The Social State in Latin America

Two approaches to labour and social security law: Colombia and Peru

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Abstract 1

At the end of the last century, in several Latin American States, such as Colombia and Peru, a focus on the Social State emerged with a clear commitment to the welfare of citizens along with an effort to establish minimum conditions for individuals to enjoy a decent life. To achieve this goal, the political constitutions that adopted this new form of State placed labour rights, social security and the implementation of suitable mechanisms for their realization as a central pillar of the new social goals of the State. However, from the very moment of the approval of the Colombian Constitution of 1991 and the Peruvian Constitution of 1993, the legislator began to issue labour reforms to deregulate the labour market and make it more flexible. This allowed the adoption of individual capitalisation systems in the area of social security and would become the first obstacle in the consolidation of the Social State. Since then, several problems have arisen and persisted that keep the resolution of social issues as a promise rather than a reality within the framework of aspirational constitutionalism: These problems include the ongoing use of informal labour, discrimination against and segregation of women as well as the lack of opportunities for young people who do not study or work (referred to locally as *ninis*). All of these difficulties were clearly accentuated by the economic and social crisis resulting from Covid-19 and heightened by States' responses that saw further measures to relax labour laws and the promotion of agreements between the parties even if doing so undermines the guarantees provided for under labour and social security legislation.

I. Introduction

Several of the constitutions adopted in Latin America in the 1990s pro- 2
foundly transformed the understanding of the State and its institutions. Several States went from being purely liberal States to having stronger social

commitments towards the material welfare of their respective populations. This decade represented a major legal breakthrough in terms of the constitutional adoption of the political formula of the Social State of Law, leaving behind old conceptions of the relationship between the State and society and allowing the former to guarantee minimum standards of decent living for its citizens.

3 Consequently, the desire to transition to a Social State saw several States incorporate special mandates for the protection of labour rights and social security as suitable mechanisms to facilitate a functional welfare system, set reasonable incomes and create the prospect for citizens to enjoy a decent life. These constitutions dating to the 1990s are characterised by being highly protective of labour rights and providing access to social security, establishing wide-ranging regulations that enshrined special guarantees, principles, protection of the vulnerable, freedom of association and the establishment of social security systems.

4 However, at the same time that these novel and transcendental constitutional formulas of the State were consecrated in States such as Colombia, Peru, Brazil, Ecuador, Panama and Argentina, strong labour reforms were also incorporated which constituted the first counterweight to the realisation of the new constitutional mandates. Legislators had a clear intention to transform their respective national economies so they could be integrated into the neoliberal international context of free competition and openness. This required adopting schemes to deregulate their labour markets and make them more flexible as the political discourse of the time recognised the existing labour-law framework was an obstacle to generating employment, dampened competitiveness and constrained economic growth. In other States, such as Guatemala, Nicaragua, the Dominican Republic and Venezuela, these reforms were less far-reaching and less profound.[1] Hence, this text intends to make a detailed and exhaustive examination of the Social State and its implications in labour law and social security in Colombia and Peru. These two Latin American States introduced policies and made legal decisions that led to them having significantly more flexible labour markets and where labour guarantees were seriously altered from

1 Jürguen Weller, La flexibilidad del mercado de trabajo en América Latina y el Caribe. Aspectos del debate, alguna evidencia y políticas, Cepal (2007), ‹https://repositorio.cepal.org/bitstream/handle/11362/5429/1/S0701070_es.pdf›, last accessed on 8 April 2022.

those present under their previous labour-law regimes that were considered hyper-protective.[2]

In addition to the decisive role played by labour and liberal reforms in the weak consolidation of Social States in Colombia and Peru, it should also be noted that these States have been confronted with a series of social problems that call into question the constitutional advances themselves. These problems include the widespread use of informal labour, discrimination against and segregation of women as well as the lack of opportunities for the so-called '*ninis*', i.e., young people who have neither studied nor previously worked. In the face of these serious problems within their labour systems, the Social States in Colombia and Peru have not been able to provide relief for those who find themselves in these or other similar circumstances of vulnerability since the Constitution reforms remain a promise with little real-world effect. It is this rupture between the constitutional texts and reality that has caused Latin America's social constitutionalism to be described as aspirational.[3] 5

The serious and very real social problems in the area of labour law and social security have been intensified in several Latin American States with the economic and social crisis of the Covid-19 pandemic, which has made it difficult to manage labour law and social security. Thus, after the disastrous consequences of the pandemic, the continuity of the Social State and the policies for the expansion of welfare are in even greater jeopardy since the priority is to overcome the impacts of the crisis, especially in terms of the considerable increase in poverty. Perhaps the biggest problem is the States' responses in terms of taking measures that seek to reduce working hours and, therefore, remuneration, the validity of agreements between employer and worker that were negotiated on unequal terms or even going as far as repealing legal guarantees and flexibility mechanisms in labour relations. 6

In light of this, the present text strives to shed some light on i) the Social State in Colombia and its constitutional standards on labour law; ii) the liberal reform that accompanied the emergence and consolidation of Colombia's Social State; iii) the real-world problems that were accentuated by the Covid-19 crisis; and, finally, iv) the measures adopted by the State 7

2 Mario Pasco Cosmópolis, 'Flexibilización y desregulación' (1996), TRDD ‹https://revistas.pucp.edu.pe/index.php/themis/article/view/11829› last accessed on 8 April 2022.

3 Mauricio García Villegas, 'Constitucionalismo Aspiracional: Derecho, Democracia y Cambio Social en América Latina' (2012), AP ‹http://www.scielo.org.co/pdf/anpol/v25n75/v25n75a05.pdf› last accessed on 8 April 2022.

to overcome the impacts of the Covid-19 crisis. This will be followed by an examination of the situation in Peru with regard to; i) the developments of the Social State with the advent of the 1993 Constitution; ii) the problems of the neoliberal reform; iii) the real-world difficulties Peruvians face; and iv) the measures adopted during the Covid-19 pandemic. Finally, the text will close with a comparative examination of the situation of the Social State in both Colombia and Peru.

II. The Social State of Law in Colombia and the constitutional standards in labour and social security law

8 For just over a century, the Colombian Constitution of 1886 provided a liberal constitutional system in which the State only guaranteed non-intervention in the basic freedoms of citizens and judges could not make rights justiciable.[4] This all changed in 1991 with the entry into force of the new constitution. From this moment on, the role of the State changed profoundly as it became the director of social life and the guarantor of minimum standards designed to ensure a dignified life, surpassing the requirements laid upon the previous Liberal State.[5] Thus, the formula adopted in Article 1 of the constitutional text of "Social State of Law" was not merely a rhetorical embellishment of the new constitution but an open commitment to fulfil and realise various promises of social order, particularly for citizens to have a job that provides decent and fair conditions as well as having the right to access social security.[6]

9 The constitution of 1991 is based on various constitutional principles that have binding value for legislators and judges, such as those related to work, human dignity and solidarity (Article 1). It also provided for special State protection for labour, in all its forms, guaranteeing decent and fair conditions (Article 25) as well as recognition of the inalienable right to

4 Juan Fernando Jaramillo Pérez, 'La Constitución de 1991 en Colombia: la revolución de los derechos' in Mauricio García Villegas, Andrés Abel Rodríguez, Rodrigo Uprimny Yepes and Diana Isabel Guïsa (eds), *Constitución, democracia y derechos. Textos escogidos de Juan Fernando Jaramillo Pérez* (Dejusticia, 2016) 64–65.

5 Luis Villar Borda, 'Estado de Derecho y Estado Social de Derecho' (2007), DE ‹https://revistas.uexternado.edu.co/index.php/derest/article/view/705/667› last accessed on February 22, 2022.

6 José Manuel Rodríguez contra Empresas Públicas de Cartagena, [1992], Corte Constitucional [1992] T- 406 [2].

social security to protect the population from various social contingencies. This social security aspect was designed as a public service, to be directed, coordinated and controlled by the State subject to the principles of efficiency, universality and solidarity (Article 48).[7]

10 The labour system under the 1991 constitution was subject to a series of fundamental minimum principles without productive activity in the country that cannot be understood and which are the minimum standard that must always be taken into account by the legislator and judges.[8] Thus, equality of opportunities, minimum vital and mobile remuneration, labour stability, favourable to the worker in case of doubt in the interpretation and application of the formal sources, the primacy of reality over the formalities of the bond, special protection to women and those recently entering into maternity, the inalienability of the minimum rights enshrined in the labour laws, among others, were established.[9] These principles set the minimum standards and requirements that labour regulations must provide when issued by the legislator and must be complied with by public authorities and individuals while also being fundamental in their justiciability through tutela action.[10]

11 In the area of collective law, the Colombian Constitution of 1991 recognised the right to union association as one of the pillars of the democratic system it adopted. Thus, the right of workers to form unions without any intervention by the State was guaranteed, as was the right to union privilege for their representatives. Also relevant in this field was the constitutional establishment of the right of workers to employ collective bargaining to agree with employers on wages and working conditions. This went hand-in-hand with the right to strike, as a self-protection mechanism, except for those workers engaged in essential public services. The new constitution also provided for the creation of a Commission for the Agreement of Wage and Labour Policies, a tripartite structure where employers, workers and the government would meet to discuss and settle essential issues impacting the labour market.[11]

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7 Constitución Política de Colombia of 1991, Articles 1, 25 and 48.

