before the Committee on Freedom of Association, that the Venezuelan government has attempted to obstruct or impede its progress, whether delaying responses to requests for information, or dilating accept the visit of contact missions, which is illustrated in a report of a high-level tripartite mission which visited Venezuela from 27 to 31 January, 20146.

In that report, relates the kidnapping, assault and maltreatment that various leaders, members of the entrepreneurial elite, have undergone in the country, a bomb attack on the headquarters of the main Venezuelan entrepreneurial organization (FEDECAMARAS), and other acts of intimidation and violence against employers and workers’ organizations, which the Government categorizes as common crime, even though the facts show otherwise. For example, the perpetrator of the bomb attach was a police officer; and while the Government has argued that the authors of many of these acts of violence have been arrested, entrepreneurial leaders deny that the arrested parties are the real perpetrators of the attacks.

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Intervention and confiscation of property of business leaders is also mentioned, with neither property rights having been restored nor even the payment of any compensation having been received. The lack of bipartite and tripartite social dialogue is also highlighted in that report, as there is no consultation with employers and workers’ organizations on various laws and presidential decree-laws affecting the interests of employers and their organizations, union rights, collective bargaining, labor relationships or employment conditions. Similarly, the report mentions the incitement of attacks and looting against supermarkets and other businesses incited by verbal attacks by the government against entrepreneurs who are accused of promoting an "economic war" such attacks, being perpetrated by organizations that support the government.

Another report issued by the Committee of Experts on the Application of Conventions and Recommendations⁷, contemplates the arrest, harassment and verbal attacks on entrepreneurial leaders, the arrest and murder of union leaders in the context of protests against the government, the existence of a trend of criminalization of trade union action by the Government, intimidation of the largest entrepreneurial organization, FEDECAMARAS, and its leaders. This report also mentions in the imposition on labor unions by the current law, of functions and purposes beyond their nature as in order to force submission by the trade union movement, including the intervention of the electoral authority in union elections through the National Electoral Council (Consejo Nacional Electoral), serious restrictions on the right to strike in cases of public officials in civil service, and by imposing criminal penalties, among others.

2. EQUALITY OF OPPORTUNITY AND TREATMENT

Daniel JAIME KELLERHOFF

i. Conventions signed by Venezuela

Venezuela has ratified three conventions which the ILO classifies under the category of "equality of opportunity and treatment." These conventions are: Equal Remuneration Convention, 1951 (No. 100.), ⁸ Discrimination (Employment and Occupation) Convention, 1958 (No. 111), ⁹ Convention on Workers with Family Responsibilities, 1981 (No. 156). ¹⁰

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¹⁰ Approving Law published in Official Gazette No. 3,309 Extraordinary, dated January 3, 1984 and ratification registered on November 27, 1984
ii. Legislative and State policy development

Venezuela has enacted a set of laws that develop the principle of equality and non-discrimination in employment. With regard to Convention No. 100, equal pay for men and women for work of equal value, we must mention the Equal Opportunities for Women Act, which entered into effect on September 28, 1993 and was amended on October 26, 1999\(^1\), which regulates the exercise of the rights and guarantees necessary to achieve equal opportunities for women. Chapter II of the Act is entitled "Labor Rights of Women" and states that the legal basis of the relationship of women at work consist of the right to urban and rural work, equal access to employment, titles, promotions, opportunities and to equal pay for equal work (Article 11); contemplating in turn a series of guarantees from the State (Articles 12-17).

The Constitution, meanwhile, set forth the State's obligation to ensure equality and equity between men and women in the exercise of the right to work and recognized the added value of household work (Article 88, CRBV). From there the recognition of the right to "housewives" to social security has arisen. However, such expression can in itself give rise to discrimination since the terms of the Equal Remuneration Convention, declare a priori that those who work at home are usually women, thus, recognizing the existence of occupational segregation by gender in the country.

In 2007, the Organic Law on the Right of Women to a Life Free of Violence entered into force, and it was amended last November.\(^2\) It includes the breach of a woman’s right to equal pay for equal work as one of the cases of workplace violence toward women. It is sanctioned with a fine between one hundred tax units (100 TU) and thousand tax units (1,000 TU), in accordance with the seriousness of the act (Article 49).

Finally, it is important to establish that although occupational segregation by gender and the pay gap between men and women exists in Venezuela\(^3\), the LOTTT requires employers to apply criteria of equality and equity in the selection, education, promotion, job security, remuneration and professional training of workers, as well as promoting equal participation of women and men in management responsibilities (Article 20). Similarly the Law restricts free wage stipulation, and prohibits the granting of less than a minimum salary which is set by the national executive branch. The minimum salary is established by

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\(^{1}\)Published in Official Gazette Extraordinary No. 5398 dated October 26, 1999.
\(^{2}\) Published in Gazette No. 40,548, dated November 25, 2014
\(^{3}\) For example, the study contained in the article entitled "The construction process of labor statistics with a gender perspective in Venezuela," published in the VENEZUELAN MAGAZINE OF WOMANS STUDIES, January - June 2013. vol. 18 / No. 40. pp. 49-62, found that, according to the results of the National Household Sample Survey of the first and second quarters of 2006 and 2007, there is an average difference of 14.2% in the salaries of men over women. The lower the educational level and the lower the wages, the larger the remaining wage gap.
presidential decrees to be complied with for workers in the public and private sectors regardless of gender (Article 99).

In relation to Convention No. 111, the Constitution provides for the principle of equality before the law and the prohibition of discriminatory treatment (Article 21, CRBV). Likewise, the Venezuelan Constitution provides that the State has a duty to protect work as a social fact and in order to do so, it prohibits any discrimination on grounds of policy, age, race, sex, creed or any other condition (Article 89, paragraph 5, CRBV).

Meanwhile the LOTTT not only includes equality within the system of sources of labor law, but, additionally, includes a number of provisions prohibiting any discrimination on grounds of age, race, sex, marital status, social condition, creed, union, political opinions, nationality, sexual orientation, disability, social origin or other condition, which would restrict the right to work (Article 18, paragraph 7, and 21, LOTTT). Hence, the LOTTT outlaws all discriminatory clauses in job applications and individual employment contracts and, similarly, prohibits discrimination against anyone in their right to work due to a criminal record¹⁴.

Regarding Convention No. 156, we can also find a number of provisions guaranteeing employment protection for workers with family responsibilities. The LOTTT includes a title referring to the protection of the family in the social process of work that contemplates the protection of maternity (Article 331); prohibiting the requirement that job applicants submit to medical examinations to reveal a pregnancy (Article 332); the prohibition to require the worker during pregnancy to perform any task or activity that endangers her life or that of her child (Article 333), and the need to transfer jobs when the working conditions may affect the pregnancy (Article 334); prohibiting wage discrimination against workers during pregnancy or during lactation (section 346); pre- and postnatal leave for workers (Article 336), leave for adoption (Article 340) and breaks for breastfeeding (Article 345); the employer's obligation to maintain early childhood education centers with a nursing room when it has more than twenty female workers (Article 343); paternity leave (Article 339); immobility or special and temporary protection against dismissal, transfer or deterioration of conditions or the worker during pregnancy without the permission of the labor administrative authority for up to two years after delivery of the baby (Articles 335 and 420, paragraph 1).

Besides the immobility of the worker during pregnancy, the LOTTT provides protection against dismissal, transfer or deterioration of working conditions without authorization from the labor authority for the following workers with family responsibilities: (i) Workers from the start of their partner's pregnancy, for

¹⁴ Article 8 of the Criminal History Registry Law, published in Official Gazette No. 31 791 dated August 3, 1979, prohibits any company or person to require individuals to present criminal records in relation to a job offer and in matters related to labor recruitment.
up to two years after delivery of the baby (article 420, paragraph 2); and (ii) Workers who adopt children under three years old, for a period of two years from the date of adoption (Article 420, paragraph 3); (iii) The workers with children with a disability or illness that permanently prevents or hinders the child from fend for herself or himself (Articles 347 and 420, number 4).

