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Weber's Concept of Modern Law and Labor Law: A Critical View

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Abstract

The current article presents a critique of Max Weber's sociology of law, specifically in what concerns the concept of modern law. It is argued, as the core of the critical appraisal, that Weberian notion of modern law is restricted to 19th century formalist approaches. There is a clear contrast between Weber's theoretical proposal and the anti-formalist tendency that emerged as hegemonic in the first decades of the 20th century. If we consider the emerging branches of law at the period, such as labor law, it is possible to note that legal systems were increasingly open to contents that proved to be incompatible with a formal legal rationality. In order to correctly understand labor law's legality, it is necessary to adopt the perspective of legal subjectivity, a Marxist analysis provided by Evgeny Pashukanis. Such approach is able to explain the nature of both classic private law (praised by legal formalism) and labor law (endorsed by anti-formalist legal thinking).

Keywords

Weber, Modern Law, Legal Formalism, Labor Law, Marxist Critique of Law

1. Introduction

Max Weber is undoubtedly a classical author in general sociology and also in sociology of law, particularly concerning modern law. The author's concept of law is highly influential, even when it doesn't appear clearly, as it is noticeable in Roberto Unger's concept of liberal society and the presence of rule of law. By stating that rule of law is defined by notions like neutrality, uniformity and predicability (Unger, 1979: p. 187), the acknowledged author undoubtedly follows Weber's theoretical guidance, despite residual disagreements. In addition, if we take as an example a very known article like *The Modernization of Law*, by Marc Galanter, it is not difficult to notice how Weber's unmentioned presence is

remarkable. The list of eleven key attributes (uniform rules, transactional complexion, universalism, hierarchical structure, bureaucratic organization, instrumental rationality, professional running, specialized agents, amendable dispositions, intimate connection to the state, distinct government functions concerning application of law) presented in the paper (Galanter, 1966) is certainly close to Weberian conception about the features of a modern legal order.

Both the idea of a typical rule of law in a liberal society and the idea of modern law as a bureaucratic and systemic order pay tribute to Weber, and this happens in two ways: firstly, in terms of conceptual content, it is not difficult to notice how the image of law in modernity as an impersonal power (governed by rules, and not by arbitrary and uncontrollable decisions) prevails. Secondly, authors like Unger and Galanter adopt "ideal type model" in their methodology, a procedure that also comes from Weber's legacy. Ideal types are "pure constructs of causal relations that the researcher conceives as objectively probable and causally adequate on the strength of his nomological knowledge, while assuming an 'active' role in the rational interpretative process" (Oliverio, 2020: p. 3). Such constructs underline the most significant aspects of a generalized phenomenon, fulfilling the purpose of identifying its main traits (it is not required to coincide perfectly with every empirical referent).

And yet a closer look at Weber's propositions on modern law can find considerable theoretical limits in this conception, specially if one gives attention to the traits of the emerging branches of law in the beginning of 20th century. Labor law seems to be the most remarkable example. It is born from a breaking with ordinary private law, in a way that labor contract ceases to be a mere agreement of wills, becoming a highly regulated practice, subject to principle and policy reasoning at courts. It is not casual that Lochner case at US Supreme Court, whose core was labor regulation, stand as the symbol of an era, the pivotal case of a revolt against legal formalism. But in spite of this anti-formalist movement in western countries, Weber's thinking on law remained reticent on this matter. His theory assumes formalist (also called conceptualist) legal schools like *L'École de l'exégèse* in France and *Pandektenrecht* in Germany, although with caveats, as models of an utter modern rationality in legal orders. Both schools may be deemed as incipient forms of legal positivism, since they treat normative texts like an authoritative source of law, regardless any moral controversies about them (Gordley, 2013).

Weber's view on modern law is inspired in 19th century legal positivism, in conceptualist schools, not in early 20th century schools like Holmes Jr.'s legal pragmatism and later realist theories. The German sociologist was not receptive towards contemporaneous elaborations, above all concerning pragmatist approaches. The more legal schools take distance from classical formalism, the more Weber cover them with the suspicion of an irrationalism's stigma. All teleological-type tendencies in law's development, e.g. general clauses in legal codes, seemed like a step backwards, a factor of disruption and uncertainty. Labor law

is a branch particularly plentiful of teleological and evaluative categories, and this is why it poses a real challenge to Weberian concept of modern law.

After exposing Weber's theory on modern law, we intend to demonstrate how labor law is inconsistent with legal formalism. The rise of labor law is revealing of conceptualism's sunset. It requires, then, a different kind of analysis. An alternative approach to be cogitated is Marxist critique of law, uniquely in the way that it is developed by Evgeny Pashukanis. By following Pashukanis' method, the inquiry is able to overcome the limits of a rationality-based legal theory. It is more productive to replace it with a perception centered in notions like legal form and legal equivalence in contracts. Under this alternative (non-hegemonic) perspective, law can be explained either in a formalist context, either in a post-formalist context. Such line of thought, however, demands a narrower (but much more precise) definition of legality, a historically bordered definition, restricted to capitalism.

2. Weber and His Notion of Modern Law

Law is, in Max Weber's thought, essentially a matter of authority, of legitimate order, whose rules and procedures are perceived as mandatory by the subjects, and beyond the mere regularity of their submissive behavior. A social order can achieve this requirement by different manners: the holiness of tradition, the reliability of prophetic oracles, the value of natural law doctrines and the pure submission to legality (prevalence of statutes and decisions according procedural correction). Weber indicates theses possibilities to explain the meaning and the variations of an authentic authority, endorsed by the belief in its legitimacy (Weber, 2000: p. 23).

