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# The Mercosur Socio-Labour Declaration and the importance of judicial activism

La Declaración Sociolaboral del Mercosur y la importancia del activismo judicial

A Declaração Sociolaboral do MERCOSUL e a importância do ativismo judicial

La déclaration sociolaboral du MERCOSUR et l'importance de l'activisme judiciaire

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**Summary:** Given the fragmentary and uneven development of Mercosur, the adoption of the Mercosur Socio-Labour Declaration has been a bold attempt to protect workers' fundamental rights within a regional trade bloc. It was first adopted in 1998 and then substantially revisited in 2015. This article explores how Mercosur bodies and, particularly, national judges and their activism have circumvented the current intergovernmental institutional framework to consider the Socio-Labour Declaration as a justiciable instrument. This has allowed workers and citizens to rely upon it to challenge domestic legislations and protect their fundamental rights in the workplace. This piece concludes that an already overdue revision should not only reform the legal nature of the Socio-Labour, which should become a protocol to the Treaty of Asuncion, but should also regulate two crucial areas that are already shaping the Mercosur Member States' labour markets, namely: platform work, and climate change

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with a particular focus on green jobs and just transition policies.

**Keywords:** Southern Common Market; Fundamental Workers' Rights; Socio-Labour Declaration; International and Regional Trade Blocs

**Resumen:** En el marco de un desarrollo fragmentado e irregular a lo largo de la historia del Mercosur, la Declaración Sociolaboral ha sido un intento ambicioso de consagrar y proteger los derechos fundamentales de los trabajadores y, en cierta medida, de regular las relaciones laborales dentro de un proceso de integración regional. Originalmente adoptada en 1998, la declaración fue luego reformada y substancialmente mejorada en 2015. Este artículo explora cómo los organismos del Mercosur y, especialmente, los jueces nacionales a través de su activismo judicial han sorteado los obstáculos impuestos por la arquitectura institucional intergubernamental para utilizar a la Declaración Sociolaboral como un documento justiciable. Ello ha permitido que tanto los trabajadores como los ciudadanos en general puedan utilizarla para proteger sus derechos fundamentales en el marco de las relaciones laborales. Este artículo concluye que la revisión Declaración, que ya debería haber tenido lugar, debe reformar no sólo su naturaleza jurídica – a través del reconocimiento del mencionado instrumento como un protocolo adicional al Tratado de Asunción, sino que debe incluir nuevos derechos vinculados al trabajo de plataformas, y al cambio climático con especial énfasis en materia de empleo verde y políticas de transición justa.

**Palabras clave:** Mercosur ; Acuerdos de libre comercio; Derechos laborales fundamentales; Declaración Sociolaboral del Mercosur; Integración regional

**Resumo:** Considerando a natureza fragmentada e desigual do desenvolvimento do Mercosul, a adoção da Declaração Socio-Laboral do Mercosul foi uma tentativa audaz de proteger os direitos fundamentais dos trabalhadores dentro de um bloco comercial regional. O documento foi inicialmente adotado em 1998 e posteriormente revisado de forma substancial em 2015. Este artigo explora como os órgãos do Mercosul e, em particular, os juízes nacionais e seu ativismo, contornaram o atual quadro institucional intergovernamental para considerar a Declaração Socio-Laboral como um instrumento passível para a utilização em decisões judiciais. Isso permitiu que trabalhadores e cidadãos a utilizassem para contestar legislações domésticas e proteger seus direitos fundamentais no ambiente de trabalho. Este artigo conclui que uma revisão já atrasada não só deve reformar a natureza legal da Declaração Socio-Laboral, que deveria se tornar um protocolo para o Tratado de Assunção, mas também regulamentar duas áreas cruciais que já estão moldando os mercados de trabalho dos Estados Membros do Mercosul, a saber: trabalho em plataformas e mudanças climáticas, com um foco especial em empregos verdes e políticas de transição justa.