In addition, on September 20, 2007 the Law on Protection of Families, Motherhood and Fatherhood came into force, which includes the extension of paternity leave in case of multiple births or if the mother dies (Article 9) and the creation of education programs and parent training for work (Article 11); feeding programs to eradicate malnutrition in families (Article 12); culture, tourism and recreation programs for families (Article 15); sports programs (Article 16); and a housing program (Article 17). These programs materialize through direct action policies implemented by the executive branch through the Bolivarian missions and among which are included: the food mission (*mission alimentacion*), sports neighborhood penetration mission (*mission barrio adentro deportivo*), and the great knowledge and work mission (*gran mission saber y trabajo*), neighborhood mothers mission (*mission madres del barrio*), among others.

### iii. Using the conventions on opportunity and treatment

While the Conventions on equality of opportunity and treatment have inspired the Venezuelan legislation, there are few cases in which they have been used. Rather, it is possible to find legal precedents in which courts are resolve using the provisions of domestic sources (the Constitution, laws, collective agreements, etc.), in order to resolve conflicts in which there is alleged discrimination.

The discrimination most commonly reported by workers to judicial and administrative authorities in Venezuela is related to payment or working conditions. However, Convention No. 111 does not consider differences based on the qualifications of workers as discriminatory. Additionally, the LOTTT and Regulations of the Organic Labor Act (hereinafter, RLOT), allow for differences in pay or benefits of some workers from others, provided that there are differences in the circumstances of workers, because of age, professional training, regular attendance, family responsibilities and the like, and provided they are general, ie the benefit or premium should be granted to anyone in similar conditions (Article 109 LOTTT and Article 14 RLOT).

However, the Social Chamber of the Supreme Tribunal of Justice (hereinafter SCS-TSJ) has established that when a worker meets the general condition and complains he does not get the compensation or premium - indirect discrimination cases\(^\text{15}\) – the case must be resolved through the application of isonomy or equality.

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\(^{15}\) Indirect discrimination is materialized by the inclusion of seemingly neutral conditions in these processes of selection or promotion, but only some of the candidates and not others possess said
of conditions, provided that the worker proves the alleged discrimination (Article 15 RLOT), which is the existence of a wage gap for the same office, position or occupation, with identical work hours and efficiency (similar conditions) than other workers\textsuperscript{16} and if it is evident, it is up to the employer the burden of proving the objective, reasonable and proportionate justification for the situation that denotes a differential treatment against the complainant worker.\textsuperscript{17}

Also, the SCS-TSJ has solved cases of apparent legal discrimination through the extension of regulatory regimes to categories of workers excluded by the law or by the collective autonomy, even if such extension has been more of creation of new law than an interpretative function\textsuperscript{18}.

\textit{iv. Balance}

International labor rules have inspired the constitutionalization of labor rights as well as their development of those rules through public order policy instruments that guarantee the prohibition of any measure of discrimination in the workplace and which have been increasing and which are being reformed, due to their importance in the Venezuelan Labor Law.

Policy instruments and Supreme Court jurisprudence have established mechanisms for preventing and correcting any measure of direct or indirect discrimination.

The development that internal sources of law have had in relation to equality and the prohibition of discrimination has influence on the judgments issued by the courts of the Republic and, especially, the Supreme Court preferentially more than the ILO Conventions.

\textsuperscript{16} SCS-TSJ No. 327 dated February 23, 2006 (case: Jose Bohorquez vs. INDUSTRIAL BUILDINGS, CA and RAYMOND DE VENEZUELA, CA)

\textsuperscript{17} Political-Administrative Chamber of the Supreme Court, sentences No. 1024 dated May 3, 2000 (case: Francisco Javier Hurtado Leon vs. University of Carabobo).

\textsuperscript{18} The most striking case was the judgment of the SCS-TSJ No. 522 dated April 14, 2009, which resolved the request for interpretation of Article 275 of the repealed Organic Labor Law, which provided for the exclusion of domestic workers from the general labor regime established in Titles II, III and IV of that Law, and which extended the application of certain rules of the general scheme for domestic workers, including: presumption and working situation, employment contracts, labor tenure, free stipulation of salary and limits, among others. It is necessary to mention that this judgment applies constitutional and legal depositions, as well as jurisprudence related to the prohibition of discrimination, but it did not apply the provisions contained in the ILO conventions related to equal treatment. However, in relation to the extension of the general payment regime to domestic workers, the SCS-TSJ decided in accordance with the provisions of Convention No. 95 on Protection of Wages, 1949.
3. TRIPARTITE CONSULTATION

Alexandre MARIN FANTUZI

i) ILO Conventions signed and ratified by Venezuela

In this contribution it is analyzed the degree of effectiveness of the content that establish the Conventions 81, 144, 150 of the International Labor Organization and which are part of the so-called "priority" or "governance" Conventions are analyzed.

Although only the three conventions listed are analyzed, we will mention all those associated with this report, stating which ones Venezuela has ratified and which are pending. The most important agreements signed and ratified by Venezuela governance are: (a) Convention 81 on Labor Inspection. (B) Convention 122 on Employment Policy and (c) Convention 144 on Tripartite Consultation (International Labor Standards). Of the remaining agreements "Governance", Venezuela has not signed the Convention 129 on Labor Inspection (in Agriculture) nor ratified the Protocol of 1995 to the Convention on labor inspection, 1947. The other ILO ILSs' related to the subject under review are: (i) Convention 88 on the employment service; (ii) Convention 150 on Labor Administration; (iii) Convention 160 on labor statistics; and (iv) Convention 159 on Vocational Rehabilitation and Employment (Disabled Persons). From the above list, Venezuela only has signed and ratified Convention 88 on Employment and 150 on Labor Administration, not having so far ratified or signed the Conventions 160 and 159.

ii) Legal-political context

In order to be able to contextualize the complex situation in Venezuela at the present time and the effect it has had on relations regarding tripartism, social dialogue and labor administration and inspection, we listed three important moments in the political life of Venezuela and the development of labor law: (i) The birth of the industrial relations system with 1936¹⁹ (ii) The birth of democracy and consolidation of the Labor Law in 1958; and (iii) Approval of new political and social order to the Constitution of 1999: Beginning of the fifth (V) Republic.²⁰

According to previous timeline, we have to mention that during 1936 and 1958, there were no significant manifestations of dialogue because it was a period of intermittency between democratic governments and dictatorships. By contrast,

¹⁹The first Labor Law was in 1928 but had no efficacy. Hence, there is consensus that the Law of 1936 as the starting point of the system of labor relations is taken.
²⁰There is no consensus about the accuracy of this denomination since historically, some consider it wrong. However, we use the same because that is how it named former President Hugo Chavez when he came to power and is generally accepted in the current vocabulary in Venezuela.
during the period that goes from 1958 to 1999 (IV Republic\textsuperscript{21}) the labor movement did play an important role in the political and democratic life through the Confederation of Workers of Venezuela (CTV), which was the most representative organization. At that time, there was a close link between political parties and trade unions that allowed a balanced functioning of social relations; but there were serious questions that ended significantly discrediting the trade union movement. The business sector, represented by FEDECAMARAS\textsuperscript{22}, acted, as in any democratic system, as the influence that holds the capital and its relationship with the state developed interdependently. Without ignoring the difficulties and the questioning that took place during that period, and discounting the natural conflicts that are characteristic of labor relations, we can say that between the state, the business sector and the labor movement itself there was dialogue and important cooperation on many of the economic and social issues that should be discussed in the country.

By contrast, in the Fifth Republic, and arguing that the trade union movement used its relationship with the state for their own benefit, the government of President Hugo Chavez rejected the traditional unions and openly acted against the labor movement. The same situation occurred with the business sector, perhaps not so much because it was questioned as the union movement, but because it embodied the natural enemy of the socialist ideological project. As a result, since 1999 the social dialogue between the Government and its social antagonists began a process of conflict that still persists.