According to David Trubek's explanation on Weberian perspective, "law is a subclass of a category called legitimate or normative orders" (Trubek, 1972: p. 726). Legitimate orders are socially structured systems whose normative propositions are, at some degree, subjectively admitted as binding by community members, regardless the fear of coercion in case of disobedience. Coercion is thought, concerning a legal order, as a distinctive element in comparison with custom and convention, but not all law can be qualified as coercive. "Precepts and principles may be stated by the legal order and yet men may accept them as obligatory without actual coercion", although they are necessarily seen as part of a system of standards which is "backed by a specialized enforcement agency employing coercive sanctions" (Trubek, 1972: p. 727).

A legitimate order constitutes a state of domination, which "involves a reciprocal relationship between rulers and ruled" (Bendix, 1960: p. 295), since both are attached to an authority relationship. Rulers claim a legitimate authority to rule, and the ruled justify their own obedience according a variety of belief systems. Weber conceives three pure types of legitimate domination: legal or rational domination, based on an impersonal, hierarchical and statutory order; traditional domination, based on the authority of venerable custom, on long

time consecrated practices (habitual devotion); charismatic domination, based on the personal authority of an extraordinary leader, endowed with a "heroic power" (Weber, 2000: p. 141).

If traditional authority is always religious (at least to some degree) in its nature, comprising sacred rules (timelessly accepted rules) whose infraction leads to a magical evil, legal-rational authority, on the contrary, breaks with the "eternal yesterday" of tradition, imposing a domain of enacted and abstract rules. "Where legal-rational principles control", as describes Anthony Kronman, power can only be justified "by the formal process of enactment through which the norms invoked by the ruler have been promulgated or posited" (Kronman, 1983: p. 45).

Legal-rational domination performs itself in a continuous and ruled exercise of official functions within a power structure. Authority becomes entirely institutional, an observable characteristic in public offices and private companies. This is the rise of the principle of official hierarchy, i.e. the organization of power by the use of fixed and multi-level distributed instances of control. In its purest form, legal-rational domination provides a bureaucratic administrative framework, an apparatus in which leadership functions derives from legal powers (Weber, 2000: pp. 143-144). Both public and private employees are officials governed by objective rules, and not by despotic and arbitrary will. Besides, this kind of bureaucracy increases professional efficiency. Official tasks present a superior pattern of precision, speed, knowledge, continuity and uniformity (Faria, 1988: p. 49).

What we have seen so far is consistent with modern authority and with the hegemonic notion of modern law. The many aspects described by Weber through his categories can be found in modern legal theories, like Kelsen's "pure theory of law" or Hart's "analytical jurisprudence". However, the same cannot be stated about the particularities of the Weberian concept of modern law. By introducing a classification of ideal types referring to "how law is both made and found" (Trubek, 1972: p. 729), Weber's analysis on law is then centered in definitions around the rationality of legal decision-making process.

The making and the adjudication of law, in case of deficit of rationality, can be formally irrational (if extracted from uncontrollable sources like oracles) or substantively irrational (if hold on concrete circumstances and ethical-political judgments, like in full casuistry). On the other hand, rational legal practice can also be formally rational and substantively rational (Weber, 1999: p. 13). Law is described as substantively rational if it adopts open criteria for decisions, being receptive to ethical imperatives, convenience rules and political demands. To be deemed as formally rational, a legal system must assure the abstraction of external contents in favor of fixed legal concepts, which enables the logical-systematic task of coordinating legal rules.

Legal decision-making, if measured by the degrees of generality and differentiation of legal norms, achieves its maximum of rationality in modern law, par-

ticularly in codified law. This means that rational law cannot be associated with prophetic decision or revelations. Rational law must be created and applied with reference to general standards, but these standards are supposed to be intrinsic to the legal system, they cannot be mistaken with ethical or practical consideration, or even with religious or political criteria. Briefly, it "combines a high degree of legal differentiation with a substantial reliance on preexisting general rules in the determination of legal decisions" (Trubek, 1972: p. 730).

Such combination provides the ideal type of a logically formal rationality, or simply a formal legal rationality. Anthony Kronman's analytical effort shows nonetheless that Weber "employs the idea of formal legal rationality in a confusing way, using it at different points to describe different, though related, features of various procedural arrangements and substantive legal doctrines" (Kronman, 1983: p. 72). There are four identifiable senses, in Weber's work, for the use of "rationality" as a concept: 1) the attribute of a deliberation governed by rules and principles; 2) the attribute of a legal order which is conceived as a system, a complete and coherent totality of legal propositions; 3) a method of legal analysis which favors logical interpretations, in opposition to extrinsic concerns (beyond systemic boundaries); 4) a method of reasoning which rejects magical means and supports intellectually controllable decisions (Kronman, 1983).

The first and the fourth meanings of rationality are broad enough to reach any aspect of legal decision-making in modernity. The second and the third meaning, in contrast, correspond to a very specific legal thinking, the one that triumphed at 19th century but decayed at early 20th century. When Weber enumerates the main characteristics of legal rationality in its highest level, he obviously has in mind the conception that was named "legal formalism". This conclusion is inevitable since the author points out the following list for his pure type: 1) all concrete legal decision is just an application of a previous general rule over a given fact; 2) legal logic can always find a solution, based on abstract legal propositions, to any legal problem; 3) objective law must be seen as a gapless system (and also deprived of norm conflicts); 4) a practical matter that cannot be presented in a formal and rational way is not legally relevant; 5) social behavior is either the compliance or the transgression of legal dispositions (Weber, 1999: p. 13).