8 Iván Daniel Jaramillo Jassir, *Principios constitucionales y legales del Derecho del Trabajo Colombiano,* (Editorial Universidad del Rosario, 2010) 37–239.

9 Constitución Política de Colombia of 1991, Article 53.

10 Mauricio Barón Machado contra Luis Martínez Ruiz y Emisora Ondas de Ibagué [2006], Corte Constitucional de Colombia [2006] T- 205 [6.2].

11 Constitución Política de Colombia of 1991, Articles 39, 55 and 56.

12 These rights enshrined in the constitution allowed the Constitutional Court to develop a series of precedents in which clear rules were and are drawn up and applied regarding work, such as decent and fair conditions of employment, minimum standards, the right to association, negotiation and strike (these last three can be framed within the concept of freedom of association). This non-exhaustive list represents a collection of true fundamental rights and, as such, must be mandatorily applied and complied with by all public authorities and officials working therein. They impose restrictions and limits on the activity of both the legislator and judiciary and can be enforced by means of the tutela action.[12]

13 In the matter of social security, the Constitutional Court deemed that this only constituted a fundamental right to the extent that it was applied in connection with goods strictly of this nature such as life. As such, the Court views the rights derived from the introduction of a social security system, such as the right to access healthcare, pensions and protection from occupational hazards, as constitutional rights and are fundamental in nature. This binds the activity of all public authorities and associated officials and is enforceable through the preferential and constitutional process of tutela.[13]

14 This also allowed for a true reformulation of the sources of law at the constitutional level since the 1991 Constitution recognises that social law is not exhausted in the national system and that local law is not the only

12 María Elena Casas, María Ermelinda Guillén, María Ofelia Medina, Patrocinia Yara, Helda Rojas and Oliva Pico contra Liceo Francés Louis Pasteur, [1992], Corte Constitucional de Colombia [1992] T- 407 [2 y 3]; sentencia de revisión de constitucionalidad [1999], Corte Constitucional de Colombia [1999] C-055 [4]; Sindicato Único de Trabajadores de Laboratorios Chalver S.A. (SINTRACHALVER) contra Laboratorios Chalver de Colombia S.A. [2016], Corte Constitucional de Colombia [2016] T- 619 [10 a 15]; Uriel de Jesús Zapata contra Industria de Alimentos Zenú S.A. [2004], Corte Constitucional de Colombia [2004] T- 656 [3.1. a 3.8]; Sindicato de las Empresas Varias de Medellín E.S.P. contra Ministerio de Trabajo y Seguridad Social, Ministerio de las Relaciones Exteriores, Municipio de Medellín and Empresas Varias de Medellín E.S.P., [1999], Corte Constitucional de Colombia [1999] T- 568 [1. a]; Martha Cecilia Martínez contra Ministerio de Educación, Gobernación de Antioquia and Secretaría de Educación Departamental de Antioquia, [2001], Corte Constitucional de Colombia [2001] T- 1059 [2].

13 Luz Mary Osorio contra Colpatria EPS y otros contra otros, [2008], Corte Constitucional de Colombia [2008] T- 760 [2008]; Jorge Antonio Cárdenas Duarte contra Colpensiones, [2018], Corte Constitucional de Colombia [2018] T- 222 [17]; Ramón Emilio Mejía contra Colpensiones, [2020], Corte Constitucional de Colombia [2020] T- 013 [37 a 42]; Fabián de Jesús Suaza contra Colpensiones, [2018], Corte Constitucional de Colombia [2018] T- 323 [29 a 37]; Fredys Durán Mejía contra Colmena Seguros S.A., [2018], Corte Constitucional de Colombia [2018] T- 265 [2.1].

or even primary source as there were already various developments at the international level that could not be disregarded. Specifically with respect to labour law, Article 53 of the constitution provides that international labour treaties duly ratified by Colombia are part of national legislation while Article 93 states that treaties on human rights whose limitation is prohibited in states of emergency prevail in the national legal system.[14]

15 With these provisions, the Constitutional Court introduced into the Colombian legal system the concept of the block of constitutionality. Namely, by referring to a set of values, principles and norms that, despite not being expressly in the Constitution, serve as a reference for the abstract control of the relevant norms which would lead to a broad concept of the block. Later, the Court would point out that in a strict sense, the block implied the set of rights and parameters of international law contained in international treaties on human rights that could not be limited in states of exception.[15]

16 This block of constitutionality is the mechanism of understanding that the Constitutional Court had to predicate that the international labour conventions ratified by Colombia, extensively developed during the 21st century by the ILO and other international organisations, were part of the domestic legal system and held primacy when applying the law. This introduced to Colombia an open recognition of labour guarantees, such as access to decent and fair conditions in employment, equal work for equal pay, equitable remuneration that guarantees human dignity, the right to establish unions and strike, equal opportunities as well as provisions for rest periods and leisure time (Article 23 of the Universal Declaration of Human Rights, 7th and 8th of the International Covenant on Economic, Social and Cultural Rights, ICESCR and 7th and 8th of the Protocol of San Salvador), protection against unemployment and the risks of illness, old age, disability and death (Article 25 of the Universal Declaration of Human Rights, 9th of the ICESCR and 9th of the Protocol of San Salvador).

14 Constitución Política de Colombia of 1991, Articles 53 and 93.

15 Rodrigo Uprimny, El bloque de constitucionalidad en Colombia. Un análisis jurisprudencial y un ensayo de sistematización doctrinal, (Dejusticia, 12 de diciembre de 2005), last accessed on 26 February 2022.

1. A social constitution and a flexible legislation

17 Notwithstanding the important advances represented by the 1991 Constitution in terms of the Social State in Colombia, particularly in connection with labour and social security law, serious problems arose in the 1990s that put the new constitutional model and its broader societal implementation to the test.

18 The first of these had to do with the constant flow of legislation issued since 1990 that sought to deregulate the labour market and make it more flexible. This was done within the framework of the new neoliberal economic model with the primary aim being to reduce the labour costs associated with far-reaching existent labour legislation.[16] An attempt was made to accommodate labour law regulations into new economic mandates, despite the fact that the constitutional provisions were not designed for this, that is, a highly protectionist one. This is how the long-term labour reform that has been ongoing for more than two decades in Colombia was conceived and why it has generated a lot of legal and social discussion and disjunction.

19 In this sense, Law 50 of 1990 allowed the phenomenon of labour intermediation as it created temporary service companies as entities that supply personnel to user companies. These temporary service companies assumed their labour responsibilities and the exercise of subordination by delegation while the law allowed the participation of the financial sector in the management of severance pay that would no longer be paid retroactively according to the last annual salary but based on income earned in each previous year. Law 50 also eliminated an employee's right to reinstatement, which would no longer be paid retroactively with the last salary earned, but year by year with the remuneration of each one of them. It also eliminated the right to reinstatement for long-term workers who had been with a company for more than ten years and were dismissed without just cause while simultaneously creating so-called 'salary exclusion clauses' that allowed the parties to stipulate that certain payments did not constitute a salary or part thereof.[17]

16 Marcel Silva Romero, Flujos y Reflujos. Proyección de un siglo de Derecho Laboral Colectivo en Colombia, (Universidad Nacional de Colombia, Facultad de Derecho Ciencias Políticas y Sociales, 1999), 227- 233. See also Mauricio Lenis, 'Transformación del trabajo y regulación laboral', PAJ 2007 ‹https://www.icesi.edu.co/revistas/index.php/precedente/article/view/1437/1834›, last accessed on 26 February 2022.