**Palavras chave:** MERCOSUL; Acordos de livre comércio; Direitos trabalhistas fundamentais; Declaração Sócio-Trabalhista do Mercosul; Integração regional

**Résumé:** Étant donné le développement fragmentaire et inégal du Mercosur, l'adoption de la Déclaration Socio-Laboral du Mercosur a été une tentative courageuse de protéger les droits fondamentaux des travailleurs au sein d'un bloc régional de libre-échange. Elle a été adoptée en 1998, puis largement révisée en 2015. Cet article étudie comment les instances du Mercosur et, en particulier, les juges nationaux et leur activisme judiciaire, ont contourné le cadre institutionnel intergouvernemental actuel pour considérer la Déclaration Socio-Laboral comme un instrument juridique justiciable. Cela a permis aux travailleurs et aux citoyens de s'appuyer sur la Déclaration pour contester les législations nationales et protéger leurs droits fondamentaux. Cet article conclut qu'une révision déjà nécessaire ne devrait pas seulement réformer la nature juridique de la Déclaration Socio-Laboral, qui devrait devenir un protocole du Traité d'Asunción, mais devrait également réglementer deux domaines cruciaux qui façonnent déjà les marchés du travail des États membres du Mercosur, à savoir: le travail des plateformes numériques, et le changement climatique, en mettant particulièrement l'accent sur les emplois verts et les politiques de transition juste.

**Mots-clés:** Mercosur ; Des accords de libre-échange; Droits fondamentaux du travail ; Déclaration socio-travail du Mercosur ; Intégration régionale

## **1. INTRODUCTION: A REGIONAL LABOUR DIMENSION IN AN INTERGOVERNMENTAL SETTING**

As set out in Article 1 Treaty of Asuncion ('TA'), Mercosur, which originally prioritised its economic dimension, has pursued the unification of customs and, eventually, the establishment of the 'Southern Common Market' as its main goal. Unsurprisingly, there was not a regional labour dimension as such, and the founding members only a 'safeguard clause' in Annex IV of the TA to protect employment, which could be affected by the intra-Mercosur importations (Article 3(b)). In the same vein, the preamble to the TA stated that 'the expansion of their domestic markets, through integration, is a vital prerequisite for accelerating their processes of economic development with *social justice*' (emphasis added)<sup>1</sup>.

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<sup>1</sup> RODRÍGUEZ, Tania. "Sindicalismo regional: Las estrategias de la CCSCS frente al Mercosur (1991-2017)". En SANDOVAL CERVANTES, Daniel et al. (Eds). *Derecho, lucha de clases y reconfiguración del capital en nuestra América*. Buenos Aires: CLACSO, 2019. p.107-128; PLÁ RODRÍGUEZ, Américo. "Problemática de los Trabajadores en el Mercosur". En Instituto de Derecho del Trabajo y de la Seguridad Social de la Facultad de Derecho, Universidad de la República (Cinterfor/OIT) (Ed). *El Derecho Laboral del Mercosur Ampliado*. Montevideo: Fundación de Cultura Universitaria, 2000, p. 1-24.

The silence of the founding treaty led the Southern Cone Trade Union Coordinating Body ('CCSCS' in Spanish)<sup>2</sup> to push for the creation of a regional labour dimension. This resulted in the adoption of the 1991 Declaration of Montevideo, which recognized that social and labour issues had to be addressed at the Mercosur level to ensure real equality in working conditions across Member States<sup>3</sup>. Furthermore, the Working Subgroup 10<sup>4</sup>, consisting of representatives from governments, unions and employers' organizations, proposed the ratification of 37 International Labour Organization ('ILO') conventions<sup>5</sup>. However, the then four Member States agreed to ratify only 12 ILO conventions<sup>6</sup>.

Given the swift development of the economic dimension of Mercosur, trade unions raised the alarm around the possible negative effects of regional integration and, consequently, proposed the adoption of a regional social charter<sup>7</sup>. Although such instrument was not enacted, in 1998, the Heads of State and the Council of the Common Market ('CCM') – the highest political institution of Mercosur – adopted the 1998-Declaration, which constitutes the backbone of the Mercosur labour dimension<sup>8</sup>.

The Socio-Labour Declaration ('Declaration'<sup>9</sup>) is the most important fundamental labour rights legal instrument within Mercosur and its Member States. It was originally adopted to protect workers from the potential negative impact of the economic integration. Furthermore, it was conceived and as a barrier to the 1990s neoliberal policies adopted by national governments following the Washington Consensus<sup>10</sup>. According to the original Article 24,

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2 'Coordinadora de Centrales Sindicales del Cono Sur' is an agency created in 1986 that includes the main trade unions of Mercosur Member States and Chile, whose main objective is to coordinate their activity.

