BOOK REVIEW

Principled Labor Law: U.S. Labor Law Through a Latin American Method, Sergio Gamonal and César Rosado Marzán
(Oxford UP, 2019, 186 pp.)

reviewed by Guy Davidov†

In their short, well-written, and highly engaging book, Sergio Gamonal and César Rosado Marzán urge us to return to tradition. One can guess as much already from the cover, which features a painting of the most traditional kind of workers that labor law was originally designed for after the industrial revolution: factory workers. It is not a high-tech factory, but rather an old-fashioned factory from the 1930s, and we see a group of men doing physical work with heavy machines.[1] The authors are not shy about being traditionalists. They do not care much for new ideas, such as the capability approach, which could threaten the traditional view of labor law,[2] or for taking economic efficiency into account.[3] They want us to return to a simple world, in which labor law has a simple goal ("protection"),[4] and employment is long-term and continuous.[5]

To that end, the authors present four Latin American "principles" of labor law that have been derived by judges from labor legislation and consolidated by scholars and are used as aids in interpretation in Latin American legal systems. Gamonal and Rosado Marzán argue that this idea of having labor law principles is useful and valuable, and that the specific principles adopted in Latin America are normatively justified.[6] Accordingly,

†Elias Lieberman Professor of Labor Law, Hebrew University of Jerusalem. Many thanks to Sergio Gamonal and César Rosado Marzán for inviting me to participate in a panel on their book at the LLRN4 conference in Valparaíso, June 2019. This review is based on my comments there.

1. Mural painted by Diego Rivera in 1932-3 on the walls of the Detroit Institute of Arts, depicting workers at a Ford factory.
2. SERGIO GAMONAL C & CÉSAR F. ROSADO MARZÁN, PRINCIPLED LABOR LAW: U.S. LABOR LAW THROUGH A LATIN AMERICAN METHOD 24-25 (2019).
3. *Id*. at 23.
4. *Id*. at 31 ff.
5. *Id*. at 119 ff.
6. *Id*. at Ch 7.

they call for the adoption of these principles in other parts of the world as well, with a focus on the United States—arguing that with some effort the same principles can be also found in U.S. law (relying on several pieces of legislation and on the 13th Amendment of the Constitution). For each of the four principles, there is a review of the law in several Latin American legal systems (Argentina, Brazil, Chile, and Uruguay)—explaining how the principle has been developed and became established—followed by an examination of the implicit existence of this principle in U.S. law.[7]

Some may question the claim that these principles can be considered Latin American, given their existence in one way or another also in Europe and other parts of the world. Others may question the arguments concerning the ability to derive the same principles also in U.S. law. These can be interesting and fruitful discussions. My own focus, however, in this short review, will be the normative level: whether it is useful to have a set of "labor law principles," and whether the specific principles proposed by the authors (following Latin American jurisprudence)—which can be characterized as simple and traditionalist—are indeed justified and helpful. I will start with the latter issue.

I. THE FOUR PROPOSED PRINCIPLES

I am very sympathetic to the view that the basic idea behind labor law has not changed. In essence, we need labor law for the same reasons we needed it a 100 years ago—whether we call it inequality of bargaining power, or inherent vulnerabilities, or market failures.[8] Also, if we look at the positive goals—or general values—that we want to advance through labor law, there are perhaps variations in emphasis between generations, and some new articulations, but the basic goals such as distributive justice or protecting human dignity are the same as they were in the past. So, the fact that the authors' principles can be described as traditional, rather than proposing something entirely new and different, is not at all a problem in my view. Still, the question is whether the principles can offer a useful aid for addressing new interpretive challenges and otherwise for developing the law (filling lacunas, thinking about reforms).

7. *Id*. at Ch 2-5.

8. *See* GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW Ch 3-4 (2016) for a discussion of the goals, and Guy Davidov, *Putting the Purpose of Labor Law to Work: A Response to Comments*, 16 JERUS. REV. LEG. STUD. 68 (2017) on their endurance.

The first and most important principle listed by the authors is "protection."[9] There is no doubt that labor laws are protective. But that is a very simple and general way to describe them, and I doubt if it can be of much help when we face concrete, difficult questions. Here the authors offer the companion idea of *in dubio pro operario*—meaning, that in any case of doubt, whenever "the law is ambiguous or vague or when there is a gap in the rules," judges should rule in favor of the worker.[10] I can see the practical advantage of having such a simple, easy-to-use rule, but it seems too simplistic with regard to interpretation of legislation or the filling of lacunas. Why are we in doubt in the first place? We need to have a method of solving hard cases, and the method cannot be that "workers always win."