17 Law 50 of 1990, Articles 6, paragraph 2, 71 to 94, 95 to 96, 98 to 106 and 128.

Three years later, Law 100 of 1993 was enacted to create the Comprehen- 20
sive Social Security System. Although this law stipulated that social security was subject to the principles of efficiency, universality, solidarity, integrity, unity and participation, it allowed the participation of the private sector in the public social security service. Thus, for several decades Colombia had a pension system administered exclusively by the State, however, in 1993 it became necessary for the private sector to participate in its administration. Thus, private pension funds were created and unequal competition was created between the public and private sectors, that is, between the average premium system and the individual savings system. In fact, a campaign was started for contributors to the public system to switch to the private system to give profitability to the individual savings system. and so it happened, a good part of those linked to the system moved to the private system, without being very aware of the effects that this would imply for their pension situation. The truth is that the public system, operating on the idea of solidarity that allowed the contributions of current workers to finance the pensions of former workers, now faced competition from a private system where everything worked as an individual savings scheme.[18] A similar fate befell the healthcare system, Law 100 left the dichotomy between a contributory system administered by health-promoting companies established for people with the capacity to pay and a subsidized system focused on caring for the poor and other most vulnerable groups within the population.[19]

Subsequently, with the labour reform of Law 789 of 2002, some labour 21
rights were drastically reduced. For example, the daytime working day was extended from 12 hours (6:00 a.m. to 6:00 p.m.) to 16 hours (6:00 a.m. to 10:00 p.m.), which meant that the night shift penalty rates employers had to pay, previously incurred for employees working between 6:00 p.m. and 10:00 p.m., would no longer be paid. Likewise, the penalty rates applicable for Sunday work, which was double time, were now 75 % of the ordinary salary earned. A very important right, which was the indemnity for non-payment of labour claims by the employer, which was one day's salary for each day of delay until the debt was paid, was now reduced to 24 months and after the 25th month, interest for late payment was payable. Likewise, this legislation established the figure of the apprenticeship relationship, to facilitate the formation of occupations, without this implying an employ-

18 Law 100 of 1993, Articles 2 and 59 to 112.
19 Law 100 of 1993, Articles 202 to 217.

ment relationship and that people could only receive a monthly support that was not a salary.[20]

22 Law 797 of 2003 dealt with pension reforms and imposed greater restrictions on access to the rights of the social security system. In effect, it increased the requirements to access the old age pension, from 1000 weeks of contributions to 1300 weeks, progressively increasing from the age of 55 for women and 60 for men to 57 for women and 62 for men. It also increased the requirements to obtain a disability pension as it established a minimum period of contribution to the system that was not required under the previous legislation as well as contributions for at least 50 weeks in the 3 years prior to claiming disability. Regarding the survivors' pension, it also established a qualifying contribution period and 50 weeks of contribution in the three years prior to death. Likewise, it substantially modified the pension transition system provided for in Law 100 of 1993 as a way of cushioning the reform introduced by the latter law. In effect, Law 100 of 1993 provided that women who were 35 years of age or older on 1 April 1994, men who were 40 years of age or older on the same date, or anybody who had more than 15 years of service on the same date would be eligible to receive a pension at the age, time of service and amount of the previous legislation. Law 797 of 2003 provided that only the age would be referred to the previous law, since the other conditions, among them, the length of service, would be of the new legislation.[21]

23 The Constitutional Court of Colombia found these modifications contrary to the progressive mandate contained in the block of constitutionality, particularly the introduction of minimum contribution periods to access certain pensions since it made exercising fundamental rights more burdensome. As a result, the Court declared the content of Law 797 unconstitutional in its Ruling C-556 of 2009. In judgment C-1056–2003,[22] the Court eliminated the reform referring to the disability pension due to procedural flaws in its approval. It also ruled the article declaring the modification to the pension transition system of Law 100 of 1993[23] unconstitutional due to procedural problems.

20 Law 789 of 2002, Articles 25, 26, 29 and 30.
21 Law 797 of 2003, Articles 9, 11, 12 and 18.
22 Sentencia de revisión de constitucionalidad [2009], Corte Constitucional de Colombia [2009] C-556 [Consideración Séptima].
23 Sentencia de revisión de constitucionalidad [2003], Corte Constitucional de Colombia [2003] C-1056 [12].

In view of the Court's decision to declare the issue unconstitutional due to procedural flaws, the Colombian legislature established by means of Law 860 in 2003, that to access the disability pension, the requirement of a minimum contribution period to the system had to be accredited.[24] The Constitutional Court, in accordance with its previous stance, declared this modification was also unconstitutional as it was similarly contrary to the principle of progressiveness established by international instruments.[25] 24

Finally, Legislative Act 01 of 2005 constituted a reform to the 1991 Constitution of great importance for labour and social security law in Colombia since it modified the right to access social security contained in Article 48 of the 1991 Constitution. Among the reforms established was the incorporation of the mandate of financial sustainability of the pension system as a new constitutional principle. This was introduced to ensure that subsequent laws passed on pension-related matters must contribute to the system's financial sustainability. Likewise, it was stated that no pension could be paid at rates below the current legal monthly minimum wage, although the legislator could still make allowance for cases where periodic benefits below the minimum wage could be granted to low-income persons who did not meet the conditions for an old-age pension. This reform also eliminated the special and exempted pension systems; the fourteenth allowance, leaving only thirteen allowances per year; the possibility of collective bargaining between unions and companies for pensions different from the legal ones. Finally, it provided that the pension transition system of Law 100 of 1993 could not be extended beyond 31 July 2010 except for those who were in this system and had at least 750 weeks' worth of contributions at the time the constitutional reform came into force, who would be maintained until 31 December 2014.[26] 25

This modification at the constitutional level regarding social security payments would generate a tension that bordered on antinomy at the level of the block of constitutionality since the incorporated mandates of international law, such as the International Covenant on Social, Economic and Cultural Rights and the Protocol of San Salvador provided for respect for the progressiveness of social rights and their non-regression. This situation was further exacerbated by various international labour conventions, 26

24 Law 860 of 2003, Article 1º.

25 Sentencia de revisión de constitucionalidad [2009], Corte Constitucional de Colombia [2009] C-428 [3.3 y 4].

26 Legislative Act 01 of 2005, Article 1º.

especially numbers 98, 151 and 154, as these promoted the broad right to collective bargaining while the constitutional reform reduced or limited that right.[27]

27 Thus, labour legislation issued after the 1991 Constitution was not focused on developing and regulating in detail the high standards of labour protection of the Constituent Assembly but was aimed at incorporating long-term labour and social security reform of a structural nature. The purpose was to reduce costs in the recognition and payment of labour and social security rights as a prior gain for the country's workers as well as to create a more flexible and deregulated labour market than that which already existed. All of this was undertaken to bring labour and social security law into line with the new economic mandates of economic openness, minimise State intervention and provide greater labour mobility.

2. Problems of the Colombian situation that were accentuated by the Covid- 19 pandemic[28]

28 The reality of working in Colombia has always come hand-in-hand with some serious problems, many of which were intensified by the Covid-19 pandemic, aggravating the situation for all but especially those already suffering from a situation of vulnerability prior to the pandemic. In this context, the three most important problems are highlighted below, however, it is undeniable that many other difficulties exist and were exacerbated by the pandemic.

29 A clear problem that has existed since the introduction of the 1991 Constitution is the situation of those who are engaged in informal work and live on daily scavenging-based activities. These people, although they can materially undertake a job (they already carry out an activity for subsistence), do

27 María Rosalba Buitrago Guzmán, 'El nuevo derecho a la seguridad social del Acto Legislativo 01 de 2005 en Colombia: un caso específico de antinomia y contradicción al interior del bloque de constitucionalidad' PJ ‹https://revistas.unal.edu.co/index.php/peju/article/view/45231/pdf_15› last accessed on 28 February 2022.

28 This section was part of a paper by the author entitled "Avances y desafíos de la Constitución de 1991 en materia de Derecho del Trabajo", presented at the virtual event "Treinta años de la Constitución de 1991: el ideal en medio de la tormenta", held on 23–25 November 2021 by the Constitutional Law and Human Rights Research Group of the Faculty of Law, Political and Social Sciences of the National University of Columbia. The conference proceedings are currently being published.

not enjoy the system of labour rights because their work is not recognised. For them, there is no possibility of access to a minimum wage or receive remuneration for extra work, vacations, bonuses and other labour rights or rights of association, including the options to enter into employment negotiations or strike. For them, the standard of decent work is not met and they remained trapped in the daily cycle of trying to find ways and mechanisms to survive. They are not covered by labour legislation nor are they linked to the social security system. In this sense, informal work includes forms of self-employment and salaried employment that are not registered and, as such, are not regulated or protected by legal frameworks under which they would otherwise be classified as not meeting the standards of decent work.

Certainly, for the ILO, it is very clear that informal work is often not 30
decent work given that this type of employment is not covered by the law and such workers lack rights, social protection, representation and have no voice to address these deficiencies.[29] For this reason, the necessary goal is that the State manages to bring informal workers to formality and under the protection of labour legislation. This would at least allow a minimum of benefits to flow and a reasonable level of subsistence attained to provide a more dignified life that moves towards overcoming long-standing poverty thresholds.

Informal workers in Colombia, being a highly vulnerable group in 31
society, did not have sufficient capacity to withstand the economic and social crisis that resulted from the Covid-19 pandemic, which of course has been far-reaching. The pandemic intensified the problems of exclusion and marginalisation of informal workers in Colombia given the paralysis of the informal economy for many months. According to studies by the Centro de Investigaciones para el Desarrollo – CID – of the Faculty of Economic Sciences of the Universidad Nacional, in Colombia's large cities, 49.5 % of the employed are informally employed. This means that approximately 50 % of the country's workforce is engaged in informal employment, which is a matter of concern and should draw the attention of the State, especially given the fact that it has been verified that there are more women in these jobs than men.[30] This means an already somewhat vulnerable demographic

29 Conferencia Internacional del Trabajo, 90ª reunión Informe VI, El Trabajo decente y la economía informal, ‹https://www.ilo.org/public/spanish/standards/relm/ilc/ilc90/pdf/rep-vi.pdf› last accessed on 28 February 2022.