3 It was signed on 9 May 1991 by the Ministers of Labour of Argentina, Brazil, Paraguay and Uruguay. PÉREZ DEL CASTILLO, Santiago. "MERCOSUR: History and aims". *International Labour Review* 1993, vol.132, no 5-6, p.639-653.

4 Mercosur created in 1991 the so-called 'Labour affairs' Working Sub-group (SGT-11), which was later replaced by the current SGT-10 on 'Labour affairs, employment and social security' (1995). Its main function is to develop the Mercosur labour dimension, Mercosur/CMG/Resolution 20/95, 03 August 1995.

5 SGT-11, Commission No 8 on Principles, Act 4/92, 27 November 1992: ILO Conventions 1, 11, 13, 14, 19, 22, 26, 29, 30, 77, 78, 79, 81, 87, 90, 95, 97, 98, 100, 105, 107, 111, 115, 119, 124, 135, 136, 137, 139, 144, 147, 151, 154, 155, 159, 162, and 167.

6 ILO Conventions 11, 14, 26, 29, 81, 95, 98, 100, 105, 111, 115, and 159.

7 RODRÍGUEZ, Tania. Op.cit., p.113; HUMMER, Waldemar. "La elaboración de una Carta de los Derechos Fundamentales del Mercosur desde una perspectiva europea". En *Anuario de Derecho Constitucional Latinoamericano*. Montevideo: Konrad-Adenauer-Stiftung, 2009, p. 690-722.

8 SCHAEFFER, Kristi. "Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States". *Columbia Journal of Transnational Law*. 2007, vol. 45, no. 3 p. 829-867.

9 When a distinction is necessary, the original Socio-Labour Declaration is referred to as '1998-Declaration' and the revised Declaration as '2015-Declaration'.

10 GATHII, Thuo. "The Neoliberal Turn in Regional Trade Agreements". Washington Law

the Declaration had to be revisited after two years of its adoption. However, it took seventeen years to be reformed. The 2015 revision has not only been positive from a quantitative perspective – the Declaration has gone from 25 to 34 provisions – but also from a qualitative point of view – labour rights have been strengthened<sup>11</sup>.

The recurrent use of the European Union ('EU') as a main source of inspiration has been one of the biggest obstacles of the development of Mercosur. It has been put forward that Mercosur should create some supranational bodies and should draw inspiration from, *inter alia*, the Court of Justice of the EU. This would help the South American bloc to overcome the frequent stalemates in which it has been found itself. The EU approach was conceived as the only possible way to achieve successful integration. It was 'believed that integration could bring peace and economic development to other continents as it did in Europe'<sup>12</sup>. However, the EU approach is not necessarily feasible in Latin America<sup>13</sup>.

Despite the positive aspects of supranationalism, Mercosur's institutional architecture, as developed by the TA and the Protocol of Ouro Preto ('POP')<sup>14</sup>, has embraced intergovernmentalism. A regional autonomous legal order that has primacy over national law has been recognized by the Permanent Review Court<sup>15</sup> ('PRC') and by prestigious scholars<sup>16</sup>. Nonetheless, the intergovernmental nature of Mercosur has undermined the effectiveness of Mercosur law<sup>17</sup>. Its primacy over national law, its direct applicability and

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Review 2011, vol. 86, no. 3, p. 421-474; KELLOG, Paul. "Regional Integration in Latin America: Dawn of an Alternative to Neoliberalism". *New Political Science* 2007, vol. 29, no. 2, p.187-209.

11 CASTELLO, Alejandro. "Revisión y Actualización de la Declaración Sociolaboral del Mercosur". *Derecho Laboral. Revista de Doctrina, Jurisprudencia e Informaciones Sociales*. 2015, vol. 58, no. 260, p.637-651.

12 DRI, Clarissa. "Limits of the Institutional Mimesis of the European Union: The Case of the Mercosur Parliament". *Latin American Policy*. 2010, vol. 1, no. 1, p. 52-74.