Let me give a few examples, based on recent cases from my own country (Israel). Surely, similar examples can be found in any other legal system. Imagine that employees sue, because they want to get their minimum wage, without taking tips into account for this purpose. Imagine also that employees sue to prevent the employer from reading their emails or requiring them to clock in and out with a fingerprint. Finally, imagine that employees sue because they want the employer to be prohibited from saying anything against unionization. All of these issues can be solved explicitly in legislation, but assume that the legislation is silent about them—as is indeed the case in Israel, and as is often the case elsewhere with regard to new problems.

Apparently, for Gamonal and Rosado Marzán, the fact that there is no solution in legislation is enough to make this a case of "doubt," and we should rule in favor of the workers in all of those cases—giving them everything they want.[11] This sounds problematic on its face. I believe that judges *do* have tools to solve these legal questions, by relying on the goals of labor law or the goals of the specific legislation in question. And it is not enough to say that workers need protection—of course they do. But how much protection? How much is enough, and when does it become too much? We have to base our decision on the relevant goals: for the minimum wage, it is (in my view) redistribution and dignity; for the emails and fingerprints, it is privacy; for the unionization drive, it is freedom of association.[12] Then, we have to take into account the conflicting rights and legitimate interests of the employer, and come to a solution. Quite often, the solution is not "yes" or "no" to what the workers have asked for, but rather a more complicated solution in between.[13]

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9. GAMONAL C & ROSADO MARZÁN, *supra* note 2, at Ch 2.
10. *Id*. at 40.
11. *Id*. at 19.
12. See DAVIDOV, *supra* note 8, at Ch 7.
13. With regard to the issue of tips, for example, the Israeli Court decided in favor of counting tips as part of the minimum wage, but only if they are documented and the employee receives the related benefits on them. The authors criticize my support for this solution (GAMONAL C & ROSADO MARZÁN,

The second principle is "primacy of reality"—the idea that we should look at the reality of the relationship rather than the way it is described in the contract.[14] This is an important idea, recognized in many legal systems (even if it is not always applied). Note, however, that it is not relevant for interpreting legislation, but only for determining the facts for the purpose of interpreting *contracts*.[15] Although the authors ask us not to confuse this rule with the general principle of contract interpretation that appears to have the same effect,[16] I am not convinced that the principle is specific to labor law. The authors describe the contract of employment as a "reality contract,"[17] but this has to be true of other contracts as well. Still, because the problem of sham contracts that do not present the real relationship is more common in employment than in other contracts, I can see how it could be useful to consider this a labor law principle.

The authors refer to the "economic realities test" that is sometimes used in the United States to determine employee status as an example of the "primacy of reality" principle.[18] But this is different: economic realities refer to economic dependency, which is a way to articulate the purpose of labor law and, accordingly, the purpose behind the employee/independent contractor distinction. In other words, this is not the primacy of reality principle that can be an aid when interpreting contracts, but a purposive approach to interpretation of legislation. If we think that the purpose of the law requires that it covers all those who are economically dependent on an employer, this can be achieved by using an "economic dependency" test, which in the United States has sometimes been called the "economic realities" test. Separately, when applying this test—and any other test (e.g. control)—we should look at the reality of the relationship and not the way it has been described in the contract, when the two are not the same. To be clear, I am in full agreement with the authors about the desired solution, in the sense of giving weight to economic dependency when determining employee status. My doubts relate to whether the idea of "primacy of reality" can help lead us in this direction.

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supra note 2, at 19-20). They argue that the tips might not be enough to ensure a dignified bargain. But, if the employee is secured an income of at least the level of the minimum wage, s/he is in the same position as any other employee earning the minimum wage in a workplace without the possibility to collect tips. If the minimum wage is too low, that is a separate (and much more general) problem. The authors also ask, "[w]hat if the employer asks that all waiting staff stay after hours to clean the restaurant, when the workers cannot collect any tips?". In such situations, when tips are not relevant, the employer has the responsibility to pay at least the minimum wage for any hour worked. The question is only whether tips that have been received, in practice, should be counted as part of the income derived from this employment.

14. *Id*. at Ch 3.

15. All the examples brought by the authors from Latin American jurisprudence (*id*. at 65-77) refer to contract interpretation.

16. *Id*. at 68, fn 26.

17. *Id*. at 66-67.

18. *Id*. at 79.