\textit{iii. Tripartite Consultation: Development of the State Policy on dialogue and consensus}

In Venezuela, unlike many countries in the region, the political and democratic model for the period 1958-1998 is constructed based on big deals between the government and the most representative organizations of employers and workers, which allows appreciating there was a significant social consensus during that stage process. The important experiences of dialogue and consultation\textsuperscript{23} that we refer to are: (i) the Workers-Employers Compromise of 1958\textsuperscript{24}, which was bipartisan, but in the presence of the State, which agreed to recognize the union freedom as a fundamental human right; (ii) The Tripartite Agreement on Integral Social Security and Wage Policy (ATSSI) which produced seven draft laws that would then be approved by Congress, including the reform

\textsuperscript{21} Ibid 2
\textsuperscript{22} Federation of Chambers and Associations of Commerce and Production of Venezuela (Federación de Cámaras y Asociaciones de Comercio y Producción de Venezuela)
\textsuperscript{23} Other cases: qualifying tripartite layoffs established against unfair dismissal Commissions Act, the National Costs, Prices and Wages (CONACOPRESA) (la Comisión Nacional de Costos, Precios y Salarios).
\textsuperscript{24} Social pact signed by the United Committee of Trade Unions and FEDECAMARAS after the dictatorship of the twentieth century. Immediately after the three major political parties signed the political pact that ushered in democracy and that "fixed point" was called.
of the Labor Act of 1997, and (iii) The tripartite agreement on minimum wage fixing of 1998 whereby a National Tripartite Commission was established for concerted revision of minimum wages annually. There were experiences of tripartite integration in administrative bodies as well.25

However, the situation after 1999, that is, from the beginning of the Fifth Republic (V Republic) did not follow the same path taken so far, abandoning the dialogue, consultation and tripartite cooperation that had been achieved between the state and the most representative organizations of workers and employers. Thus, from the beginning of that political period the relationship between the state and trade unions and employers organizations has been confrontational, even reaching violence.26 An immediate impact that emerged from that struggle was the failure of the mechanisms of revision of minimum wages through tripartite consultation that was agreed in 1997, which, since 1999, the National Executive has decreed minimum wage every year without any consultation. Moreover, from that moment, it begins a questionable practice to legislate by decree-laws, under special powers granted by the National Assembly.

The most important law reformed by presidential decree is the Labor Law in 2012,27 which, on tripartism, eliminates the tripartite commission on minimum wages by tripartite agreement that was included in the reform of 1997, and substitutes it "for an extensive consultation with social organizations and institutions in socio-economic." While the new law creates a tripartite body called the Council of Workers, the reality is that you cannot attribute true tripartite because all its members are pro government. What is objectionable about the reform of the Labor Law in 2012 is that was not made through a genuine process of tripartite dialogue; nor it circulated a draft Law for review, and was adopted in a span of four months, from the President of the Republic announced it would carry out the reform. To illustrate what we have explained, we do not refer to the report of the Committee of Experts on the Application of Conventions of 2015, which also mentions the findings of the tripartite high-level mission28 which visited Venezuela in 2014, where evidence describing the situation: Let's see:

The Committee recalls that for many years requested the Government to: i) any legislation adopted concerning labor, social and economic issues that

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25 Tripartite directory to manage the National Institute of Training and Education (INCE) (Directorio tripartito para administrar el Instituto Nacional de Capacitación y Educación)
26 The Report of the Committee of Experts on the Application of Conventions and Recommendations in its 2014 report, the government said: "The Commission expresses its deep concern at the serious and different forms of stigmatization and intimidation reported by the Mission (...) calls. once again the Government's attention on the fundamental principle that the rights of workers' and employers recognized by the Convention can only develop in a climate free of violence, intimidation and fear."
27 Labor Law, workers and workers (LOTTT).
28 Report of the High Level Tripartite Mission held in the Bolivarian Republic of Venezuela from 27 to 31 January 2014 concerning the examination of all matters pending before the Board in connection with Case No. 2254, as well as all issues relating to technical cooperation.
affect workers, employers and their organizations, is subject to prior real in-depth consultations with independent organizations most representative employers and workers (...) and ii) taking into account the allegations of discrimination expressed by FEDECAMARAS and several workers' organizations, the Government is guided exclusively by criteria of representativeness in its dialogue and relations with workers' organizations and employers, and to refrain from any kind of favoritism or interference and complies with Article 3 of the Convention.

Then it states:

The Commission takes note of the conclusions of the Mission in this regard: The Mission emphasizes that inclusive dialogue advocated by the Constitution of the Bolivarian Republic of Venezuela is fully compatible with the existence of tripartite social dialogue bodies and that any experience negative in the past in relation to tripartism cannot undermine the implementation of ILO conventions on freedom of association, collective bargaining and social dialogue nor discredits the contribution that tripartism done in all the member states of the ILO.

iv. Balance on Tripartite Consultation

a. The social dialogue that existed between the most representative organizations of employers and organized labor and the state during the years 1958-1998, made significant process of economic and social consensus in Venezuela, compared to other countries in Latin America during that period.

b. The formal social dialogue, which had been kept in the period before 1998, was broke from the start of President Chavez’s government.

c. The government only consults with the organizations of workers and employers that are pro government, excluding all those organizations that the government considers contrary to the ideology of the Bolivarian Socialism.

d. It has not been possible to develop true tripartite cooperation mechanisms with organizations that have not been recognized by the government, which means that in the current time there is a lack of practices to achieve the commitment made under the provisions established in Article 2 of the Convention 144. In this regard, CEACR has been making comments on the Venezuelan government since 1999 about the implementation of articles 1 to 5 of the Convention 144. In its last report, again reiterates to the Government to indicate the manner in which they have into account the views expressed by representative organizations.

e. There is a serious weakening of the democratic model of labor relations since the time channels are closed formal and true dialogue with the organizations that oppose the government. The right to genuine tripartite dialogue and the recognition of the rights of the most representative organizations provided by
the Convention 144 has not been effective. In order to be a tripartite dialogue it is essential that the Government recognizes the representation, collective autonomy, freedom of association and all public freedoms.

f. In conclusion, the balance of the period 1958 -1999 is low; on the contrary, the balance from 1999 to date sheds negative balance and content-rights under the Convention 144 in Venezuela, are unfulfilled by the State.

4. LABOR ADMINISTRATION AND INSPECTION.

Alexandre MARIN FANTUZI

i. State Legislative and Policy Development.

The Labor Administration was founded in 1936 with the creation of the National Labor Office and currently consists of several agencies, all under the overview of a central body, specifically, the Ministry of Popular Power for Social Work Process. The most important organ is in charge of labor inspections. It should be mentioned that, since 1936, the state has retained mechanisms of control over the activity of trade unions, significantly limiting their development. The body responsible for this has been the labor administration. These mechanisms increased significantly with the of 2012 labor legislation reform.

By contrast, the model of Individual rights was designed based on the principle of protection and has many guarantees. It is highly protectionist. Because of this, the labor administration in Venezuela was assigned many functions. Another feature that should be noted regarding the labor administration in Venezuela is that it has a strong ideological character, which has led to a rift with the trade or business organizations that do not possess the same beliefs.

With regard to Convention 150 on Labor Administration, and based on the above, among the violations that are found in the same, we can observe: (i) administration personnel must act according to imposed guidelines and members of the military are designated to direct administrative work organizations (ii) the

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29 There are also four attached autonomous institutes that deal with different functions, social security, health and safety at work, recreation and training, and education and training.

30 1) monitoring and enforcement of all regulations governing the labor and social security protection. 2) Implementation of justice in administrative 3) Development of employment policies 4) Inspection and supervision of working conditions and safety and health 5) Publication of statistics. 6) Advice workers, 7) Application of sanctions 8) Study and Research 9) Standard setting 10) Education 11) Participation in collective labor relations, including control of the organization and life of the collective subjects, as well as collective bargaining and strike.

31 Report of the Ministry for Social Work Process I. LINES OF ACTION 2014 GREAT HISTORICAL OBJECTIVE 2 II. Continue to build Bolivarian socialism of the XXI century in Venezuela, as an alternative to a destructive and savage capitalist system and thus ensure "the greatest sum of happiness possible, the greatest amount of social security and greater amount of political stability for our people".
administration does not give technical advice to employers or their organizations but reserves it only for workers (iii) the political conflict has resulted in the breakdown of formal and regular dialogue between the government and organizations that are not in accordance with the official line. The positions described are contrary to literal c) and d) of Article 2 and Articles 5 and 10 of Convention 150, meaning that no technical assistance is provided to employers, staff have no independence and no proper procedures are developed for consultation, cooperation and negotiation and, therefore, there is no participation of employers and excluded unions in the policies regarding employment and working conditions.\textsuperscript{32}

With regard to inspection, as a preliminary matter, it should be noted that the Venezuelan model is a combination of the compliance model and the deterrence model, but with a predominance of the latter over the former, as is expected, besides sanctions fine and closures, there is a penalty of arrest or imprisonment.\textsuperscript{33} Thus, the price of punishment is not only more costly than the benefit of non-compliance but is also of a criminal nature, which becomes more severely repressive and punitive since it can restrict personal freedom.