13 NOLTE, Detlef. "Regional Governance from a Comparative Perspective". En GONZÁLEZ-SÁNCHEZ, Victor M. (ed). *Economy, Politics and Governance Challenges for the 21st Century*. New York: Nova Science Publishers, 2016. p. 1-15.

14 Based on Article 18 TA, the POP was approved on 17 December 1994 and came into force on 15 December 1995.

15 It is the highest jurisdictional instance of Mercosur, which was implemented in 2004. PRC Award 01/05, *Prohibición de importación de neumáticos remoldeados procedentes del Uruguay*, 20 December 2005; PRC Award 01/07, *Prohibición de importación de neumáticos remoldeados procedentes del Uruguay*, 08 June 2007; PRC Advisory Opinion 01/07, *Norte S.A. Imp. Exp. c/ Laboratorios Northia Sociedad Anónima, Comercial, Industrial, Financiera, Inmobiliaria y Agropecuaria s/ Indemnización de Daños y Perjuicios y Lucro Cesante*, 04 July 2007; PRC Advisory Opinion 01/08, *Sucesión Carlos Schnek y otros c/Ministerio de Economía y Finanzas y otros. Cobro de pesos*, 25 April 2008; and PRC Advisory Opinion 01/09, *Frigorífico Centenario S.A. c/ Ministerio de Economía y Finanzas y otros. Cobro de pesos. IUE: 2-43923/2007. Exhorto*, 15 June 2009.

16 MATA DIZ, Jamile & JAEGER JUNIOR, Augusto, "Por uma teoria jurídica da integração regional: a inter-relação direito interno, direito internacional público e direito da integração". *Brazilian Journal International Law*. 2015, vol. 12, no.2 p.139-158.

17 DABÈNE, Olivier. *The Politics of Regional Integration in Latin America*. New York: Palgrave,

direct effect depend upon each Member States legal orders<sup>18</sup>. This has been further heightened by the Member States' constitutional asymmetries that consider regional law differently within their legal systems<sup>19</sup>. This imperfect legal order has been a major hurdle in both the adoption and the enforcement of the Declaration by both regional and national actors.

Traditionally, despite the importance of the EU as a model, Mercosur has not pursued the path of supranationalism<sup>20</sup>. There does not seem to be any changes that may make someone think that regional bodies, particularly the judicial ones, will be vested with supranational powers. Therefore, it is necessary to find alternative ways through which Mercosur can flourish in an intergovernmental framework. The existence of multiple overlapping regional organisations, which has sometimes been considered a negative feature of Latin American integration, has pushed Latin American countries to cooperate through intergovernmental rather than supranational organizations, where the intensity of integration is higher<sup>21</sup>. Employment is one of the areas in which Mercosur Member States aim to cooperate, albeit not exclusively via Mercosur. The Declaration constitutes a paradigmatic example of how regional legal norms can be enforced within Member States legal orders in the current intergovernmental setting<sup>22</sup>.

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2009; VERVAELE, John. "Mercosur and Regional Integration in South America". *International Comparative Law Quarterly*. 2005, vol. 54, no. 2. p. 387-410.

18 FELDSTEIN DE CÁRDENAS, Sara & SCOTTI, Luciana. "Las asimetrías constitucionales: un problema siempre vigente en el Mercosur". *Revista de la Secretaría del Tribunal Permanente del Revisión* 2013, vol. 1, no. 2, p.271-311; HUMMEL, Felix & LOHAUS, Mathis. "MERCOSUR: Integration through presidents and paymasters". En BORZEL, Tanja et al. (ed), *Roads to regionalism: genesis, design, and effects of regional organisations*. Farnham (England): Ashgate, 2012, p.50-80.

19 See: Constitution of Argentina, Article 75, s (22)-(24); Constitution of Paraguay, Articles 141 and 145; Constitution of Venezuela, Art. 153; Constitution of Brazil, Articles 4 and 5; and, Constitution of Uruguay, Article 6. See: PEROTTI, Alejandro. *Habilitación constitucional para la integración comunitaria*. Montevideo: Konrad-Adenauer-Stiftung, 2004; FELDSTEIN DE CÁRDENAS, Sara & SCOTTI, Luciana. Op. cit. p. 271.