The third principle is "nonwaiver"—the idea that employment standards create a floor of rights and any agreement by an employee to waive these rights shall be considered void.[19] Again, this is an internationally recognized principle, which is generally undisputed. I agree entirely about its importance.[20] However, like other principles, or rights, it is not absolute. There are exceptions, and there should be. For example, the authors mention that collective agreements cannot derogate from legislated standards[21]—but in many legal systems this is not always true, and normatively, I think there are good reasons to sometimes allow such exceptions.[22] Still, I agree that it could be useful to refer to nonwaivability as a principle, to the extent that it provides a quick reminder to judges and others about this idea. This is shown nicely in the book when the authors criticize the U.S. judgments that allow arbitration agreements in employment relations.[23] These cases are certainly perplexing in their complete ignorance of the idea behind labor laws and how they operate—and the principle of nonwaiver/nonwaivability is one easy way (although certainly not the only one) to explain why such judgments are wrong and problematic.

The final principle suggested by the authors is "continuity." Assuming that employment relations have to be indefinite is a somewhat conservative approach to the labor market. Isn't it possible to protect employee rights also in shorter-term engagements? That is not obvious on its face. Simply invoking the principle of continuity does not solve such questions, and the authors do not offer a full account of why exactly continuity is important and whether it should be considered necessary.

The authors use the continuity principle as a justification for "just cause" laws. But, is this the only justification? Or, the best justification? And what about contradicting considerations, in favor of "at will" laws, which surely should also be taken into account? There is no way to avoid a fuller discussion at the level of goals/purposes: when faced with the need to devise legal solutions, we need to consider other goals, rights, and interests as well. A single simple idea cannot replace this work.

A separate question is whether this principle can help the call for labor law reform in the United States concerning dismissals. The authors realize that the reforms they are suggesting, in favor of "just cause" laws, are not politically realistic at the Federal level, but believe there might still be hope for them at the State level.[24] Presumably, however, State legislators are

19. *Id*. at Ch 4.

20. I discuss the justifications for nonwaivability in a recent paper: Guy Davidov, *Nonwaivability in Labour Law* (unpublished draft, presented at LLRN4, June 2019).

21. GAMONAL C & ROSADO MARZÁN, *supra* note 2, at 102.

22. For example, in many countries, working time laws give the social partners the flexibility to change the regular working day, which is often beneficial to workers as well as employers.

23. GAMONAL C & ROSADO MARZÁN, *supra* note 2, at 93 ff.

24. *Id*. at 141.

already aware of the difficulties with "at-will" employment and the critiques of this doctrine. Do they need the principle of continuity to learn about the problem or understand it? That seems doubtful.

II. BETWEEN PURPOSE AND PRINCIPLES

After commenting briefly on the four specific principles, let me add a few words on the more general idea of articulating principles for labor law. The authors see a strong connection between their approach and a purposive approach to labor law, because the principles are derived from the purposes of labor legislation. At the same time, they argue that the principled approach is superior because it is simpler to use, does not leave too much discretion with judges, and leads to clear and better solutions.[25]

As a supporter of the purposive approach,[26] I like the idea of articulating a few principles of labor law that can be used to aid interpretation. Such principles have to be based on the general goals of labor law, as deduced from the legislation—they cannot be detached from purpose. But it could be useful if "one level below" the purposes we have some principles that are derived from the purposes and are perhaps easier to work with. Provided, in my view, that we realize that such principles cannot always lead to easy solutions. Often, there are conflicts between goals, or between rights, that require making exceptions or balancing—and we cannot avoid that simply by invoking principles. When we have to balance between conflicting rights and interests—which is almost always the case when confronted with new problems—this requires looking into the purposes of the different rights (i.e. going back to the "upper level").

The authors are worried about giving judges too much discretion to weigh different goals and balance between them, especially given the U.S. history of judges' hostility to labor.[27] The principles are supposed to limit this discretion. But if judges are hostile, why would they accept these principles? If the authors want to suggest to the legislature to impose these principles on judges through legislation, they have not done so explicitly. And as we know, this is politically unlikely. In fact, this is less realistic than reaching progressive solutions through the purposive approach. Let me give an example. The authors discuss a U.S. case considering whether time that miners spent on getting to the working face of the mine was "working time" requiring compensation.[28] The authors suggest that in such cases, judges

25. *Id*. at 18-22.
26. See DAVIDOV, *supra* note 8.
27. GAMONAL C & ROSADO MARZÁN, *supra* note 2, at 22.
28. *Id*. at 58.

should say, "there is doubt, so we rule in favor of the workers."[29] I would suggest instead to say, "based on the purpose of the law, because this was an activity required by the employer, it required compensation." I believe that the latter option will raise much less resistance from both employers and judges.