Formalist thought in legal domain reduces legal adjudication to a logical operation, as if a legal decision could only be conceived as the result of deductive reasoning, regardless any role played by sociological, ethical and psychological features (Atienza, 2014: p. 262). Legal concepts become rigid and absolute, which gives rise to an attitude of indifference towards social reality. Law is imagined as a self-sufficient normative system, specially under the dogmatic model of rational lawmaker that was developed in 19th century alongside legal codification. Such dogmatic model is the perfect abstraction used by jurists, judges and lawyers to deal with law's imperfections in the real world (an operative pure

type, in Weberian terms). In order to present a legal solution as rational and justifiable, legal practitioners formulate original normative propositions under the cover of an impersonal will, i.e. according a speech that finds support in legal order's systemic rationality. Hence the allegory of a lawmaker endowed of absolute (god-level) predicates: permanent, uniform, omniscient, omnipotent, all-comprehensive, non-redundant, precise etc. (Santiago Nino, 1989).

The notion of law enunciated by Weber as the utmost rational law is impregnated with values that Giovanni Tarello summarized with the expression "Leibnizian ideology". The pillars of this ideology are descriptiveness, systematic reason and conceptualism: they mean that law is a set of true legal propositions, linked by logical (true) connections, ordered by axioms and supported by the purity of concepts (Tarello, 2002: pp. 49-50). Legal dogmatics was, in fact, crucial to the making and consolidation of such view on legality. Jurists were the architects of the notion of law as a logical-normative system. Their participation was more highlighted in German pandectism, a legal school in which "Weber sees the ultimate sublimation of a process of rationalization on the foundation of Roman law, and of law itself" (Dilcher, 2016: p. 45). This doctrine consecrated the highly abstract nature of legal concepts and endorsed the fiction of a legal system run by deductive logic and deprived of gaps.

The so-called Roman law, in a Weberian reading of facts, was turned, during times of Roman Empire, into "an object of a purely literary activity and, in the absence of binding sacred laws or substantive ethical concerns, purely logical elements of legal thinking had become to play some role" (Bendix, 1960: pp. 409-410). Such tendency was revived and strengthened in medieval Europe and later (19th century) by German legal scholars. Pandectist jurists gave continuity to Leibnizian ideology by cleansing Roman institutions from their original context, converting them in systematic categories, in rational propositions usable as axioms in deductive arguments. Leibniz himself, as it is known, had the ambition of turning jurisprudence (including Roman legacy) into a logical system inspired in arithmetic thinking. Such systematization could only happen *a posteriori*, initially by Savigny's hands and later with Windscheid's work (Vesting, 2015: p. 110).

As it was pointed out by Kenneth Vandervelde, "formalism affirmed the principle of the rule of law by insisting that all adjudication was the mechanical application of rules" (Vandervelde, 2011: p. 243), which suggests a kind of judge totally bound by preexisting law. Judges could only declare a given legal content in concrete cases, with little or no discretion power. Law is then treated like a fixed object to be merely reproduced in legal practice, and with support in absolute concepts, immune to social needs and any other external pressure. Conceptualism and logicism prevail.

Weber argued that any trait in contrast with formalist adjudication would weaken legal formal rationality. He mentions jury trial as an example: layman's participation in legal decisions meets non-privileged classes' demands for sub-

stantive justice, but in detriment of juristic and professional opinions. Once "judges are to apply the code using specific modes of professional logic" (Trubek, 1972: p. 731), layman's justice lacks rationality and could be regarded similar to an oracle. In addition, Weber stated that professional justice was under threat by the psychiatric opinions in criminal law, claiming an incompatibility between reasons collected from natural sciences and formal legal reasoning (Weber, 1999: pp. 151-152).

In a Weberian point of view, there is also an incompatibility between modern law's typical formal rationality and adjudicative lawmaking. The author holds that it would be unlikely a scenario where bureaucratic judges from civil law countries are turned into a legal prophet, into an authentic creator of law (Weber, 1999: p. 152). The very use of the expression "legal prophet" suggests that Weber regards adjudicative lawmaking as a procedure more suitable to charismatic and traditional forms of domination. Nonetheless, the recognition of the creative role of judges was a very strong trend in early 20th century. That was precisely the time of the "revolt against formalism".

Under an anti-formalist context, judge is taken as a morally and politically responsible agent. Legal decisions were associated to the exercise of a discretion power, hence the room for evaluative judgments and balancing of interests. Practical results and moral choices' implications were very much the order of the day in that historical period, and this explains why formal logic was considered insufficient and unsuitable to express what happens both in legal order and legal practice. History, economics, politics, ethics, sociology and psychology were increasingly incorporated in legal reasoning, and all these substantive references weakened the image of judge as a neutral persona, as spokesman of a legal logic and simple applier of clear and ready-made rules (Cappelletti, 1999: p. 33).

Oliver Wendell Holmes Jr., for instance, rejected as a fallacy the idea that the development of law is logic, the thesis that a given legal system "can be worked out like mathematics from some general of conduct" (Holmes Jr., 1897). Legal decisions' language is indeed logical, since any conclusion can assume a logical form, but their making is defined through a process which considers and weights "the ends of legislation, the means of attaining them, and the cost". This pragmatist approach, also adopted by jurist like Karl Llewellyn, proposes that law "is to be viewed *instrumentally*, not as a doctrine deriving worth from is integrity or normative unity as a system of abstract ideas but as a means to practical ends, an instrument for appropriate governmental purposes" (Cotterrell, 1989: p. 185).