It is important to note that the labor inspections in Venezuela are conducted through the labor inspectorates that are assigned general powers in both the field of working conditions and of health and safety. Inspections are also carried out by the technical units of the National Institute of Prevention, Conditions and Working Environment (INPSASEL), which shares concurrent jurisdiction with the provinces with respect to health and safety. Along with these organizations there is another body whose competence is specific to social security.\textsuperscript{34}

One aspect of inspections in Venezuela that is openly at odds with Convention 81 on Labor Inspection, is the quantity and multiplicity of functions that are assigned to the Labor Inspector, who, in addition to those mentioned in Article 3 of the Convention 81, is entrusted with: (i) resolution of inter-subjective conflicts at the administrative headquarters to authorize dismissal of protected workers with tenure or immobility. (ii) attending to claims of workers (iii) direct punitive procedures (iv) intervention in the design of controls over collective labor relations, which also translates into restrictions on trade union activities.\textsuperscript{35}

\textsuperscript{32} http://www.mpppst.gob.ve/mpppst/?page_id=246
\textsuperscript{33} In Venezuela there is a penalty of arrest for contempt of a fine for illegal closure of companies, for violation of the right to strike and for obstruction of reinstatement orders and any administrative order issued by the administration. There are also criminal consequences for grave violations of the rules of health and safety that have caused death or disability in the worker
\textsuperscript{34} Inspection is Venezuelan Institute of Social Security (IVSS)
\textsuperscript{35} This intervention includes: determining the most representative organization, removing immobility of protected workers, determination of the most representative union organization, participation in, settling procedures related to collective bargaining agreements standardize conventions, process petitions, settlement and procedures on violations of freedom of association.
Moreover, the state is in non-compliance with Article 5 of the Convention 81 since it only encourages collaboration with workers, but not with employers or unions that are not affiliated with the government. Another of the serious breaches of the terms of the Convention 81 (Articles 6 and 7), which is apparent is the situation of instability in the employment of labor inspectors and area directors, who are appointed and removed by the Ministry at will. This determines the course of their work and allows for interference by the state in mandated activities, thus limiting the effectiveness of securing of rights. Additionally, there is the temporary nature of the members of the inspectorate’s technical units, who are often admitted under contract without further training, which compromises the technical result of their duties. Another flaw is that the number of existing inspectors is not sufficient to fulfill all assigned tasks, which affects the efficient performance of the inspection functions under the terms of Article 10 of the Convention 81.

Notwithstanding the above, the state has partially complied with the provisions of paragraph a) of article 11 of the Convention, in the sense that it has modernized and reorganized the infrastructure as well as equipping the country’s offices of the labor inspectorate, which permits the labor inspectorate to function better. Additionally, another important observation is that the inspectorate system was attributed with jurisdiction to apply penalties for violations of regulations instead of following a procedure before a judicial body, as provided for Article 17.1 of the Convention 81. However, with regard to that article, the state has adopted item 17.2, which provides for the discretion to open a sanctioning procedure, which varies according to whether it is opened by a labor inspector or a security and health inspector. In the first case, the law requires warnings to be made before starting the procedure and in the second case is optional, at the discretion of the health and safety inspection officer.

In another vein, it should be noted that the content of Articles 12, 13 and 14 of the Convention 81 have been adopted by the state, being incorporated into the written law governing the inspection as official administrative powers to act and take measures, included in the 90s in the labor legislation, and in current legislation of safety and health, which has been adapted to local law very similar to the content of those articles in some of its provisions.

With regard to the adoption of sanctions for compliance with the standard and in cases of obstruction of the functions of inspector provided under Article 18 of the Convention 81, Venezuelan legislation is highly punitive and imposes imprisonment which constitutes a deviation from the content of the convention, since the sanctions that the Convention refers to must be "appropriate". In the field of labor relations, sanctions that include imprisonment are disproportionate,

36 Article 514 of the LOTTT
37 Article 123 LOPCYMAT
being unrelated to the legally protected interest. Additionally, the way they are designed undermines the principle of classification of criminal law and the principle of harm in criminal matters, which are clear violations of the Convention.

ii. Balance of the Administration and Labor Inspectorate.

a. Numerous administrative powers are attributed to the labor inspectorates that are in excess of its purpose, and their main functions have residual character. The impartiality of the inspectors is virtually nonexistent because they are not assured any stability of the civil service career and the obligation to provide advice and assistance is selective.

b. The Labor Administration is built on the idea that work is a social process of liberation and an aim of the state, whose ultimate objective is the destruction of the capitalist model of production to achieve the transition to the socialist state. To this is added, the incorporation of the legal powers from the Convention 81de ILO into domestic legislation with disproportionate penalties, generating a model of highly punitive legalistic compliance with an inspectorate of great power, such power being used on a discretionary basis.

c. In conclusion, the state contravenes the purpose that was attributed to the Administration and the Labor Inspectorate when it adopted the Convention 81 of the ILO, which, due to the ideological, repressive and selective action, gives Venezuela a negative balance under this agreement.

5. ORIENTATION AND TRAINING

Luis FERNÁNDEZ AGUILERA

i. Conventions signed by Venezuela


b. Human Resources Development Convention, No. 142 (1975).

c. Universal Declaration of Human Rights (Art. 26).


ii. Legislative Development and State policies

a. Laws
   – Constitution of the Bolivarian Republic of Venezuela (Arts. 81, 85, 87, 102 and 103)
   – Labor Law of Male Workers and Female Workers (LOTTT) (Arts. 20, 105, 156, 289, 293 to 319 and 505)
– Law of the National Institute of Socialist Education and Training (INCES) (Law governing the operation of INCES, which requires employers in the formal sector to participate in orientation and training of workers).
– Productive Youth Act (Act that promotes the incorporation of young people under 30 years old into the labor market).
– Universities Act (Art. 145)
– Education Act (Art. 22)

b. State policies

– Great Mission Knowledge and Work (Government program to train people to be successfully inserted into the labor market).
– Sucre Mission (Government program to encourage college education).

iii. Balance

Orientation and training in Venezuela has an average balance, as it has many positive aspects, but also has negative aspects. In the next lines there is a reference of the most striking positive and negative aspects.

a. Positive Aspects

Venezuela is proactive and diligent when enacting laws that protect the right of citizens to receive adequate orientation and training. This includes the incorporation of this right in the National Constitution, organic laws, not organic laws, administrative regulations and through the ratification of international conventions.

Likewise, the Venezuelan State has a policy that promotes the orientation and job training, and has created government programs aiming Venezuelans to prepare for incorporation into the labor market.

Finally, Venezuela has a high rate of schooling, annually increases the number of schools and annually increases schooling of minority groups such as indigenous and Afro-descendants.  

b. Negatives Aspects

In Venezuela most of the rules relating to orientation and training exclude the informal sector and according to the statistics provided by the National Institute

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39 LOTTT only applies to workers in the formal sector and the INCES Act only requires hiring apprentices to employers with more than 15 workers.
of Statistics, the informality rate in 2013 stood at 37.9%.\textsuperscript{40} This means that a very high percentage of Venezuelan workers do not receive any orientation and training, which keep them further away from the possibility of finding employment in the formal sector.

Moreover, we found that the quality of education in Venezuela in general has declined due to the poor working conditions of teachers. A teacher with 25 years of experience gained in the last quarter of 2014 Bs. 9,785 (about $ 56 monthly).\textsuperscript{41} In addition to this, on average, 15.4% of teachers in Venezuela do not have a college degree. The percentage of teachers without qualifications is as high as 30% in rural areas.\textsuperscript{42}

c. Conclusions on the implementation of the Conventions 140 and 142 of the ILO in Venezuela

Despite the enactment of laws and high levels of education, Venezuela has not achieved the goals set by the Conventions 140 and 142 of the ILO. The intention of these conventions is to prepare people for insertion in a labor market where professional skills are required. However, finding that approximately 40% of the economically active population is working in the informal sector we can conclude that the objectives have not been achieved.

To say that Venezuela has complied with the ideals of the Conventions 140 and 142, it needs to decrease the levels of informality, and to do that it requires i) to improve working conditions for teachers to encourage education, ii) encouraging growth formal sector of the economy, iii) to invest in the preparation of educators to prevent teachers teach classes without academic degrees, and iv) general education and implement economic policies that invite workers to join the formal sector of the economy.