The purposive approach, properly understood and applied, does not give judges unlimited discretion to choose the goals of the law. The goals are based on the relevant legislation. Yes, there is room for discretion, as there is almost always with judicial practice, but it is far from being completely open-ended and unlimited.

Toward the end of the book, the authors acknowledge that the principles cannot offer solutions when they conflict with other rights or interests, including the managerial prerogative. In response, they argue that the principle would at least "help us to better comprehend the law and, as such, determine whether or not there are conflicts with other laws."[30] But it is difficult to see how the principles can help us understand the law, without going into the level of goals/purposes. When faced with a conflict between different rights and interests, we need to know *why* exactly we need "protection," in a given case, or *why* "continuity" is important in a given context.[31]

To show why the principles are important/useful, the authors use the U.S. Supreme Court decision in *Janus*,[32] a recent case in which the Court prohibited the charging of union agency fees from nonmembers in the public sector. Such fees are crucial in a system of exclusive representation, where the union represents all employees in the same bargaining unit and all employees (including nonmembers) enjoy the benefits secured by the union. The majority of the Court relied on freedom of speech and completely ignored freedom of association, which is key to understanding the purpose behind agency fees. The authors' critique of the judgment relies on the principle of protection, arguing that the Court ignored the importance of agency fees to secure protection. They claim that "free speech and mandatory agency fees do not conflict."[33] Although I share the criticism of the judgment, which ignored a crucial goal of labor law, we should not make the opposite mistake of ignoring the conflicting right. The purpose behind unionization is crucial here, but when a specific employee objects to the union and is forced

29. My phrasing of the authors' point.

30. *Id*. at 146.

31. Later, the authors go back to saying that labor laws do not have to conflict with property law (*Id*. at 149), showing that perhaps they underestimate how common these conflicts are in cases that reach the courts.

32. *Id*. at 152.

33. *Id*. at 155.

to fund it, this is also an infringement that must be taken into account.[34] There is a need to put the two conflicting values one against the other and decide which one of them should trump the other under the circumstances, or whether they can somehow be balanced. The U.S. Court failed to do that, focusing only on free speech, one-sidedly. The authors' proposal of relying on the very general idea of protection and ignoring the conflict, cannot offer a solution. Again, there is no way of avoiding the discussion of goals and the need to balance between conflicting goals and rights in such cases.[35]

Another example raised by the authors for the practical usefulness of the "protection" principle is the decision of whether someone is an employee or an independent contractor. If there is doubt, they say, always decide in favor of employee status, because that leads to protection. But courts have tests that they have developed—which at least in theory should be based on purpose—to make this determination. The tests leave room for discretion, for sure, but it does not mean that they cannot lead to a conclusion. So why is there doubt? Is it just in the few cases when the judge feels it is a 50/50 case, which is probably quite rare? If so, then the proposal is to adopt a presumption of employment, as several legal systems have done, and would certainly be a good idea.[36] But it appears that the authors mean something different: to apply the above-mentioned principle whenever reasonable people can disagree. This seems problematic, because it goes against the whole idea of a test that requires discretion to apply, which in general is a useful and necessary method.[37] If, instead of applying discretion, the judge will simply rule in the worker's favor, this method collapses, and we will soon see legislatures taking discretion away from courts. The expected result—clear-cut legislated rules about who is an employee without room for judicial discretion—will only make it easier for employers to work around them and evade. Once again, simple solutions may be tempting, but are likely to prove problematic.

34. Some of the judges on the Supreme Court of Canada thought otherwise, arguing that freedom of association does not include the freedom *not* to associate, and that compulsory union dues do not infringe on freedom of expression (see *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211). I disagree on both counts, even though I agree with their final conclusion which allowed compulsory dues. But, the point is not about a concrete case, it is about the general need to balance conflicting rights.

35. I do agree, of course, that union agency fees (compulsory dues) should be allowed. The comment is about the method of analysis to reach this conclusion—which could make a difference on the result in other cases.

36. See DAVIDOV, *supra* note 8, at 122.

37. *Id*.

III. CONCLUSION

This thought-provoking book will surely contribute a lot to ongoing discussions about the idea/goal of labor law and the best methods to advance this goal. Sergio Gamonal and César Rosado Marzán have done a great service by exposing Latin American jurisprudence and scholarship to the English-speaking world. We learn that many ideas about labor law are shared in different parts of the world, and it is interesting to learn that in Latin America these ideas have been formulated as "principles" that are used as interpretive aids and perhaps also as guides and constant reminders to judges and others. Such principles can be useful. At the same time, I have warned against relying too much on them, in the sense of believing that they can offer simple solutions and replace judicial discretion and the analysis of purpose, at least when confronted with new, difficult questions.