Between the last decades of 19th century and the first decades of 20th century there was a plethora of legal schools engaged in a struggle against legal formalism. There was an intense effort in USA, France and Germany towards the defense of adjudicative lawmaking, including the explicit admission of a judicial fulfillment of social and political goals. Yet Weber refused to accept this movement as an ordinary step in legal modernization process. He believed that all anti-formalist traits in legal transformations from that period were "oddly contra-

dictory" with modern law's proper rationality. Those innovations were seen as imperfections, as inconsistent elements, born in opposition to market's legal security demands. The author brought as examples, among others, good faith clauses in commercial contracts and material justice claims in social classes conflicts (Weber, 1999: p. 153). Those last ones, as we are going to verify soon, occupy a central place in labor law.

Instead of assuming an attitude of estrangement in face of pragmatist legal doctrines, an author like Kenneth Vandervelde incorporates such reasoning scheme as a kind of ideal type, somehow updating Weber's thought. More than that, he perceives "a basic tension in American law", but also in Western law in general (we could add), "between formalism and instrumentalism", regarding them as "competing theories about the way in which courts ascertain the law, that is, about the nature of adjudication" (Vandervelde, 2011: p. 154). On one hand, formalism supposes that legal adjudication is nothing but the application of general rules to particular situations, in a way that law is formulated as a set of uniform and predictable rules. On the other hand, instrumentalism treats rules like standards to be interpreted in order to effectuate their underlying policies, avoiding formalism's rigidity.

In a similar manner, Fábio Shecaira and Noel Struchiner point out a division between as institutional (or formalist) method of interpretation and a substantive (teleological) method of interpretation in legal practice. While the first method maximize objective aspects of law (the institutional characters of its sources and the supposed certainty provided by textualist readings), the second one deals directly with value controversies, bearing the burden of defining law's purposes, which implies facing the most subjective aspects of legal adjudication. A substantive interpretation, once engaged in the pursuit of value-based goals, is free to invoke moral, political and economic reasons in litigation, using subjective judgments as guide to legal conclusions. An institutional interpretation, on the contrary, shows a greater deference to the objectivity of legal rules and procedures (i.e. to impersonal and bureaucratic reasons), highlighting uncontroversial dispositions in legal texts. By doing so, it reinforces law's systemic closure and the fixity of its logical categories (Shecaira & Struchiner, 2016).

3. Labor Law and the Fall of Legal Formalism

The presence of instrumentalist interpretations in modern legal adjudication must not be taken as a contradiction, chiefly if we have in mind that whole new branches of law were born near the dawn of 20th century under a strong appeal of substantive justice claims. Labor law seems to be the most representative case, and this is why it can be picked up as the perfect example against Weber's conclusions, above all because legal regulation of labor contracts was at the core of what Morton White named "revolt against formalism".

François Geny's "Libre recherche scientifique" school, Philipp Heck's "Interessenjurisprudenz" and the "Sociological jurisprudence" that followed Holmes

Jr.'s pragmatist steps can be listed as the main theoretical trends in early 20th century's legal thinking. Legal formalism was under heavy attack, and Weber's pure type of a formal legal rationality was a synthesis of everything that emerging schools fought against. Labor relations were the initial and privileged terrain of this struggle for "law's soul".

Once the industrialization of modern societies gave rise to severe inequities of wealth, power and social opportunity, the absolute reign of contracts was more and more perceived as a reiteration of social advantages and disadvantages. State intervention was required to balance labor market as a manner of preventing economic dysfunctions and softening class antagonism. Such political demands, however, were ignored by a formalist attitude. Lochner v. New York case (1905) was clarifying: the stipulation of a statutory maximum for the duration of bakers' working day was judicially denied under the pretext of contractual liberty. The classical liberal formula prevailed, legitimating blindness to social reality (economic disparities between employers and employees in contractual negotiation). The term "Lochnerism" emerged with a meaning of opprobrium (Vandervelde, 2011: pp. 249-250), specially because of Holmes Jr.'s dissent. Situations like that one were critically seen by Justice Holmes as "judicial frustration of the popular will for legal change by judges who imported their own prejudices into their decisions under the cover of legal logic" (Cotterrell, 1989: p. 203).

Labor law was born of a split with ordinary contract law, in a way that it ceased to be a purely private matter. Labor contract was no longer considered a market transaction like any other. This was uniquely clear in France. During 19th century, work and business were leveled by the notion of freedom of commerce, as if workers' activity was nothing but service rental at industrial relations' domain. Civil code's dispositions on service provision seemed to be utterly suitable to rule labor relations. Such scenario changed at the turn of the century, when labor contract was conceived as means for economic security and physical assurance (Supiot, 2016). The profusion of specific norms, just like the peculiar practice of collective bargaining, aid to explain why labor law evolved as a distinct subject in legal scholarship, beyond private law tradition (French exegesis school and German pandectism). In addition, his object brings out several policy (*ergo* evaluative) matters that move formalism away from the horizon. "Because this branch of the law regulates the key mechanisms for the production and distribution of wealth, and exercises a major influence on how our lives can become meaningful and fulfilled", as argues Hugh Collins, "the subject will always provoke controversy" (Collins, 2010: p. 5). Substantive reasons are more frequent in labor law speech, which is more evident in what concerns distributive justice claims.