30 Roberto Mauricio Sánchez Torres, Sergio Chaparro Hernández, ‘Un piso de protección social para preservar la vida: informalidad, pobreza y vulnerabilidad en

is trapped in informal employment which compounds their peril. For poor and vulnerable households, informal work was their only source of income and subsistence and, unsurprisingly, they were not able to work from home because they lacked digital tools to do so or were engaged in work that would not allow home-office. As such, informal workers were arguably the most affected right from the start of the pandemic. After the first few months of the pandemic, with the slow return of economic activity and recovery, much informal work could still not be fully carried out because the bulk of the population with the means to do so was still at home. Of course, it is necessary to mention that there is a wide range of informal work, some were able to continue their work as neighbourhood shopkeepers, operators of home-based small businesses or workshops and so forth. Nevertheless, these individuals remained in a low-protection working environment and suffered greatly through the economic downturn. The most affected were door-to-door workers, people working in open-air sites, kiosks or in vehicles as their subsistence income was reduced to virtually zero.[31]

32 For the ILO, having decent work is a must for every worker, as is their having labour rights, regardless of the form or method of work. Thus, from a material point of view, informal workers, although not covered by legal protection, are engaging in real work. States must make poverty reduction one of their goals and a key step in this direction is to allow informal work to be recognised and protected by labour and social security legislation, i.e. ensure informal work positions qualify as decent work. Informal workers must be provided with legal and social protection, which they currently lack in Colombia, an already evident fact that became even more pressing after the pandemic. Of course, the idea is not to promote informal work, which could be readily done since it is a low-cost option for employers, rather the focus should be on the creation of more formal jobs and the transition of informal workers to formal employment.

33 At the 90th session of the General Labor Conference in 2002, a resolution on decent work and the informal economy was adopted in which important guidelines for action by States were elucidated. It was pointed

tiempos de Covid-19', Investigaciones y Productos, Centro de Investigaciones para el Desarrollo, CID, No. 35, Facultad de Ciencias Económicas, Universidad Nacional de Colombia, mayo- 2020, ‹http://fce.unal.edu.co/media/files/CentroEditorial/documentos/investigacionesCID/documentos-CID-35.pdf›, last accessed on 1 March 2022.

31 Ibidem, pp. 11.

out that States should seek strategies to apply fundamental labour rights and principles to highly vulnerable and poverty-stricken informal workers and extend social protections to create better employment and income opportunities, all within the framework of the fight against poverty.[32]

The second challenge that has arisen in reality in the face of the formulations of the Social State in Colombia has to do with the labour situation of women. Women have traditionally been discriminated against in Colombian society and this is certainly true with regard to their entry into the labour market given the traditional expectation persists that they are responsible for the unpaid work of caring for the home and family. Indeed, women dedicate more time to unpaid work, since they devote around 7 hours and 14 minutes to this work, while men only do it for 3 hours and 25 minutes[33]. In this sense, various barriers to access to employment have arisen, especially for high-level positions in both the private and public sectors. Similarly, when women do enter the labour market, often because they have managed to break down these barriers to access, strong discrimination remains in terms of salary, promotion and advancement opportunities compared to those enjoyed by their male colleagues. It is a broadly-accepted reality that women in Colombia's workforce are permanently exposed to discrimination, marginalisation, exclusion, degradation and harassment that places them in situations rife with disadvantage and inequality. These inequalities have persisted despite the decades that have passed since the entry into force of the 1991 Constitution. 34

The Covid-19 pandemic has only served to accentuate the labour problems of women in Colombia. In the formal economy, many of them were forced to resign from their jobs where, for example, the closure of schools and kindergartens required many to take care of their children and/or other family members that were then confined to home. Others involuntarily lost their jobs, especially in sectors where a large percentage of the workforce was female, such as tourism and services, commerce, domestic service and self-employment[34]. Between 2010 and 2019, female participation in the 35

32 90ª Reunión Conferencia General, Resolución Relativa al Trabajo Decente y a la Economía Informal, Organización Internacional del Trabajo 2002 ‹https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_080536.pdf›, last accessed on 1 March 2022.

33 Diana Milena Ávila- Moreno, *Trabajo y brechas de género en Colombia tras un año de pandemia* (Friedrich Ebert Stiftung, 2021), 7.

34 Ibidem, pp. 9.

labour market rate rose from 51.8 % to 53.1 %. In 2020, this rate fell to 48.1 % and the gap between men and women approached 23 %, which equates to losing a decade's worth of improvement.[35] Female unemployment increased by 6.8 % compared while male unemployment rose by 4.5 %.[36] Other women had to take precarious work to maintain some personal and family income. Furthermore, as the pandemic progressed and societies began to adapt, the closure of educational institutions and the subsequent establishment of alternate forms of home-based education created a burden that was largely assumed by women as it resulted in even more unpaid work and consumed more of their time. Indeed, those who have been able to keep their jobs, through teleworking or working at home, have been subjected to exhausting days of intermingling paid and unpaid work that has resulted in stress, depression and fatigue.

36 The third latent challenge that the 1991 Constitution has failed to address is the employment situation of young people. In recent months, young people have made a desperate cry to draw the attention of the State and society to their plight of hopelessness and feelings of anguish due to not having a present or a future. This has been made manifest through various mobilisations and social protests that took place in 2021 and that sparked an aggressive response from the State. There are about 2.7 million young people between 14 and 28 years old in Colombia who neither study nor work and who have been excluded and marginalised from any opportunity. Society is not providing space for young people in the scenarios par excellence of social integration and recognition, which are the education system and the labour market. This should be enough to generate sensitivity to their situation,[37] especially given the harmful side effects for society that losing a generation can bring in terms of violence, crime as well as even greater poverty and inequality.

37 The situation for about 2.7 million young people without the option to study or work was already bad before the pandemic, and in 2020, as the virus spread through Colombia, this number rose by some 400 thousand[38]. What is clear is that young people who are in poor and vulnerable

35 Ibidem, pp. 10.
36 Ibidem, pp. 12.
37 Roberto Mauricio Sánchez Torres, Los jóvenes que no estudian ni trabajan (NINIS) en Colombia. Documentos FCE, CID, Escuela de Economía, No. 118, junio de 2021 ‹http://www.fce.unal.edu.co/media/files/CentroEditorial/documentos/documentosEE/documentos-economia-118.pdf› last accessed on 1 March 2022.
38 Ibidem, pp. 6.

households encounter obstacles and greater barriers to entering the labour market and must leave the education system relatively early[39] due to the lack of free access to higher education. In any case, two-thirds of the young people without work or education in Latin America are female[40]. According to Roberto Sánchez Torres, "the labour and educational inactivity that young people are suffering represents a fundamental problem of economic and social development".[41] This creates a vicious cycle as the primary reason young people do not study or work is that they come from low-income households because their parents have little schooling and are unemployed.[42] This becomes an iterative process passing from generation to generation and requires the State to address all these problems comprehensively and coherently to break the cycle.

3. Measures adopted by the Colombian State in the context of the Covid-19 pandemic

While the State has been adopting a series of legislative and regulatory measures since the beginning of the Covid-19 pandemic, some have generated serious doubts regarding the State's ability and desire to fulfil the mandates of the Social State of Law and the principles of labour protection and social security. 38

Certainly, in view of the expansion of the phenomenon of work at home during and after the Covid-19 pandemic, coupled with the different problems associated with the unwanted extensions of the working day, fatigue, stress and tiredness, Law 2088 of 2021 was issued to regulate the situation. This law provided that working at home was a temporary mechanism for the execution of the labour relationship, whether public or private, due to extraordinary circumstances, without implying a change in the form of labour and that it would be subject to limits or restrictions, such as coordination criteria. An employer would be subject to these limits or restrictions so that employees' work could continue in a sustainable and agreed-upon manner. This included employees not always being available despite them always being at home, which guaranteed that workers could enjoy rest 39

39 Ibidem, pp. 8.
40 Ibidem, pp. 9.
41 Ibidem, pp. 29.
42 Ibidem, pp. 29–30.

time, vacations, licenses and similar, spaces in which the employers could not. Likewise, whoever undertakes work in case is subject to the rules on maximum working hours and the recognition of the connectivity allowance to those who earn up to 2 legal monthly minimum wages in force.[43]