6. EMPLOYMENT SECURITY

Marcial MUNDARAY SILVA

Preliminary considerations on the use of international labor law by national courts and on certain aspects of labor legislation in Venezuela.

In our country, international treaties, once ratified, pass directly to form part of national legislation. Those treaties which deal with human rights, signed and ratified by Venezuela, have constitutional status and take precedence over


domestic law, insofar as they contain provisions that are more favorable than those established by this Constitution and the law of the Republic. Said provisions are immediately and directly applicable by the courts and other public bodies.

Regarding the Convention on Termination of Employment (no. 158, 1982, ratified by Venezuela on May 6, 1985, in the Official Gazette No. 33,170 of 02/22/1985), we can see, generally, that the guiding principle is that the termination of employment by the [...] should be limited to cases where there is a justified cause.

In Venezuela, we note that the issue of stability has always been a concern of the State. A clear reflection of this is the fact that stability has been consecrated as a right and a guarantee in the legislation even before the Convention on Termination of Employment (no. 158, 1982). It is contemplated for the first time as it is known today in the Constitution of 1947 and at the level of law in the Employment Act of 1936. It has been regulated in said Act’s various reforms as well as in new laws such as the Organic Labor and Workers Law (LOTTT), even as a specific law, the Law Against Unfair Dismissals and its Regulation, both now repealed.

It is clear from the review of the jurisprudence of national courts that they do not often invoke sources of International Law for the interpretation or direct resolution of cases, nor for the integration of legislation, including reinforcement and orientation (of the few existing cases, we mention the sentence of the Third Superior Labor Court of the Judicial Labor Circuit of the Judicial District of the Metropolitan Area of Caracas, dated five (5) December, two thousand seven (2007), subject: AP21-A-2007-000949, and the sentences dated November 20, 2003, and May 19, 2004 issued by the First Superior Labor Court of the state of Miranda (annulled dismissal), sentence of the Sixth Superior Labor Court of the Judicial Labor Circuit of the Judicial District of the Metropolitan Area of Caracas, dated ten (10) February, two thousand eleven (2011), (cause to dismiss). Indirectly, the judgment of the Social Chamber the Supreme Court, No. 154 dated February 25, 2009, case: Hanna Beyjoun Machta vs. Four Seasons Caracas, (abuse of law case), see also sentence No. 424, case: Raquel Santiago Da Silva vs CADAFe, dated May 6, 2010).

In our country, specifically in relation to the Convention on Termination of Employment (no. 158, 1982), domestic legislation is in harmony with the treaty. This is perhaps the most compelling reason for the Courts not to invoke sources of international law very often. However, there are specific legal issues in which the reference to international labor law by Venezuelan judges and lawyers could be useful and allow for further development of labor law, such cases are:

a. Discriminatory dismissals or cases that have violated a fundamental right and higher compensation is not contemplated by the law. In these cases not only does the termination of the employment relationship without cause occur, but it is essentially motivated by an act of discrimination (race, sex, religion,
nationality, political opinions, etc.) or a violation of fundamental rights, which makes it even more severe. Reparation cannot be accomplished merely with the reinstatement or with compensation based on the law in accordance with seniority and salary. Financial reparation should go beyond the moral damage. Reparation should be comprehensive, both economically and professionally, in accordance with the damage suffered.

b. Cases where the reinstatement or readmission of the worker benefits neither employers nor workers, in these cases, the reparation should be greater than that set forth in the law.

c. The burden of proof in the case of an outright refusal of the employer in relation to a dismissal. In Venezuelan jurisprudence, the burden of proof of the dismissal belongs to the worker. However, we believe that based on the Convention on Termination of Employment (no. 158, 1982), said burden of proof should remain with the employer, who should affirm and prove the mode of termination of the labor relationship in any case in which there is an alleged dismissal. Furthermore, the employer should have to prove their diligence, for example, in the case of unauthorized employee absences, by requesting a formal fault (if immobile) or dismissal (case stability).

d. Consider, based on the Convention on Termination of Employment (no. 158, 1982), that the reinstatement order issued by the Labor Inspectorate under the reinstatement procedure set forth in Article 425 of the Organic Labor and Workers Law (LOTTT) has an interim or provisional nature, and is not definitive unless there is no opposition from the employer during the execution of the reinstatement order.

7. WAGES

For the purposes of these notes, we will refer only to the rules of the International Labor Organization (ILO) on wages covering the protection of wages and equal remuneration.

Convention 95 of the International Labor Organization on the Protection of Wages, 1949, ratified by Venezuela in 1981 (Official Gazette Extraordinary No. 2,847, of August 27, 1981) defines wages as "remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered."

In Venezuela, the institution of wage regulation has undergone since the Labor Act of 1928, although in the first laws do not explicitly adopted a definition, in the Labor Act 1990 the legislature recites a definition of wages
which is maintained until now, inspired by the Convention 95 of the International Labor Organization, which was already part of our legal system.

It is clear from the review of the jurisprudence of national courts that they often neither invoke sources of international law for the direct resolution of cases, nor for interpretation, nor for the integration of the legislation to reinforce or to orientate. Of the few cases we mention: (i) the judgment of the Superior Labor Court of the Second Judicial District of Barquisimeto Lara State, of June 27, 2006, Case: KP02-A-2006-000625; and (ii) from similarly judgment of the Social Chamber of the Supreme Court, No. 522 dated April 14, 2009).

However, there are specific legal issues in which the reference to international labor law by judges and lawyers Venezuelans could be useful and would allow further development of the labor law jurisprudence, for example:

Transactions in foreign currency in situations when there are exchange limitations. In this regard the Committee of Experts, referring to the notion of legal tender argues that

...should not be understood as necessarily limited to the currency that is legal tender within the national definition of each ratifying State. It may be deemed to cover other currencies which are generally accepted as legal tender internationally and which, subject to the exchange control laws in each Member State, are immediately and freely convertible into the national currency of the country concerned. Indeed, the Committee considers that there is nothing in the Convention to prevent member States from providing in their legislation that, for the purposes of employment contracts, collective agreements or the payment of wages, convertible currencies shall be considered as legal tender (General Survey of the reports concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949)

This means, that under the effect of exchange control regimes, such as occurs in Venezuela, in accordance with Convention 95 of the International Labor Organization on the protection of wages, would not be possible transactions in foreign currency and that cannot be converted immediately and freely in the national currency of the country concerned.

**Equal Remuneration Convention (No. 100)** Venezuela ratified by the 10-08-1982, Official Gazette No. 2,850, extraordinary of 27.08.1982, on recognition of the principle of equal pay for work of equal value, must be applied in Venezuela instead of as provided under national law, on equal status.

The agreement number 100 choses the "value" of work as the comparison have a broader meaning than the expressions "the same work" or "similar work", however our law opted to maintain the traditional distinction as equal conditions, which translates in practice into an open possibility of wage discrimination, not only between man and woman, but between jobs of equal value, in this regard,
and given that our system of source of law, establishes an order of hierarchy based on the most favorable to the worker, judges should directly apply the Convention number 100.

8. WORKING TIME

Daniel JAIME KELLERHOFF

i. Conventions signed by Venezuela

Venezuela has ratified three ILO conventions that fall under the category of "working time". These conventions are: Hours of Work (Industry) Convention, 1919 (No. 1),\(^{43}\) Night Work (Women) Convention, 1919 (No. 4.), was denouncing the November 20, 1944 and is not effective because it was revised by Conventions Nos. 41 and 89,\(^{44}\) The Weekly Rest (Industry) Convention, 1921 (No. 14),\(^{45}\) Night Work (Women) Convention (Revised), 1934 (No. 41),\(^{46}\) Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153).\(^{47}\)

ii. Legislative development and State policies

In Venezuela the legislation on working time and rest periods has been characterized, because of the LOTTT, for being a rigid regulation that seeks to submit to a regime of common working time, which seemed more favorable than the provisions of international labor standards adopted by the ILO.

In line with the Convention No. 1, the LOTTT determines the maximum duration for different types of working hours: eight hours a day for daytime work, seven hours a day for night work, seven and a half hours the day for mixed shifts. Likewise, it establishes a limitation to the "weekly work". The maximum duration for work during daylight per week is forty hours, while night work and the mixed shift are reduced to thirty-five thirty-seven hours and a half per week, respectively.