Gustav Radbruch holds that labor law was born paired with economic law, but while the second one focus on productivity, adopting businessman's point of view, the first one focus on the social protection of the weakest part, in order to be a counterpart to money power, which leads to consider workers' interest as a

priority. This raises a peculiar presence of distributive justice reasons in a contractual relation, in a way that labor law constitutes a reaction against private law spirit (Radbruch, 1930: pp. 113-114). One could say that, due to its pretension of establishing limits to contractual will, taking into consideration objective inequalities between employers and employees, labor law is at the center of normative controversies involving current theories of justice. It is to be celebrated by liberal egalitarian theorists like John Rawls and mourned by libertarian theorists like Robert Nozick. This is why it can never be systematized by the use of formal and logical categories, like in a pandectist fashion.

Juristic tradition in labor law, notably in Latin America, is plentiful of elaborations that prove how this branch cannot be understood in the absence of factors like policy goals' evaluation and social purposes. The contrast with formalism could not be more transparent. Héctor-Hugo Barbagelata states that, despite its proximity with economic law, labor law should not be confused with it, since its purpose is not merely regulate working relations, but provide a satisfactory protection to workers, compensating social antagonism (Barbagelata, 1996: p. 18). In a similar positioning, Américo Plá Rodriguez announces the protective principle (or *pro operario* principle) as the fundamental criterion of labor law adjudication. Labor legal protection is thought as means to overcome formal equality and to achieve a substantive correction in labor relations (Plá Rodriguez, 2000: p. 83).

Once formal equality is repudiated as fictitious in labor relations, labor law is not receptive to pure abstract schemes and logical constructs. It is not casual that it introduces itself as power regulation, not as will or liberty fulfillment. Otto Kahn-Freund expressed this singularity by saying that labor law "is chiefly concerned with this elementary phenomenon of social power" (Kahn-Freund, 1983: p. 14). This explains why primacy of reality takes place as a labor law principle. Facts prevail over writing records: the authentic contract is not the one registered in a legal document, but the one that is put in action in real life and in accordance with real power relations (Plá Rodriguez, 2000: p. 339).

While Weberian analysis describes modern law through the optics of formal rationality, imagining that law assurances only the formal rights of the interested parties, regardless ethical or political considerations like critical judgments against unequal distribution of income (Bendix, 1960: p. 395), labor law doctrine is majorly committed with an egalitarian perspective and with an instrumentalist conception of law. It is important to stress that labor law, inserted in a context of tension between individual-driven policies and community-driven policies, corresponds to a general spirit of "majoritarianism" and "paternalism", in opposition against "individualism" and "autonomy" (Vandervelde, 2011).

Labor law's anti-formalism is also an anti-individualism. This is noticeable not only in its distributive justice speech, but also in its composition procedures. Collective bargaining was a new way of lawmaking, and which involved coalition practices initially illegal, like strike movements. The rise of labor law required

the revocation of anti-coalition legislation, like Le Chapelier statute of 1791 in France. Strikes ceased to be a criminal matter only in late 19th century, and this happened because worker's movement imposed itself in real world legal arrangements. More than that, workers' strikes were assimilated as a legal right, in contrast to abstract private law's notion of contractual breach (Supiot, 2016: p. 255).

It must be said that anti-formalism and anti-individualism in labor law were part of a broader process, a process that also comprehended private law. Assuming the premise that every economic institution is, at the same time, an institution of law, Karl Renner argues that "legal institutions designed to regulate the order of labour and of power and the co-ordination of individuals have an organising function in that they integrate the individual into the whole" (Renner, 1949: p. 71). Even ownership, the greatest symbol of liberal individualism, was put under the command of social function. It was turned into a purpose-based category: a substantive, not logical, category. Civil society was no longer majorly seen as an association of self-interested individuals, but as an organic totality in which everyone plays a functional role. Under this point of view, members of society are bonded by the operative force of solidarity: not a sentiment or a doctrine, but rather an objective social interdependence, an empiric fact whose legal meaning is the denial of liberalism's metaphysical abstractions (Duguit, 1912: p. 26).

All these traits in labor law context and in labor law itself are in conflict with Weber's perception on modern law. Weber took calculable functioning of administration and jurisdiction as a requirement to capitalist development (Weber, 1999: p. 310), and he believed that only formal legal rationality could provide predictable decisions. This reasoning was clarified by Franz Neumann in what concerns free competition. He listed features like freedom of commodity market, freedom of the labor market, freedom of contract and predictability of judicial decisions as "the essential characteristics of the liberal competitive system which, through continuous, rationalistic, and capitalistic enterprise, produces a steady flow of profits" (Neumann, 1964: p. 40).

However, Weber failed to see that early 20th century capitalism no longer relied on free competition *tout court*. The rise of interventionist state broke liberal order's rigidity, in a way that law (mainly statutory law) became as instrument of governmental management and social planning. There was a profusion of legislative and administrative norms that affected the usual connection between public and private spheres, between state and individuals, which made traditional formalism in legal thinking a misplaced idea (Faria, 1988). The judicial approval of this new legal complexion demanded the growing use and prevalence of general principles over general rules, and that was certainly the case in labor law.

Labor market cannot be understood as a free market under state interventionism. Public intervention on labor relations in order to establish minimum standards in a private contract was a policy whose legal confirmation depended

on judicial decisions grounded in general principles, i.e. in strongly substantive reasons (more open to subjectivism, to moral and political evaluation). Such kind of legal reasoning was even more important to consolidate compromises between employers and employees, to assure and accommodate the bargaining of the antagonistic interests hold by capital and labor. This leads to an adaptable and more discretionary legal adjudication, but in detriment of legal rationality in its formal sense (Neumann, 1964).