40 Also, through Law 2121 of 2021, remote work was regulated, also as a new form of execution of the labour contract involving the use of information technologies would allow the labour relationship to be redeveloped since physical interaction is no longer necessary for its execution. This extended to the location an employee could execute his/her work duties given that a specific physical place is not required to do so, as such, a worker has the freedom to select a place he/she deems appropriate. It was established that employees working in places away from their pre-pandemic normal place of employment would still be guaranteed labour rights. The guiding principle of this remote work is flexibility in all pre-contractual and contractual stages with the overarching goal of avoiding labour exclusivity. The law stipulated that the working day would be respected according to the existing regulations and/or collective bargaining agreements but it contradictorily indicated that it would be distributed during the week and would not entail compliance with a strict daily schedule. In effect, this meant that the first mandate to respect the working day was nullified as the law abolished compliance with a strict daily schedule that limited working hours. According to the law, an employer can dictate employees' functions, schedules and duties through technological tools but hyper-connection must be avoided, respecting the working hours and those who have dependents would have work schedules that allowed them to provide the care needed to those dependents.[44]

41 Under Law 2101 of 2021, the length of the working week was to be gradually reduced, going from a maximum of 48 hours spread over 6 8-hour days to a 42-hour work week which could be distributed over 5 or 6 days by mutual agreement. The law allows the number of daily working hours to be distributed variably during the week, having a minimum of four continuous hours and a maximum of nine hours per day. If an employee opted for fewer but longer workdays that exceeded 8 hours, no penalty rates for work done beyond the 8-hour mark applied if the 42-hour week was not exceeded. Likewise, the reduction of the working day indicated in the

43 Law 2088 of 2021, Articles 2, 4, 6 and 10.
44 Law 2121 of 2021, Articles 1, 4, 7 and 17.

law could be implemented gradually by the employer.[45] With the above, the working day in Colombia became a highly flexible and nuanced subject to the will of the parties. This put an end to the classic gain in labour law whereby the maximum daily workday was limited to 8 hours and any additional hours, taken from the workers' rest period, had to be paid as overtime.

A year before, in the midst of the pandemic, the reduction of the working day and hourly work had already been introduced by means of Decree 1174 of 2020 which regulated the so-called 'minimum level of social protection'. This was aimed at people who receive an income of one month's minimum wage for a part-time job so that they could gain access to the subsidised health system. the periodic economic benefits BEPS as an alternative for old age protection (although in this case, they do not receive a fixed pension of 1 month's minimum wage, it is for those who cannot contribute or who do not have the required time) and inclusive insurance for occupational risks.[46] 42

The Court considered that such regulations should be included in the context of the crisis derived from the Covid-19 pandemic and the closure of many companies or their transition to the informal sector so that the minimum social protection level was extended to people who were not in the formal sector. This was designed to allow such individuals to gain access to at least some measure of social protection, which the Court viewed as a starting point of human dignity, not the final destination. Thus, for the Court, the minimum social protection level pursues constitutionally imperative purposes related to the principle of universality in providing access to at least base levels of social security for vulnerable segments of the population. This was proposed as complementary to the social security system rather than the latter's replacement, which should be preferred in labour relations.[47] 43

45 Law 2101 of 2021, Articles 1, 2, 3 and 5.

46 Decree 1174 of 2020, Articles 2.2.13.14.1.1., 2.2.13.14.1.2.

47 Sentencia de revisión de constitucionalidad [2021], Corte Constitucional de Colombia [2021] C-277 [77–90, 125 a 132].

III. The Social Rule of Law in Peru

44 The 1993 Political Constitution of Peru (hereafter the 1993 Constitution) stipulated that Peru is a democratic, social, independent and sovereign republic. Of course, the introduction of the social nuance implied a commitment to the full enjoyment of human rights, justice and integral development. The ultimate purpose of society and the State is the human person and his or her dignity.[48]

45 Thus, the 1993 Constitution expressly provided in Chapter II a catalogue of social and economic rights among which the State recognises the universal and progressive right of all persons to social security for their protection against the contingencies specified by law and for the improvement of their quality of life. It was also provided that the State guarantees free access to healthcare benefits and pensions through public, private or mixed-sector entities. Social security funds and reserves are intangible and are applied as provided by law.[49]

46 Regarding work, it was established as both a duty and a right, the basis for gaining access to social welfare and as a means of personal fulfilment. Thus, the constitution indicated that work in all its modalities was a priority issue deserving attention from the State, especially when it came to protecting mothers, minors and those unable to work. The Peruvian State committed itself to social and economic progress through policies to promote productive employment and education that would lead to work. As such, no labour relationship in Peru may limit the exercise of the constitutional rights of the worker nor disregard or lower his/her dignity. Furthermore, no one is obliged to work without remuneration or without freely giving their consent to do so.[50]

47 Regarding labour guarantees, the 1993 Constitution was detailed and specific in stating that equitable and sufficient remuneration is safeguarded to ensure workers' material and spiritual well-being while the payment of remuneration and social benefits had priority over any other obligation of the employer. The minimum wage is regulated by the State with the participation of the most representative organisations of workers and employers. The maximum working day was also constitutionally regulated to 8 hours, the work week set at 48 hours, wages are paid weekly and provision must

48 Constitución Política del Perú of 1993, Articles 43, 1.
49 Ibidem, Articles 10 and 11.
50 Ibidem, Articles 22, 23, 24 and 25.

be made for annual rest. The catalogue of principles regulating labour relationships is comprised of only equal opportunity and non-discrimination aspects, unwaivable constitutional and legal rights, as well as their interpretation in favour of the worker in cases of doubt, are secured according to the meaning of the norms. The law also provides adequate protection against arbitrary dismissal.[51]

Finally, the 1993 Constitution also provided for the right to freedom 48
of association and established rights concerning association, collective bargaining and strikes. Indeed, it expressly granted a binding character to collective bargaining agreements and allows workers to participate in the profits of the companies or other forms of participation.[52]

In a process that began in the 1990s, the Constitutional Tribunal, which 49
is the controlling body of the constitution in Peru[53], has established a series of jurisprudential rules in the area of labour waw based on the constitutional mandates referred to above. This has been supported by the Constitutional Court which has indicated that work is the use of human strength for the transformation of nature and the production of something useful, but work is inseparably identified with the person himself. This is because it is the action of man, who deploys all his physical, moral and intellectual faculties and, to that extent, the true dignity of the worker lies in his condition of subject and author. "In work there always remains the imprint of the human being".[54]

The right to work is of constitutional rank and, according to jurispru- 50
dence, has two basic elements insofar as it first requires the State to adopt a policy, as circumstance permits, that allows people to have access to a job within a context of progressive development. The second element is a guarantee for workers not to be dismissed without just cause. Provision of this last guarantee is mandated to the legislator as it allows for the reservation of the law to guarantee the regulation of protection, however, the constitution does not establish the specific form of protection the law must provide. Irrespective of the detail here, this must not affect the constitutional right of the worker since for the legislative act to be valid, it must respect the

51 Ibidem, Articles 24, 25, 26 and 27.
52 Ibidem, Articles 28 and 29.
53 Ibidem, Articles 201 and 202.
54 Juan José Gorriti y otros contra Congreso de la República [2005], Tribunal Constitucional del Perú [2005] File-No. 008–2005 [18].

essential content of the right. Thus, the legislator cannot undermine the intent of labour rights.[55]

51 Similarly, the jurisprudence of the Peruvian Constitutional Court has emphasised that discrimination cannot occur in the labour market for reasons of age, pregnancy, union membership, disability or religion. As such, equality in labour matters constitutes a fundamental right and must be applied imperatively unless there are justified and reasonable reasons to impose alternate treatment.[56]

52 Regarding unspecific labour rights, the Constitutional Court has pointed out that an employer's powers may not diminish the worker's rights, meaning no labour relationship may diminish constitutional rights or disregard a worker's dignity. This means the free formation of ideas and the manner of acting is a constitutionally protected right and that the confidentiality of private communications and documents can only be limited by a court order since confidentiality is a constitutional right. This last aspect highlights that certain communications and documents may belong to the company where the worker works, however, this does not imply that the company can take the ownership that belongs to the worker, altering the scheme of attributes of the person.[57]

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55 Sindicato Unitario de Trabajadores de Telefónica del Perú y Federación de Trabajadores contra Telefónica del Perú S.A.A. y Telefónica Perú Holding S.A. [2002], Tribunal Constitucional del Perú [2002] File-No. 1124 [12].

56 José Andrés Ruiz y otros contra Empresa Telefónica del Perú S.A.A. [2004], Tribunal Constitucional del Perú [2004] File-No. 2510 [2 and 3]; Víctor Ricardo Luna y otros contra Congreso de la República y Ministerio de Relaciones Exteriores [2006], Tribunal Constitucional del Perú [2006] File-No. [6 to 12 and 25]; Sindicato Unitario de Trabajadores de Telefónica del Perú S.A. y Federación de Trabajadores de Telefónica del Perú contra Telefónica del Perú S.A.A. y Telefónica Perú Holding S.A. [2002], Tribunal Constitucional del Perú [2002] File-No. 1124 [8 to 11]; Leyda Mireya Rojas contra Empresa Municipal de Agua Potable de Alcantarillado Ica [2004], Tribunal Constitucional del Perú [2004] File-No. 0666 [4 and 5]; Juan Luis Juliachs contra Municipalidad Provincial de Tacna [2004], Tribunal Constitucional del Perú [2004] File-No. 217 [1 to 4]; Lucio Valentín Rosado contra Seguro Social de Salud [2002], Tribunal Constitucional del Perú [2002] File-No. 0895 [7 to 9].