The LOTTT includes a number of exceptions to the limits of daily and weekly working hours in accordance with the provisions of Convention No. 1, among which we mention:

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\(^{44}\) Approving Law published in Official Gazette No. XVII-3 dated and ratification registered on August 31, 1933.


\(^{46}\) Approving Law published in Extraordinary Official Gazette No. 118 dated January 4 de1945 and ratification registered on November 20, 1944.

a. **Special or agreed shifts**, under which certain categories of workers are not subject to the limits of daily and weekly hours, provided that the working day does not exceed eleven hours a day and the hours over a period of eight weeks does not exceed average of forty hours per week and the worker is entitled to two days of continuous rest and paid each week (Article 175 LOTTT). These workers are: (a) directors; (B) inspection and surveillance workers when the work does not require a continuous effort; (C) workers performing tasks that requires only to be present, or discontinuous or intermittent tasks that involve long periods of inaction during which the worker does not perform any material activity, but must remain in their jobs to respond to possible calls; (D) hours established by collective agreement.

b. **Continuous work is done in shifts.** The LOTTT provides working time exception for the production systems that require that the activity is carried out continuously, with a duration that may exceed the daily limits or even weekly, if the average number of hours worked, calculated for a period of eight weeks does not exceed forty-two hours a week (Article 176).

The LOTTT also allows overtime this is all time worked in excess of the day than normal or usual way - ordinarily a working day meets and considers two types of circumstances justifying the use of overtime: the nature of the work and the circumstances of accidental type.

a. **The nature of the work.** This is the list of these type of works: (a) Preparatory or complementary work\(^{48}\) which must necessarily be carried outside normal working hours; (b) operations which for technical reasons cannot be interrupted because it can compromise the outcome of the work, or that are necessary to prevent deterioration of processed products; (c) essential work to coordinate the work of two teams that are relieved; (d) necessary work for the preparation of inventories and balance sheets, settlement days, liquidations, settlements and accounts; (e) work that obeys to particular circumstances such as complete an urgent job or to meet increased consumer demand at certain times of the year (Article 179 LOTTT); (f) special and exceptional works such

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\(^{48}\) Preparatory work are those that must be performed prior to the start of normal working hours and that are essential for the normal development of the company, such as the ignition and control of ovens, boilers, stoves and similar, preparation of raw materials, lighting or driving force. They are complementary while those that are essential to implementing the termination of the regular working day to ensure that the place or work items are in conditions that permit the resumption of activity. (Article 5 of the Regulation of the Labor Law, the working men and women on working time)
as repair, modification or installation of new equipment, or facilities of water, gas, electricity and telecommunications.

b. **Extraordinary work due to accidents.** The LOTTT, in line with the Convention No. 1 justifies the use of overtime, both to repair the effects of accidents and to make forecasts of the case, when this were imminent or whenever necessary to take measures to prevent that the normal running of the company can be seriously disturbed (Article 180).

The LOTTT includes breaks as part of the regulation of working time, regulating it in a broader way than in Convention No. 14 and it is distinguished as follows:

a. **Within the workday breaks.** Of an hour a day without it can be worked more than five hours a day. However, if the employee cannot be absent from the workplace the rest time will be computed to the work time and it cannot be less than 30 minutes. The LOTTT also provides two additional breaks during the working day, for at least half an hour each, so breastfeeding women can breastfeed her child in the early childhood education center of the employer, however if the employer does not have an early education center, the rest will be of hour and a half each (Article 345).

b. Rests between working days. Venezuelan labor law only provides a general rule for the continuous interval between the end of a working day and the beginning of another for certain types of jobs. In air transport the continuous break has to be of at least 8 hours or equal to twice the hours flown after 8 continuous hours of flying time. In maritime, river and lake transport is mandatory to grant a continuous break of at least eight hours within twenty-four hours a day (Article 250 LOTTT) and when the officer or crew member must enter to shift guards, there should be enjoyed a break of at least four hours immediately preceding the guard time. However, in the case of land transport the working time should be regulated by a collective agreement that has not yet been negotiated, or by a joint ministerial resolution that does not yet exist (Article 240 LOTTT), thus even though there have been no judgments based on Convention No. 153 to establish a minimum rest period for this category of worker, it is possible that because of its immediate application can be considered the provisions of Article 8, this is a break of at least ten consecutive hours.

c. **Weekly rest.** The LOTTT provides, as a general rule, that the worker will be entitled to two consecutive days of rest paid for each week of work (Article 173). According to the Regulation of the Labor Law, (hereinafter RLOTTT)

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49 See Joint Resolution No. 102 and 1,460 of July 10, 1996 issued by the Ministries of Labor and Transport and Communications, published in Official Gazette No. 36 003 dated July 18, 1996.

50 The repealed law provided only one day of rest, given that the weekly limit was forty-four hours, in practice day and a half of rest was granted.
these two rest days should either be Saturdays and Sundays, or on Sunday and Monday. However, RLOTTT brings two exceptions: (a) in non-susceptible interrupt work, rest days can match other days of the week, provided that they are continuous; and (b) entities with continuous work schedules and shifts, days off need not be continuous, can be fixed one day off during the week, but should be offset by an additional day in the holiday period.

d. **Paid vacations.** The LOTTT provides that any employee with one year of uninterrupted work for an employer, is entitled to a paid vacation period of fifteen working days after that first year, for each year of length of service, is entitled to enjoy an additional day, up to fifteen additional days. Rest referred to vacations must be continuous, periodic and paid in cash.

Finally, the LOTTT, in accordance with the provisions of Conventions Nos. 1 and 14, ordered to set ads containing the schedule and the granting of days and hours of rest.

**iii. Use of conventions on working time by the courts**

As is the case with the rest of the ILO Conventions, courts apply domestic law in preference. This assertion is reflected in detail in the judgment SCS-TSJ No. 529 dated 22.03.2006 (case: José Vicente Villalba vs. AEROEXPRESOS EJECUTIVOS, CA), where they determined the value of Convention No. 153 as a source of Venezuelan Labor Law, holding that:

> ...once a matter relating to international conventions, the SCS-TSJ considered that it should be respectful to the international conventions, and since the Convention 153 protects the health of transport workers, and seeks to promote and stimulate the development of public land transport in the country, it should be understood that there is no contradiction between the content of the Convention and domestic legislation, since the same Convention refers to domestic law, which means that the regulation of the conditions under which it must be realized, and in the absence of this regulation, domestic law must prevail.

Thus considered, in the specific case, that inland transport workers are subject to the special day that included eleven hours contemplated in the Venezuelan labor law contrary to limit of nine contemplated in the said Convention.51

However and given that the internal sources contain more favorable provisions of international labor standards - with the exception of the day for inland transport workers, the Conventions are considered only references that reinforce the assumptions contained in domestic legislation. From there we find the judgment of the SCS-TSJ No. 449 dated 31.3.2009 (case: Request for

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51 Such approach has been ratified by the SCS / TSJ decision No. 1095 dated 18.10.2011 (case: Givanni Joel Medina and others vs. DOMESA)
interpretation of Articles 154 and 218 of the Labor Act filed by the METROPOLITAN ASSOCIATION OF PETROL DISPENSERS AND THE FEDERAL DISTRICT, et al.) which is recognized under the Constitution that:

...workers are entitled to paid weekly rest on the same terms as for days actually worked. Similarly, Article 2 of Convention No. 14 of the International Labor Organization, which concerns weekly rest, states that subject to the exceptions provided in the Convention, all staff employed in any industrial, public enterprise or private, or in any branch, you will enjoy in the course of each period of seven days, a weekly rest comprising at least twenty-four consecutive hours, which will be awarded at the same time and all the staff whenever possible, and should match, where feasible, with the days already established by the traditions or customs of the country or region.  

iv. Balance

International standards on working time have not only influenced the domestic legislation, but it has established better conditions for workers. However, unlike the provisions of the Conventions on working time, Venezuelan law aims to establish a common and general workday regime for all types of work.

Jurisprudence, while analyzing international standards on working time, stressed that domestic law should be deprived of those above, since the Conventions refer to the regulation of working hours through internal instruments and though there is no such regulation, the analogous rules of domestic law should apply.

However, international labor standards can be considered as a reference that reinforces scientific opinion of judicial precedents.