Weber's theory could only admit labor law's rationality concerning workers' subordination to managerial power inside capitalist companies. Once formal rationality is typical of bureaucratic and accounting institutions, it implies rules of coordination, hierarchy, specialization and training (Thiry-Cherques, 2009: p. 899). All these features are suitable to performance optimization, whatever may be the institutional ends. This is indeed the reality of both public offices and private companies in modernity. Labor, in a modern context, is a disenchanted activity, a controlled process put in motion by heartless specialists. Supervision and direction powers are exercised within a managerial bureaucratic hierarchy that submit workers' performance to surveillance in order to "secure the most efficient extraction of labour power from the workforce" (Collins, 2010: p. 102). Labor law's dispositions on employers' directive power are essential to assure its rational and impersonal nature, unlike what is observed in the arbitrary will of the master over his serfs.

A Weberian positioning seems to recognize labor law's rationality only in bureaucratic organization aspects, as an inner component of capitalist enterprise. By considering adjudication, the conclusion is quite different. One could imagine, anyway, that current neoliberal scenario is favorable to Weber's view. Interventionism's setback could be interpreted as conducive to a revival of legal formalism. Yet this is not the case, because both the attempt to soften welfare state (like flexicurity politics) and the attempt to destroy it (like radical neoliberalism, inspired in Hayek's ideas) are grounded in highly substantive judgments, not in abstract categorization. On one hand, flexicurity brings a set of policies guided by programmatic goals like adaptability, market dynamism, labor market mobility etc. (Rogowski, 2008). On the other hand, radical neoliberalism regards labor law's classical principles and protective measures as paternalism and state oppression, hence the openly ideological celebration of an "entrepreneurial mindset": just like the employer, the employee is thought as an entrepreneurial subject, as a maximizing agent of his own "human capital", in a world in which life itself is utterly transformed into a market enterprise, in which workers are individually accountable for their success or failure in labor market (Dardot & Laval, 2016). Capitalist values are put in normative terms, dismissing the cover of a purely logical treatment of legal concepts.

4. Labor Law and Legal Subjectivity

A Marxist approach on law, as we intend to demonstrate, can avoid the verifia-

ble difficulties in Weberian analysis, starting with a more accurate and resilient concept of law, a concept that makes sense both in classical private law and in labor law, i.e. an enlightening reference both in liberal and interventionist contexts. Among many Marxist proposals on the matter, Evgeny Pashukanis' theory stands out by the power of its method.

According Christopher Arthur's explanation on Pashukanis' Marxist perspective, "what is required in the materialist interpretation of the legal sphere is not merely an investigation of the content of legal regulations but also a materialist account of the form of law itself" (Arthur, 2003: p. 11). This means that a scientific inquiry on law must focus on identifying key legal concepts and their material roots. It is a search for the conceptual requirements that make law the phenomenon we know as such, and that allow a distinction between law and other social spheres like religion, customs, technique, politics etc.

Yet these conceptual requirements are not arbitrary doctrinal inventions. Knowing legal form beyond variable contents (like different political choices in parliaments or different interpretations about statutory dispositions in courts) presupposes the existence of objective categories that express law's social specificity and irreducible character. "If law is not explored in terms of its internal structure, then its peculiar character will be dissolved away into some vaguer notion of social control" (Arthur, 2003: p. 12). Pashukanis' answer for this search, unlike positivist hegemonic thinking, does not lie on a kind of authority or perception about authoritativeness (e.g. Hart's rule of recognition), but on the kind of agent that is produced under socially specific relationships.

Pashukanis claims initially that "legal relation is the cell-form of the legal fabric", and that "only there does law accomplish its real movement. Compared to this, law as the aggregate of norms is merely a lifeless abstraction" (Pashukanis, 2003: p. 85). Norms are supposed to be understood from the point of view of their validity and authoritativeness, not necessarily from their social operability. However, if law is indeed a social matter, then it must be extracted from social practice. But the "social" quality, in a Marxist conception, is not the sheer belonging to society, or a shared condition of being and doing. "Social" means, for Marx and for Marxist authors, a historical singularity that points out to the functioning of a given mode of production. Capitalism, for instance, has its singularities, its social forms: commodity is its general form of product; money is its general form of wealth; wage labor is its general form of labor, and so on. It is crucial to note that these generalizations only occur (or only occur utterly) in capitalist societies. Commodity and money were residual elements in feudalism, they can only occupy a central position in material production of life under capitalist modernity. Wage labor could not be even conceived before capitalism, in times when labor was accomplished under different social forms (like slavery and serfdom).

This finding leads to the conclusion that "Marx's economic theory and its crowning work *Capital* are based upon an understanding of the *relativity*, *social*

determination and historical limitation of all economic laws" (Mandel, 1976: p. 13). There are no universal laws of economic organization, and this is why it is not possible to imagine an absolute economic theory, a sort of approach able to elucidate every form of production. One can only identify the peculiar laws of motion in a specific kind of society, determining in which social conditions the notion of capital, e.g., rises and represents a singular dynamics in production. Similarly, it is not possible to imagine an absolute regulation theory. Jurists should ask themselves under which conditions the regulations of social relations assume a properly legal character, instead of a purely technical or customary character.