57 Sindicato Unitario de Trabajadores de Telefónica del Perú y Federación de Trabajadores contra Telefónica del Perú S.A.A. y Telefónica Perú Holding S.A. [2002], Tribunal Constitucional del Perú [2002] File-No. 1124 [12]; Lucio Valentín Rosado contra Seguro Social de Salud, Hospital Nacional Almanzor Aguinaga [2002], Tribunal Constitucional del Perú [2002] File-No. 0895 [6]; Rafael Francisco García Mendoza contra Empresa de Servicios Postales del Perú S.A. [2004], Tribunal Constitucional del Perú [2004] File-No. 1058 [17 to 19].

The high court has also emphasised that all work must be remunerated and, with the support of the Additional Protocol to the American Convention on Human Rights, workers must be guaranteed a salary that ensures a dignified and decent subsistence. In addition to this, it has been established that remunerations are intangible and unrenounceable and, therefore, cannot be unilaterally reduced.[58] 53

Regarding protection against unfair dismissal, constitutional jurisprudence has ruled that the constitution provides a guarantee for the legislator to establish the form of the same, but cannot, in any case, disregard the essential content of the right. This protection is activated once the probationary period has passed. Here the Constitutional Court has proscribed fraudulent dismissals, which are those that are contrary to the truth and good faith in labour relations since they impute non-existent facts or when conduct not provided for by law is attributed.[59] Regarding the act of unfair dismissal and fundamental rights, the Constitutional Court has noted that: 54

> "Evidently, whatever option a worker adopts to obtain 'adequate protection' against arbitrary dismissal, it starts from a prior and unavoidable consideration. Arbitrary dismissal, precisely because it is 'arbitrary', is repulsive to the legal system. This is not the place where the Constitutional Court should indicate that the principle of reasonableness, implicitly derived from the principle of equality, and expressly formulated in Article 200 of the Constitution, does not tolerate or protect arbitrary acts or norms. Reasonableness, in its minimal sense, is the opposite of arbitrariness and an elementary sense of justice. Therefore, when Article 27 of the Constitution establishes that, against arbitrary dismissal, the law shall provide 'adequate protection', such provision cannot be understood in

58 Milagritos Fany Baldeón Sánchez contra Dirección Regional de Salud de Huánuco y Director de la Unidad Ejecutora de Salud 403 de Leoncio Prado, [2004], Tribunal Constitucional del Perú [2004] File-No. 2382 [6]; César Julio Talledo y otros contra el Presidente del Gobierno Regional de La Libertad, [2005], Tribunal Constitucional del Perú [2005] File-No. 4188 [1 and 2]; Mario Filiberto Figueroa contra Southern Perú Coper Corporation, [2004], Tribunal Constitucional del Perú [2004] File-No. 2906 [4 and 5].

59 Sindicato Unitario de Trabajadores de Telefónica del Perú y Federación de Trabajadores contra Telefónica del Perú S.A.A. y Telefónica Perú Holding S.A. [2002], Tribunal Constitucional del Perú [2002] File-No. 1124 [12]; John Richard Velásquez contra Director Regional de Trabajo y Promoción del Empleo – Áncash, [2004], Tribunal Constitucional del Perú [2004] File-No. 3275 [3, 4 and 5]; Eusebio Llanos contra Telefónica del Perú S.A., [2003], Tribunal Constitucional del Perú [2003] File-No. 976 [15 and 16].

the sense that it is constitutionalising the employer's right to dismiss arbitrarily, as the plaintiff seems to understand it. Under the protection of an arbitrary act, such as unmotivated dismissal, no constitutional right can be claimed. The legal system simply sanctions arbitrary acts, although, as we have seen, this sanction for arbitrary dismissal can have, in certain circumstances, both restitution and compensatory protection".[60]

55 In any case, the construction of the figure of null dismissal has to do with the fact that this is configured when the worker is dismissed for reasons of discrimination such as being a union representative, for reasons based on their sex, race, religion, political opinion, pregnancy, disability or for health reasons, such as being a carrier of HIV.[61] In particular, mass dismissals where an employer terminates the contracts of all union members working at a given workplace seriously affect the functioning of the union. In these cases, the dismissal of workers entails an injury to the union organisation.[62]

56 Regarding labour rights of a collective nature, the Court pointed out that freedom of association relates a civil right to the consolidation of the Social State of Law. This is because it has constitutionalised the creation of trade union organisations that represent a group of workers in a conflict as relevant associations in the structure of a democratic society and, as such, collective labour agreements are indispensable tools to help set conditions that regulate labour relations. One characteristic of such agreements is their supra-ordination over individual employment contracts since collective labour agreements can modify aspects agreed to individually. This is also reflected in the fact that the 1993 Constitution expressly attributes binding force to these agreements. Finally, within the rights of this nature, the Constitutional Court recognised the right to strike as a collective suspension of labour activities agreed to by the majority of the workers and by which they are empowered to temporarily disengage from their legal-contractual obligations.[63] It has also been admitted that any act that seriously and

60 Eusebio Llanos contra Telefónica del Perú S.A., [2003], Tribunal Constitucional del Perú [2003] File-No. 976 [17].

61 Ibidem [15].

62 Sindicato de Trabajadores Mineros de Atacocha contra Compañía Minera Atacocha S.A., [2006], Tribunal Constitucional del Perú [2006] File-No. 3311 [16].

63 Juan José Gorriti y otros contra Congreso de la República, [2005], Fn. 54.

unreasonably injures union leaders and makes the operation of the union impracticable must be adequately remedied.[64]

Now, in relation to constitutional labour principles, the Constitutional Court has understood them as a basis for the elaboration, interpretation and application of labour norms[65]. Thus, there can be no discrimination of any kind in the workplace and the principle of equality must be respected; the rights established in the 1993 Constitution and in the law cannot be changed, since they are a minimum standard of protection for workers. Similarly, the *in dubio pro operario*, for events in which the same rule provides different meanings, the one most favourable to the worker will be preferred, which applies to the 1993 Constitution as well as various treaties, laws, regulations, labour agreements, contracts and so forth. Any decisions taken in such matters that make use of discretionary powers must conform to the bounds of reasonableness and proportionality. Finally, any faults must be previously established respecting the principle of legality while the primacy of reality over the forms of the documents.[66] 57

1. Problems generated in the neoliberal era

In 1991, with its economy and institutional apparatus in crisis, Peruvian society began to discuss what would be the bases of profound labour reform and what this requires from the country's classic labour law system. Labour law was caught up in the new economic mandates put in place to address the crisis because having an effective employment and training policy was seen as an imperative since the most serious problems stemmed from development, employment and training issues.[67] 58

As a result, labour market flexibility was presented as a solution to these problems. It was argued that it was not a matter of eliminating the levels of protection provided by labour law but of adapting the law to the new 59

64 César Antonio Baylón contra EPS EMAPA HUACHO S.A. y Víctor Manuel Hacen, [2005], Tribunal Constitucional del Perú [2005] File-No. 0206 [13].

65 Juan José Gorriti y otros contra Congreso de la República, [2005], Fn. 54.

66 Ibidem [21 and 24]. See also Eduardo Enrique Chinchay contra Presidente del Consejo Transitorio de Administración Regional de Lambayeque [2003], Tribunal Constitucional del Perú [2003] File-No. 1944 [2 and 3], entre otros.

67 Alfonso de los Heros Pérez Arbela 'La reforma laboral y sus efectos' (1996), TRDD ‹https://revistas.pucp.edu.pe/index.php/themis/article/view/11860/12428›, last accessed on 28 March 2022.

social and economic requirements. This entailed adjusting working conditions and labour costs, extending atypical hiring, reducing risks, increasing *ius variandi* and rotating the labour force to manage unemployment. This went hand in hand with less rigidity in terms of shifts and working hours, temporary employment and outsourcing. It was important, from the perspective of those who defended the reform, that the rapid changes in technology should be received within the framework of a more dynamic labour law. The idea was to pave the way for a body of law in which the autonomy of the parties would allow them to seek solutions to problems,[68] this naturally required doing away with the existing largely immutable approach and adopting an adaptive labour model.