9. SAFETY AND HEALTH AT WORK

Nelson CAMBAS TRUJILLO

In Venezuela, the legislative development of material on safety and health at work began with the enactment of the Organic Law on Prevention, Conditions and Environment of Work (LOPCYMAT) published in the Extraordinary Official Gazette No. 3850 dated 18 July 1986. However, the regulation on the matter was being developed by the Regulation of the Health and Safety at Work dated December 31, 1973, which, despite the time which has elapsed and technological advances in the area, continues in full force in the absence of any rule to expressly repeal it.

So, it is worth noting that, despite the policy development in the field of occupational safety and health in our country [...] effectively dates back to the

52 Ratified by the decision of the SCS-TSJ No. 309 dated 22.5.2013 (case: Neck Hermes Rojas vs. Luis Antonio Francisco Gonzalez Sanchez)
late twentieth century, Venezuela, since the beginning of the century, had already given some clear signs of interest in regulating aspects in this area, which can be exemplified by some supranational legal instruments such as Convention No. 13 on White Lead (Painting) 1921, ratified by Venezuela in Extraordinary Official Gazette No. 18937 dated 23 April 1936 and Convention No. 45 on Underground Work (Women) of 1935, ratified by Venezuela in Extraordinary Official Gazette No. 118 dated 04 January 1945. Similarly, worth mentioning are Convention No. 120 Hygiene (Commerce and offices) of 1964, ratified by Venezuela in Extraordinary Official Gazette No. 29,475 dated March 30, 197, Convention No. 127 on maximum weight of 1967, ratified by Venezuela in Extraordinary Official Gazette No. 3301 dated 23 December 1983, and Convention No. 139 on Occupational Cancer 1974, ratified by Venezuela in Extraordinary Official Gazette No. 32,731 dated 1 August 1983.

In this regard, the abovementioned Regulations on Health and Safety at Work, in Title II, Hygiene Conditions, Chapter II, The Use of White Lead in Paint and Chapter III, Hygiene at Sites, Premises and Workplaces, establishes standards for that use white lead, lead sulfate and products containing such substances in the work for which such employment is not prohibited as well as provisions relating to the provision of fresh drinking water and ice, drinking glasses and water for personal hygiene of workers, respectively. Similarly, Title VII, Excavations, Quarries & Demolitions in its Chapter II, Tunnels and Subterranean Work requires the manufacturer to take the necessary measures to ensure the full protection of workers in the construction of tunnels and underground work.

Similarly, Convention No. 155 on Safety and Workers’ Health of 1981, ratified by Venezuela in Extraordinary Official Gazette No. 3,312 dated January 10, 1984 and No. 161 on the Health Services at Work ratified by Venezuela in Official Gazette No. 38 093 dated December 23, 2004, have had a profound impact on the legal regulation of this area and are set out explicitly in the Venezuelan law. In this sense, the LOPCYMAT, whose last amendment dates back to 2005, in line with Convention No. 155, sets forth that the scope of the Act covers all branches in which workers are employed, including the public administration, and in general all personal services, where there are employers and workers, whatever form it takes, except as otherwise expressly provided by law, among which are included members of the National Armed Forces.

Also, the LOPCYMAT, in line with the content of the Convention referred to above, sets forth key notions in the field of health, considering that it covers not only the absence of disease or infirmity, but also the physical and mental elements affecting health that are directly related to health and safety at work and ergonomics, which is conceived as the adaptation of machinery, equipment, working time, organization of work and work processes to the physical and mental abilities the workers.
In this same sense, another aspect worth noting is that among the many competences of the National Institute for Prevention, Health and Safety (INPSASEL), the main body of governance for a safe and healthy workplace, highlights the advice to workers, employers, unions and other forms of productive or service oriented community associations as well as their representative organizations, in the material of prevention, occupational safety and health. Similarly, and in line with Convention No. 155, it expressly states that those who design, manufacture, import, provide or transfer any machinery, equipment, substances for occupational use, work products and tools are required to ensure that they do not constitute a hazard to workers, provided they are installed and used under the conditions, in the manner and for the purposes recommended by them.

LOPCYMAT, aligned with what is set forth in said supranational source, provides that the security and health at work shall not involve any financial expenditure for the workers, and sets forth that costs corresponding to this Benefit System, noting that these contributions will be entirely by the employer, union, or other productive or service oriented community association, as appropriate, which will quote a percentage ranging from zero point seven five percent (0.75%) and ten percent (10%) of the salary of each worker or income of each member of the cooperative organization or other productive or service oriented community association.

Similarly, Venezuelan legislation sets forth, in keeping with the spirit of the Convention referred to above, that cooperation between employers and workers or their company representatives shall be an essential element of organizational measures as well as any other type which are taken, for which it developed a set of rights and duties for both parties, but which always emphasizes the undeniable importance of the rights of participation, training and information that correspond to workers in this area. The duties established by this Law for the workers and the allocation of functions relating to occupational safety and health shall complement the actions of the employer, without exempting said employer from fulfilling its duty of prevention and safety.

For its part, Convention No. 161, includes health services at work as an organizational structure with essentially preventive functions which is responsible for, among other things, advising the employer, workers and their representatives on the adaptation of work to the capabilities of workers in light of their physical and mental health and the requirements for establishing and maintaining a safe and healthy work environment that promotes optimum physical and mental health in relation to work. The Convention provides that, for the establishment of Health Services at Work, provisions may be taken through legislation, such as in the case of Venezuela, and can be organized, as appropriate, and services for a single company or common services for several companies, as they can be organized by companies or groups of interested companies.
Undoubtedly, Safety and Health at Work is one of the supranational rules that have had the most legislative development in our country. However, despite the complexity of the subject, and the institutionality set forth, and despite nearly 10 years of existence of the law, it has not been totally developed. Administratively, there is still a long way to go. There are sectors which regard the LOPCYMAT as a punitive law, and, unfortunately, partisan political ideology has affected the technical work, but it can be said, without a doubt, that progress has been made in this field, not only creating awareness at the employers’ level, but also express recognition of the rights granted to workers in the field of occupational safety and health.

10. SOCIAL SECURITY

Nelson CAMBAS TRUJILLO

Simon Bolivar said at the Congress of Angostura (1819) that "the most perfect system of government is that which produces the greatest amount of happiness possible, the greatest amount of social security and the greatest amount of political stability", a statement that, despite some critics, has earned the Liberator recognition, even from the same International Labor Organization (ILO), for having used the term for the first time, worldwide.

In this sense, it can be argued that it is precisely with this famous phrase by the Liberator, together with the fact of signing the Treaty of Versailles (1919), with which Venezuela began to stand out at the international level in this area, thus initiating the genesis of participation of our country in the supranational legal sphere. In spite of this, its impact on domestic law was practically nonexistent at that time, as the most important result was the controversial Labor Law of 1928, considered by some as a mere doctrinal display for the purpose of Venezuela's foreign policy, but which does not remove or subtract from the value as a body of laws that collected the principles advocated by the ILO.

From then until now, our country has signed, in the field of Social Security, a series of ILO Conventions, among which are the following:


Venezuela has legislatively developed some of the principles and concepts contained in the abovementioned supranational regulations, which in accordance with the Constitution (Article 23), has full force and internal application in our country. In this regard, the regulatory legal rules of social security, based on what is set forth in Article 86 of the Constitution of the Bolivarian Republic of Venezuela, establishes the right of everyone to enjoy the protection of the system because, in accordance with the Organic Law of the Social Security System (LOS), published in Official Gazette No. 39,912 dated April 30, 2012, it is a social, fundamental and inalienable human right, guaranteed by the State to all Venezuelan who reside in the national territory of the Republic and of foreigners who legally reside there, regardless of ability to pay, status, work activity, development, salaries, revenue and income.

In this context, the LOSSS defines the Social Security System as a set of integrated systems and benefit regimes, which complement each other and are interdependent, which are designed to guarantee the right to health and to address contingencies such as maternity, paternity, illness, and accidents regardless of origin, extent and duration, disability, special needs, involuntary job loss, unemployment, old age, widowhood, orphanhood, housing and habitat, recreation, burdens of family life and any other susceptible social welfare circumstances that law may determine.