In order to know when and why some social relations become legal, it is imperative to find out the necessary traits of a legal relationship, starting with its protagonists. "Every legal relation", states Pashukanis, "is a relation between subjects. The subject is the atom of legal theory, its simplest, irreducible element" (Pashukanis, 2003: p. 109). This understanding is due to the fact only in legal relationships one can find the full notion of a subject, and particularly a legal subject. It is a premise in such elaboration that "subject" is not an ordinary agent ruled by a kind of sovereign power, but an agent engaged in certain practices according to different institutional positions (claim, duty, liberty, liability etc., like in Hohfeld's scheme). Norms and authority, therefore, are legal only if they are referred to the private and isolated subject that exists as "a person endowed with rights on the basis of which he actively makes claims" (Pashukanis, 2003: p. 101).

The core event in which people behave as subjects of a legal relationship is commodity exchange. In a capitalist society, commodity exchange is the most generalized economic transaction, is a necessary operation for material production of life. And once commodities "cannot themselves go to market and perform exchanges in their own right", one must, "therefore, have recourse to their guardians, who are the possessors of commodities" (Marx, 1976: p. 178). These possessors interact through a juridical relation which is itself determined by market relation, although it presents itself, legally, as an agreement between two wills). Such agents are nonetheless just personifications of market intercourse, bearers of the economic nexus.

Capitalism turned commodity into the general form of product, making it a universal category in modern social order. The same can be said about legal subject, its loyal companion. There are, then, two distinctive and complementary features of social life in current epoch: human relations are both mediated by things in market, always associated to money (prices, profits, credit-worthiness, among others), and by people shaped as freely disposing subjects. Social bond appears simultaneously "as the abstract equivalence of commodity values, and as a person's capacity to be the abstract subject of rights" (Arthur, 2003: p. 14). Social relations of production in capitalism assume a "doubly mysterious form": there is a legal fetishism that mirrors commodity fetishism in an inverted way,

completing the scenario of ideological mystification. "A homogeneously integrated relations assumes two fundamental abstract aspects at the same time: an economic and a legal aspect" (Pashukanis, 2003: p. 117).

Under Pashukanis' perspective, contract is commodity exchange's legal aspect *par excellence*, and hence a key category in capitalist modernity. It is within contractual practices that legal subject attributes are highlighted: liberty to exchange goods and forge market obligations, formal equality in economic transactions and ownership over transacted goods. These characteristic are replicated, although imperfectly, in other legal contexts. Due process of law, for instance, allows the defendant to be put as an equal in face of prosecutor, and even bargain his own conviction with institutional powers. Even outside direct market relations, legal subject "finds entirely adequate embodiment in the real person of the subject operating egoistically, the owner, the bearer of private interests" (Pashukanis, 2003: p. 80). Private law is the apex representation of legal form, but not its exclusive representation.

Contract is a prominent notion in Pashukanis' thinking because it shapes the vast majority of social practices (beyond business and professional affairs, like marriage, for example), including, of course, the peculiar transaction that universalizes commodity exchange and formalize capitalist exploitation. One of the most unique features of bourgeois society is the presence of wage labor. Capital face labor power as a purchasable good, and the member of exploited class "enters the market as a free vendor of his labour power, which is why the relation of capitalist exploitation is mediated through the form of the contract" (Pashukanis, 2003: p. 110). Wage workers and capitalist owners are leveled as subjects and free contractors, despite statutory charges over labor contract. The exploitative nature of labor-capital relationship is masked under legal celebration of liberty, equality and ownership, i.e., on behalf of a sublime human rights speech (Edelman, 1976).

It is thanks to the emphasis on contracts that Pashukanis perceives why capitalism produces a central authority that acquires the form of "an impersonal apparatus of public power, separate from society" (Pashukanis, 2023: p. 139). State emerges as an impersonal force that exercises public coercion on behalf of every commodity owner, since no one is allowed to use private coercion between equal contractors. Violence cannot be unilateral between contractual parties, it must be transferred to an equidistant and official instance of deliberation. Coercive functions are concentrated at state apparatus, which becomes more effective in its repressive role. More than that, state must be seen as the specific social form that capitalist political community adopts for itself (Hirsch, 2010: p. 32).

All this pleading made so far with support in Pachukanis' theory enables a conception alternative to the one that is found in Max Weber. It is not formal rationality that defines law in modernity, but legal subjectivity that reveals itself in the contractual nature of social relations. It is safe to assert thereby that the profusion of substantive elements in labor law does not matter to determine its

level of legality. What really matters is that labor law is based on a contractual operation that posits directly both employers and employers as legal subjects.

Any protective and collective aspects that labor law may exhibit in contrast with ordinary private law is conductible to contractual relationship. Protection clauses induced by statutory law and teleological statements that rise in jurisprudence are terms that integrate and guide labor contracts. Legal protection in these contracts are usually granted under the form of bonus payments for overtime work and pecuniary compensations for hazardous work conditions. These are equivalency measures that are typical of market dynamics and are in total accordance with contract's legal form. Every legal relation carries the mark of exchange value as a commodity determination, and this is the reason why this sort of social relation has always transactional traits like reciprocity and equivalency (Naves, 2014: p. 52). Besides, collective arrangements in labor law are also contractual in their nature. Collective agreements are "*de facto* contracts" (Kay & Mott, 1982: p. 115), and one can realize that trade unions and companies are both legal subjects engaged in legal relationships ruled by synallagmatic provisions that have to be accomplished during a given period through successive obligations.

As it was demonstrated by Bernard Edelman, even strike's legality is conditioned by contractual references. A strike is considered licit if its claims are related to labor contract' object and if its practice are respectful towards capitalist property rights, otherwise workers' movement is disavowed under allegations of contract abuse. Strike is no longer a crime, it was accepted as a worker's right, but a right can be abused. Exploited people are legally repudiated when their rights are exercised beyond the boundaries of their exploiters' rights. A strike' legality is nothing but deference to labor contract, and a movement bound by contract is harmless to capital (Edelman, 2016).