60 The labour reform was issued in Peru in 1990–1991. Through this reform, working hours were made more flexible and the rules on vacation rights, social benefits and service time bonuses were standardized to eliminate differences between workers and employees. It also created a single system of compensation for the time of service; workers became creditworthy, integrating their remuneration into a compensatory fund.[69]

61 The Law for the Promotion of Employment, Decree 728, took into account not only the new doctrine of labour law but also the experiences of other States where labour stability had been eliminated. This decree sought to create a system of equal conditions for access to the labour market through the stimulation of employment, training and productivity as a new postulate in the labour market. This decree created a fast and efficient system of labour mobility, specifying in detail the issue of contract suspension and termination for objective causes regulated what constituted reasonable grounds for dismissal.[70] Likewise, Law 26753 fully regulated temporary contracts, work contracts and contracts for services as well as detailing what was required to create temporary service companies and complementary service companies. Furthermore, this latter law allowed productivity agreements to generate incentives and established employment programmes focused on women who were heads of the household, people over 45 years of age and the disabled. Finally, it promoted various forms of self-employment in associative forms by the workers themselves by streamlining the process to establish small and medium-sized companies

68 Ibidem, pp. 52.
69 Ibidem, pp. 53.
70 Ibidem, pp. 54.

and employee cooperatives.[71] Subsequently, Law 26513 established a limit for employers drawing staff from temporary service companies and cooperatives, namely that such staff could only comprise 20 % of employers' total payrolls.

62 In turn, Law 25593 regulated collective labour relations and provided, among other aspects, the possibility that arbitration could be requested by both parties rather than just workers. This law also allowed the President of the Republic to intervene when a strike was excessively prolonged or had disproportionate effects. The law further mollified the protections provided to strikes if non-regular modalities arose, such as untimely stoppages, operation of regulations, staggered stoppages or violent strikes.[72] Aspects that were clearly criticised were the unilateral modification of the bargaining level and the possibility of totally revising the agreements in force.

63 Labour reform in Peru was portrayed in the discourse as something positive since a more flexible labour market would allow greater opportunity for economic investment as well as consolidate the economy and expand development. However, it was also noted by its proponents that time would be needed for the beneficial effects of the labour reforms to manifest.[73] These structural reforms were undertaken by Alberto Fujimori's government (1990–2000) and ended up dismantling the existing interventionist State practice through the introduction of an aggressive economic and trade liberalisation policy. Although this incurred a high social cost the political control exerted by Fujimori's authoritarian regime ensured that the policy was implemented.

64 Various studies in Peru have shown that neoliberal reforms, especially labour reform, have generated greater wage inequality and heightened the precariousness of employment conditions. This arguably over-deregulated the labour market as a result of the increase in temporary contracts, subcontracting, outsourcing and labour intermediation, a situation made more complicated by the privatisation of pensions that began to incorporate a model of individual capitalisation based on the system used by the Chilean pension fund.[74]

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71 Ibidem, pp. 54.
72 Ibidem, pp. 56 and 57.
73 Ibidem, pp. 57.
74 Enrique Fernández- Maldonado Mujica 'Perú: de la Ley General del Trabajo al Régimen Laboral «Pulpín». Apuntes para una aproximación al proceso laboral (2000–2014)' (2015), CDC ‹http://ve.scielo.org/pdf/cdc/v32n89/art07.pdf›, last accessed on 3 March 2022.

65 According to Enrique Fernandez-Maldonado Mujica, "The approval of labour norms during the Fujimori government – the main ones after the self-coup of 1992 – took place without preserving basic principles of labour law and international norms on labour human rights, subscribed to by the Peruvian State to a great extent. This resulted in Peru having one of the highest number of complaints before the ILO supervisory bodies for violation of union rights (Canessa, 2003), as well as complaints before the US trade procedures related to non-compliance with the labour clauses of the tariff preference system approved by both States, making visible its anti-labour and anti-union character" (Campana, 1999).[75]

66 Fujimori's labour reform was accentuated in the governments of Toledo, García and Humala, who added further flexibility to the labour market, adopting special labour systems to ostensibly encourage foreign investment. However, these systems ultimately suppressed labour rights, as can be seen in the case of micro and medium-sized companies where a double standard scheme of rights and social guarantees was adopted. These changes even impacted the public sector where the contract for the administration of services was approved, this had the effect of denying the labour character to relationships that, in principle, should have such nature and thus limiting access to labour rights such as stability, unionisation and negotiation.[76] It was only after entering into negotiations for a free trade agreement with the United States that Peru was forced to modify its legislation, for example, to incorporate the principle of solidarity in the case of contracting companies in the fulfilment of labour obligations of subcontracted workers.[77]

67 Under the government of Ollanta Humala, who continued with the neoliberal approach, the Pulpín Law was passed to establish a special system for young people. However, this was widely viewed as discriminatory legislation and triggered massive protests throughout the country, leading to the subsequent repeal of the law.

2. Challenges of the Peruvian reality

68 Some authors have pointed out that Peru has had various budgetary and personnel limitations in the government organs charged with enforcing

75 Ibidem, pp. 152.
76 Ibidem, pp. 154.
77 Ibidem, pp. 155.

compliance with labour regulations. This issue has been compounded by the fact that a system of social dialogue had not been strongly consolidated, affecting the levels of unionisation and collective bargaining and necessarily leading to low incomes and wage inequities.

69 Young people, the segment of society most hard hit by the poor labour situation, were the ones who began to demonstrate in the streets in 2015, mobilising large numbers of people to protest and seek the repeal of the so-called 'Youth Labour System'. These protests were seminal in putting aspects of labour law the labour market that had been invisible for years at the centre of the reform debate, thrusting labour-related issues onto the national political agenda.[78]

70 One of the most predominant characteristics of the Peruvian labour market is its precariousness, which is directly related to the high percentage of informal workers in the workforce. These workers represent some 42.7 % of the employed population but are unprotected in terms of labour rights. Of this 42.7 %, the majority is comprised of women, young people and indigenous people, three demographic groups who face the greatest obstacles in finding adequate employment. Thus, these individuals find themselves "at the margin of the exercise of labour rights, without access to social security or job training programmes; without minimum guarantees to exercise the right to freedom of association and collective bargaining".[79] Looking back at the history of labour in Peru, it is clear that this is a persistent and continuous situation brought on by asymmetrical power relations and a labour market that has structural weaknesses that prevent it from generating jobs. This is compounded by the low priority given to labour issues by consecutive governments, which has resulted in the tardiness of public policy to address them, coupled with the reduced power of unions to pursue agreed-upon labour reforms. A final factor at work here is the clear weakness of social dialogue about labour issues, which is a socio-cultural aspect arising from the distrust between workers and employers.[80] Given all of the above, it is unsurprising that these problems persist.

71 Another challenge in the Peruvian labour market is the widespread anti-union culture in the country from which the social discourse on labour has been built. This has resulted in unions being painted as unviable, anachronistic, populist and with a form of 'internal aristocracy' while employers'

78 Ibidem, pp. 142–143.
79 Ibidem, pp. 142–143.
80 Ibidem, pp. 145–146.

organisations are seen in a decidedly positive light, technically capable and seeking to improve competitiveness.[81] The truth is that the anti-union culture went through its most critical moments under the Fujimori government, where various actions were carried out to harass union leaders throughout the privatisation processes and succeeded in incorporating a distorted and negative public image of the performance of unions. The unions had already been victims of paramilitary violence and now they were the target of a State campaign to discredit them. In effect, Fujimori always saw the unions as a stumbling block to the development of the economy, a view that has persisted over time in various sectors of society.[82] This was reflected in the limited capacity of unions to engage in collective bargaining, relatively weak interlocutors in labour disputes and somewhat sidelined in the National Labor Council. Likewise, it has been said that the unions have not been able to tune in to the needs and interests of a large part of the population and that the neoliberal reforms only led to a decline in the use of strikes to settle disputes.[83]

72 However, female employment rates in Peru have also lagged behind, a situation that was accentuated by the Covid-19 pandemic. For example, in the first months of the pandemic, female employment fell by 14.7 %, in contrast, male employment fell by 11.3 %. This was essentially because women were over-represented in vulnerable or informal jobs hardest hit by the crisis and where the digital divide that prevented women from accessing remote work became even more apparent. Indeed, 80 % of women work in the sectors that were hardest hit by the pandemic crisis, namely trade and services. In contrast, male-dominated sectors, such as construction and extractive industries, were not affected as badly. A high proportion of micro and small businesses are also owned and/or operated by women, many of which were not sufficiently robust to withstand the economic severity of the crisis.[84]

81 Ibidem, pp. 159–160.
82 Ibidem, pp. 160.
83 Ibidem, pp. 165.
84 Andrew Morrison, 'La participación laboral de las mujeres en el Perú: 10 mensajes clave y 6 recomendaciones de política', Banco Interamericano de Desarrollo, División de Género y Diversidad, (2021), ‹https://publications.iadb.org/publications/spanish/document/La-participacion-laboral-de-las-mujeres-en-el-Peru-10-mensajes-clave-y-6-recomendaciones-de-politica.pdf›, last accessed 6 April 2022.