In order to ensure the protection of all persons covered by the System, and only for organizational purposes, the System is composed of the following benefits and services systems: Health, Social Welfare and Housing and Habitat. Each of the Benefits Systems controls six (6) benefit regimes which provide protection against the contingencies covered by the social security system, guaranteeing cash benefits (pensions, compensation, subsidies or allowances), service (orientation, intermediation and job training) or services in kind (medical care), which are directly funded by the beneficiaries through payroll contributions or through the general budget of the Nation through taxes.

Among the main benefits guaranteed by Venezuelan law are the promotion and the restoration of health and the timely, adequate and quality rehabilitation for the entire population in a universal and equitable manner; recreation programs,
use of free time, rest and social tourism: (i) The promotion of occupational health policies and measures to ensure a safe and healthy workplace; (ii) Comprehensive care, rehabilitation, retraining and reintegration of sick or injured workers due to employment; (iii) Comprehensive care for and protection against catastrophic illness, maternity, paternity and old age and even non-dependent low-income workers; (iv) Cash benefits for contingencies such as survival, disability and involuntary job loss; (v) Comprehensive care for unemployment and housing needs and habitat through credits, incentives and other forms of subsidies in this area, for low-income people, as well as allocations for special needs and burdens of family life.

In this vein, it is important to emphasize that the transition towards this new social integral security system, which aims to move beyond the traditional model of social protection conceived in the 1940s based on the Bismarckian notion of Social Security, began in 1997 with a policy derived from the Tripartite Agreement on Integral Social Security and Wage Policy. However, said transition has not materialized. On the contrary, it has been lethargic with time. Both regimes coexist today and promote a mixture of institutions, both social security and welfare, which, in some cases perform similar functions, which creates complexity and the bureaucratization of the administrative structure of the system, without this being translated into quality and efficient services for citizens.

11. PROTECTION OF MATERNITY

Reinaldo GUILARTE LAMUÑO

i. Conventions signed by Venezuela

Maternity as a higher consideration, is protected in Venezuela, both through local regulations and international instruments that have been signed and ratified by the country, such as the Conventions 3 and 183 of the ILO, which recognize: (i) prenatal leave; (ii) the postnatal leave; (iii) payment of maternity leave; and (iv) free medical care; (v) breastfeeding permission; and (vi) maternity status.

Furthermore, Article 23 of the CRBV states that a Convention that is ratified by the country, in which human rights are regulated, shall have constitutional hierarchy and shall prevail in the domestic order. Thus, Conventions 3 and 183 of the ILO are part of the legal system in Venezuela.

In Articles 76 and 86 of the CRBV the protection of maternity is recognized, in similar terms as those covered by the Conventions 3 and 183 of the ILO. The CCRBV states: (i) that the state shall guarantee the protection of maternity; (ii) protection from the moment of conception; (iii) the postnatal leave; and (iv) the payment of a maternity contingency by social security.

Based on the foregoing, in the event that a woman considers that there is violation of the rules that protect maternity, she could, in principle, bring an
action for infringement of fundamental rights and freedoms (acción de amparo) in accordance with the terms of Article 27 of the CRBV or could initiate the administrative procedure under the LOTTT to protect against violations of the protection of maternity.

Finally, the protection of maternity is very important because thanks to it, the necessary mechanisms to integrate women into the workplace can be established.

ii. Legislative Development and State policies

At the legislative level in Venezuela, maternity is governed by the LOTTT, the LPFMP, the LSS, the RLOPCYMAT, the RLOT and the RLM.

In LOTTT sets forth: (i) a prenatal leave of six weeks; (ii) a postnatal leave of 20 weeks; (iii) maternity status from conception up to two years after delivery; (iv) maternity leave; (V) prohibition of medical examination of pregnancy; (Vi) limitation of activities; (vii) transfer to protect pregnancy; and (viii) maternity leave is recognized for the tenure of the worker.

In addition, the LSS sets forth maternity healthcare, in addition to payment of a daily allowance during maternity leave, which cannot be lower than normal the wage for the woman in the month immediately preceding the start of maternity leave.

Moreover, the LOTTT establishes breastfeeding permission, so the mother is entitled to 2 daily ½ hour permits if the employer is required to establish a Lactation Room or Early Childhood Education Center, and has done so. In the event that it has not, each permit shall be 1½ hours. Added to this, the lactation period ranges between 9 and 12 months in accordance with the provisions of the RLM.

Similarly, if the company incurred in pre-contractual discrimination, the person who was chosen may bring a constitutional action for infringement of fundamental rights and freedoms (acción de amparo).

Additionally, in relation to safety and health, the RLOPCYMAT sets forth that the worker is entitled not to perform work that could jeopardize her life or

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53 article 11 of the LSS
54 articles 14 and 15 of the RLOPCYMAT
55 article 336 of the LOTTT
56 article 336 of the LOTTT
57 article 335 of the LOTTT
58 article 72 of the LOTTT
59 article 332 of the LOTTT
60 article 333 of the LOTTT
61 article 334 of the LOTTT
62 article 342 of the LOTTT
63 articles 1 and 2 of the RLM
that of her child, from conception up to 1 year after delivery. Also, the worker shall be entitled to a monthly allowance of 1 full day or 2 half days to attend the doctor during pregnancy. Once the child is born, workers are entitled to a monthly allowance of 1 day for pediatric assessment the child. In both cases, a doctor’s certificate is required.

In another sense, one of the novelties of Venezuelan law, is that it establishes special paternity regulations, which are reflected in the CRBV, the LPFMP and the LOTTT which equate parenthood to motherhood. So the father enjoys paternity status from conception to two years after the birth of the child, and a paternity leave of 14 consecutive days.

**iii. Use of the conventions by the courts**

In Venezuela, we find that in the judgments of the Supreme Court on maternity and paternity leave, the ILO Conventions are not used for sentencing. However, international standards contained in other conventions and treaties signed and ratified by Venezuela are used. Also, maternity and paternity are safeguarded by local regulations, which recognize the principles of the Conventions 3 and 183 of the ILO.

In this regard we find that the SCS of the Supreme Court in case No. 1368 dated October 29, 2004 in the case: *Venepal, CA*,

http://historico.tsj.gob.ve/decisiones/scs/octubre/1368-291004-04185.HTM

recognized that a worker cannot be dismissed during pregnancy, because she is covered by maternal immobility (maternity status), which was also recognized by the SC of the Supreme Court in judgment No. 742 dated February 5, 2006 in the case: *Wendy Coromoto Garcia Vergara*.

http://historico.tsj.gob.ve/decisiones/scon/abril/742-050406-05-2458.HTM

A particular situation occurs when a worker, covered by maternity leave, ends the employment relationship with her former employer and starts a new working relationship, pretending to assert maternal immobility that derives from maternity status with her new employer. This situation was studied by the SPA of the Supreme Court in case No. 1616 judgment dated September 27, 2007 in the case: *Limpiadores Industriales y Petroleros, S.A*


established that the worker would not be covered by maternity status with her new employer.

Furthermore, the SCS of the Supreme Court in judgment No. 2001 dated December 17, 2014 in the case: *Plaza Palace Hotel, CA*


acknowledged that in the event that a worker did not seek protection of maternity within the period specified in the LOTTT, she may not subsequently request such protection.

Finally, with regard to the protection of paternity, the SC of the Supreme Court in judgment No. 609 dated June 10, 2010 in the case: *Ingemar Leonardo*
Arocha Rizales,\textsuperscript{68} equated protection of paternity to that of maternity, which it was later recognized by the legislature in the LOTTT, in which the legislator seems to have used the interpretation of the SC of the Supreme Court as a basis.

\textit{iv. Balance}

Although in Venezuela, the judiciary organs do not utilize Conventions 3 and 183 of the ILO to safeguard the protection of maternity, it can be argued that they are applied reflexively, since the provisions of domestic law reflect the principles covered in the ILO Conventions.

In Venezuela, there is a wide regulation of the protection of maternity and paternity, which, in addition to being referred to in the Conventions 3 and 183 of the ILO, are recognized in the CRBV, the LOTTT, the LSS, the RLOPCYMAT, the RLOT and the RLM.

Similarly, the Supreme Court has interpreted the rules governing maternity and paternity in order to guarantee the rights of the parties to the employment relationship, taking into consideration that the protection of maternity and paternity are an essential protection for the family.

\footnotesize{\textsuperscript{68}http://historico.tsj.gob.ve/decisiones/scon/junio/609-10610-2010-09-0849.HTML}