Contracts are essential to modern society both in free competition capitalism and monopolist capitalism. Konstantin Stoyanovitch endorsed Pashukanis' reading on contracts by affirming that all types of transactions created in monopolist context (adhesion contracts, collective agreements and modern labor contract itself) remain rooted in a system of exchange based on equivalent provisions (Stoyanovitch, 1968: p. 97). So, unlike Weber's approach, Pashukanian elaboration is not restricted to free competition capitalism, since it characterizes law (and its contractual semblance) as a capitalist social form, i.e., a necessary component of capitalist mode of production.

Pashukanis also noticed that the new scenario of monopolistic concentration and interventionism in capitalist economy gave opportunity to a new kind of public official. Classical bureaucratic agents were still present, but these impersonal guardians of economic circulation (and contractual formalities) were sided by strategic officials, by agents more engaged in transaction contents. The new bureaucratic agent operates as an organizer of economic tasks that intertwine with political demands, as it is expected from a public administration model

which was closer to market activities. Economic intervention nearly merged a fraction of public staff and some industrial and financial circles, which led to the adoption of business management methods inside state offices (Pachukanis, 2017). This means that state bureaucrats in monopolist capitalism are not solely committed to performance optimization. They can also be committed to specific institutional ends, like policy goals and economic planning. All these observations are extendable to a new kind of judge and to the fall of formalist adjudication. In order to assure labor protectionism, courts had to abandon pandectism and similar conceptions. The use of principles in labor law is an enlightening example of a substantive rationality, a teleological-type legal reasoning that deepened modern sociability (new dimensions for the notion of contract) and gained strength because of capitalist development (and not despite of it).

5. Conclusive Notes

Max Weber proposes that modern law relies on the ideal type of a bureaucratic legal order centered in state's impersonal power. It is a model of legal-rational domination that describes legal practice (mainly adjudication) with the paradigm of an institutional hierarchical structure whose officials are committed to apply legal rules according utterly objective patterns. Such objectivity leads to legal security, and it could only be assured with support in formal rationality. Legal reasoning in modernity, in Weber's understanding, demands the exclusion of purpose-driven legal propositions. There is only room for systematic and logical articulation of abstract legal propositions, devoid of policy goals and subjective evaluation.

Our critique on Weber's conceptual positioning about modern law leads to the conclusion that formal rationality is a flawed paradigm for legal phenomenon's definition. Weberian ideal type of modern law is over-rooted in conceptual jurisprudence, particularly in German pandectism. It is true that legal dogmatic knowledge has a huge theoretical debt with jurists like Savigny and Windscheid, even today, but this is not enough to assume new legal schools as irrational and contrary to a pretentiously perfect legal rationality.

If Weber was correct, labor law would be a continent of irrationality in modern life. This could be just a pessimistic diagnosis: as Julien Freund admits, values' fundamental irrationalism cannot be defeated and life cannot be reduced to a board of abstract legal prescriptions. The absolute unity of a flawless legal order (systematic coherence and plenitude of legal rules and institutions) is a fiction (Freund, 2003: p. 192), but a fiction that, in Weber's theory, stipulates formal rationality as the only standard of legal reasoning that deserves the title of "modern".

We believe, on the contrary, that Weber's approach failed in face of new legal tendencies that arose in his lifetime. He was somehow disdainful of legal patterns that proved themselves as hostile to formalism. Such disdain was the same that labor law initially experienced in legal scholar environment. According to

Alain Supiot's explanation, labor law was treated, at his dawn, like a vulgar law. Its lower level of conceptual abstraction (in comparison with classic private law) costed it the reputation of lack of scientific rigor. It was also accused of being paternalistic, and labor legislation's protective measures were put under suspicion. A branch of law dedicated to restrain will's autonomy in free contracts could only be a degraded poors' law and a disruptive factor inside legal reason's integrity (Supiot, 2016: p. 256).

Weber's conception on modern law is compelled to endorse, at least partially, this kind of narrative, which leads the author to a theoretical contradiction. If formal rationality is a fateful force that derives from universal bureaucratization (Kronman, 1983: p. 170), then pandectist formulas should have prevailed instead of perishing. Substantive justice claims (chiefly distributive justice values towards labor contract) should have vanished instead of consolidating. Weber's model, once directed to labor law, works only as a speech that express formalist ("Lochnerist") resistance against substantive adjudication. Such approach consecrates liberal past and mourns further developments in legal practice, exerting a conservative influence on law.

Against formal rational paradigm's reductionist conclusions, one can find in Pashukanis' legal subjectivity critique a reliable alternative. Jurists should seek the core of legality in historical singularities of generalized market relations. Legal relations mirror commodity exchange in different levels, but they always produce a specific legal subject, an abstract agent enabled to universal contractual practice. Such agent is less abstract in monopolist capitalism context, but still a commodity bearer and hence a legal subject.

Labor law is a flaw in a Weberian elaboration, but not in a Pashukanian one. Substantive concerns on balance and distributive justice move formalism away, but the same cannot be said on legal form's contractual semblance. Employers and employees, no matter the incidence of directive legal principles and collective arrangements, are inescapably parties of a contract, and contract is nothing but the form that coats economic intercourse and that spreads itself to other types of legal relations. Collective agreements, by the way, are contracts in a broader sense. Adjudication patterns are variable under legal doctrines born in liberal state and legal doctrines born in interventionist state, but law's transactional character is a persisting feature in modernity, just like capitalism itself.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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