In a similar vein, the closing of schools and day-care centres affected 73
the ability of mothers to enter and/or remain in the labour market. More than half of unemployed women indicated that the main obstacle to their entering the labour market was their obligations at home, which is unsurprising given that close to 60 % of women say they are solely responsible for childcare at home while only 14 % of men say the same. Thus, what the pandemic did in Peru was to increase women's domestic and family care burdens, which was more palpable in cases of teleworking, where the overload on women was most evident as they had to juggle family and professional commitments in the same physical space. The female participation rate in Peru's labour market before the pandemic had remained stable at 64 % and was one of the highest in the region, albeit most women worked in precarious and poor-quality jobs.[85] In Peru, it is estimated that there are three groups of women with special conditions of vulnerability in the labour market: *ninis* (not studying or working), indigenous women and women of African descent.

Young people aged between 15 and 24 who neither study nor work is 74
the other major problem demographic to be faced by the Peruvian Social State. Despite being one of the States in Latin America with the lowest number of *ninis*, data suggests that there are around 5 million young people in Peru, 14 % of whom neither study nor work. The concern for *ninis* that has now come to the fore of public consciousness is rooted in the lack of opportunity and future for these young people and what may await them in their adult life. *Ninis* throughout the region are ensnared in a position of social vulnerability and exclusion, however, this seems to be especially the case in Peru where obstacles to entering the labour market are multiple. In particular, *ninis* find themselves in this situation because poverty forced them to drop out of school and take up informal jobs and unemployment and, of course, there are clear gender gaps within this demographic making such circumstances more prevalent for females.[86]

85 Ibidem, pp. 7.

86 Jorge Paz, 'Jóvenes que no estudian ni trabajan en Perú. Un análisis empírico con énfasis en las disparidades de género' (2020), ‹https://www.aacademica.org/jorge.paz/125.pdf›, en Jóvenes que no estudian, ni trabajan en Iberoamérica y Estados Unidos. Condiciones actuales, características y perspectivas a 20 años de llamarlos Ninis, last accessed 6 April 2022.

3. Measures Adopted for the Covid-19 Pandemic

75 During the Covid-19 pandemic and the ensuing declaration of a state of emergency designed to prevent the spread of the SARS-2 virus in Peru, Emergency Decree 038–2020 was issued. This decree established measures to mitigate the economic effects caused to workers and employers due to Covid-19 by allowing remote work, paid leave and, if these were not possible, it permitted employers to take measures to maintain their workforces and the perception of remunerations, giving priority to agreements with workers. Exceptionally, employers could opt for redundancies, in which case workers could apply for an extraordinary payment of up to 2000 soles (~USD 540) from their capitalisation account in the private pension fund management system, which had already been allowed under Decree 034–2020 to mitigate the economic effects of the lockdowns.[87]

76 Likewise, Supreme Decree No. 011 – 2020 – TR was issued to regulate remote work and paid leave by indicating in which types of activities these options could not be applied. Furthermore, it was established that employers may adopt alternative measures that are necessary to maintain the validity of the contractual relationship and the perception of remunerations, giving priority to the agreements with the workers. Among such measures, employers could: grant vacation leave (including future vacation leave not yet earned), agree to reductions in daily/ weekly work hours together with a proportional reduction in wages, seek a reduction in wages paid as long as this is proportional to the causes (e.g. minimum necessary to avoid company insolvency) and that it such reductions do not go below the minimum legal wage. If an employer wanted to avail itself of one or more of these options, it must inform the union of the reasons for doing so.[88]

77 Supreme Decree No. 011 – 2020- TR also provided that if the alternative measures to maintain labour relationships in force are exhausted, an employer may resort to making temporary redundancies as a means of cessation of an employee's obligation to render service and the employer's obligation to pay remuneration. Exercising this provision, an action that had to be communicated to the Labour Administrative Authority, essential-

87 Urgency Decree, No. 038- 2020, articles 3 and 10. See also Decree No. 034- 2020, Articles 1 and 2.

88 Supreme Decree No. 011- 2020- TR, Articles 3 and 4.

ly paused the employment of one or more workers rather than terminated their labour relationships.[89]

Some of these changes in the Peruvian legislation, such as those involving telework, have been interpreted by some as unnecessary since regulations that could have been modified for the emergency already existed. Others disagreed, claiming they were necessary but insufficient given the high levels of informal work in the country and the opportunities these changes provided for employers to exploit workers.[90] 78

IV. Comparative examination: Between constitutional promises, the will of the State and reality

The constitutions of Colombia and Peru, dating from 1991 and 1993 respectively, set high standards in terms of the Social State. Both of these texts adopted a high level of protection for labour and social security rights. Indeed, they both enshrined freedom of association as a pillar of their respective democratic systems, provided all forms of labour with a special guarantee governed by a series of constitutional principles and offered particular protection for groups in vulnerable situations. In addition, these constitutions broadly and extensively recognised the right to social security with each State expressly committing itself to provide access to these rights and to ensure the human dignity of its citizens. 79

Both the Colombian and the Peruvian Constitutional Courts have made important efforts to ground this special protection in their jurisprudence, creating clear rules regarding equality in the labour market, non-discrimination, the principles of labour and social security, the limitation of discretion in the labour market and freedom of association. All of this has been undertaken to give a stronger voice to workers, who are the weaker party in the employment relationship. In this sense, both courts have taken an active role in the defence of these rights, at times even resorting to judicial casuistry, which undoubtedly serves as a reference and precedent for protection in other cases with largely identical conditions. 80

89 Supreme Decree No. 011- 2020- TR, Article 5.

90 Anapaula Barron Cornejo, Marcela Centurión, Gabriel Forero, Ljubica Markovinovic, 'Cambios en la Legislación Laboral Peruana a raíz de la emergencia sanitaria por el Covid- 19' (2020), Universidad de Lima, Facultad de Ciencias Empresariales y Económicas, Carrera de Administración, ‹https://repositorio.ulima.edu.pe/bitstream/handle/20.500.12724/12461/Barron_Legislacion_laboral_peruana.pdf?sequence=1&isAllowed=y›, last accessed 6 April 2022.

81 However, as soon as the constitutions in Colombia and Peru were adopted at the beginning of the 1990s, both States' legislators began pursuing a path of strong liberal labour reforms to gain access to international markets by increasing local competitiveness to draw increased foreign investment. Thus, in these Latin American States, similar solutions and responses were adopted in terms of making labour relations more flexible, incorporating to a greater extent the use of subcontracting, labour intermediation, temporary contracts and private participation in social security schemes. This often resulted in less employment security and a reduction of other labour-related guarantees, all to provide greater labour mobility and labour turnover.

82 Thus, it is a regrettable fact that instead of going in the direction of increased protection for workers, as intended by both constitutions, Peruvian and Colombian legislators decided to take a different path. This led to laws undermining protection in labour relations and social security, focused on economic rather than social gains under the guise of a discourse centred on increased unemployment and poverty that each State had to manage.

83 In addition to the above, Colombia and Peru have encountered serious obstacles to the consolidation of the Social State, which indicates it is still just a prospect for many citizens, especially for those still trapped in vulnerable situations. In Colombia and Peru, close to half of the economically active population has no labour protection because they have informal or casual jobs. This means they have no access to labour benefit schemes, no access to social security, no opportunities for vocational training or retraining and cannot enjoy the benefits of unionisation. As such, the promise of social benefits to provide decent and fair employment conditions for may has not yet been fulfilled. Women continue to be strongly discriminated against and affected in the labour market, both in terms of gaining access and then establishing a permanent presence even if they do gain such access. As noted previously, young people find themselves in an equally if not more challenging situation as they are confronted by various obstacles to participate in both the labour market and further education. Consequently, both women and the young have suffered the most from the effects of the economic and social crises resulting from Covid- 19 because of the already vulnerable circumstances.

84 Both States considered here had responses to the pandemic that not only failed to provide strong protection for these vulnerable and heavily-affected groups, they broadly undermined the protection of labour and social security rights for all workers. Having said that, reforms aimed at deregulation and creating greater flexibility in their labour markets were adopted, as seen

by the fact that both the reduction of working hours and the commensurate reduction of wages were at the centre of the agendas of both States. This was often done for the sake of allowing telework, remote work and work at home to preserve both jobs and businesses. These reforms now mean that workers are no longer strictly subjected to the traditional working hours as flexible start/finish times were introduced along with more part-time positions. However, for many, this has also seen their remuneration substantially reduced and, consequently, their material conditions worsen.

In this regard, there is an egregious step backwards in that both States seem to be abandoning the idea that progressive labour legislation is a mandatory imperative to guide the actors within the labour market. Such guidance imposed by the State is highly desirable as it would give all concerned the power to equitably negotiate work conditions as well as adapt to present and future crises, even if this entails a derogation of classic legal guarantees.

Normative Sources

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Perú:

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Urgency Decree No. 038- 2020.
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