20 THEODORO LUCIANO, Bruno & SANCHES SIQUEIRA CAMPOS, Bruno. "Supranationalism as a Taboo: Analysing the 30 Years of Mercosur's Institutional Development". *Brazilian Journal of International Relations*. 2021, vol. 10, no. 1, p. 102-124.

21 BIANCULLI, Andrea. "Regionalismo e integración regional en América Latina. El Mercosur: ¿un 'nuevo' espacio para la regulación social?". Documentos de Trabajo 42/2021, Fundación Carolina; GÓMEZ-MERA, Laura. *Power and Regionalism in Latin America: The Politics of MERCOSUR*. Notre Dame: University of Notre Dame Press 2013.

22 For a doctrinal analysis of the Declaration, see: ARESE, César. "Crítica de la nueva Declaración Sociolaboral del Mercosur". *Derecho Laboral. Revista de Doctrina, Jurisprudencia e Informaciones Sociales*. 2015, vol. 58, no. 260, p. 555-568; CASTELLO, Alejandro. Op.cit., p.637; LOPES RIBEIRO DA SILVA, Walküre. "Carta dos Direitos Fundamentais da União Europeia e Declaração Sociolaboral do Mercosul: origen, natureza jurídica e aplicabilidade". *Revista da Faculdade de Direito da Universidade de São Paulo*. 2014, no. 109, p.349-387; MALM GREEN, Lucas. "Eficacia Jurídica de la Declaración Sociolaboral del Mercosur". *Hologramática*. 2008, vol. 8, no. 2, p.95-106; MANSUETI, Hugo. "La Declaración Socio-laboral del Mercosur. Su importancia jurídica y práctica". Tesis de doctorado. Universidad Católica Argentina, Buenos Aires, 2002.



Mercosur has adopted an intergovernmental legal order in which regional bodies have reduced powers and Member States remain the main legislator and enforcement actors. Consequently, the effectiveness and impact of the Declaration depends largely on national bodies<sup>23</sup>. This article begins by analysing the legal nature and the content of the Declaration. It then examines the ‘limited’ role of regional bodies and explores some feasible reforms to the current dispute resolution system. Furthermore, it explores the importance of national judicial activism to use the Declaration as a key legal instrument to protect workers’ rights. It concludes by identifying some possible ways forward to strengthen the Declaration as the regional bedrock that protects workers’ fundamental rights.

## **2. A REGIONAL FUNDAMENTAL LABOUR RIGHTS FRAMEWORK**

### **2.1. Decent Work as the Beacon of Mercosur Legislation**

Both the original and revised Declaration have adopted a tripartite structure, which includes an axiological, a normative, and an enforcement dimension<sup>24</sup>. The preamble to the Declaration constitutes the main foundation of the *axiological dimension*, which sets out that the regional bloc requires not only an economic dimension, but also a regional social sphere. The Declaration intends to ensure the protection of workers’ rights, which may be endangered by the integration of the Member States’ economies and the liberalization of their markets. Moreover, since Member States are founding members of the ILO and have ratified several ILO conventions, it is not a surprise that the Declaration embraces the 1998 ILO Declaration on Fundamental Principles and Rights at Work as one of the main guiding principles<sup>25</sup>. The axiological dimension has been strengthened by the 2015 revision, which underlined the importance of the 1944 Philadelphia Declaration and has reasserted the importance of the ILO notion of ‘Decent Work’, which is enshrined in Article 2 of the 2015-Declaration.

The *normative dimension* of the Declaration consists of individual and collective labour rights, and public policy provisions. The individual labour rights dimension was reinforced by the 2015 revision, which strengthened the content protected in the 1998-Declaration, such as the principle of non-discrimination and equal opportunities (Article 4), equal treatment between men and women and disabled workers (Articles 5 and 6), equal treatment between migrant and frontier workers and national workers

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23 For further analysis, see: PUCHETA, Mauro. “The Mercosur Socio-Labour Declaration: The Development of a Common Regional Framework in the Global South”. *International Journal of Comparative Labour Law and Industrial Relations*. 2021, vol 37, n. 4, p. 325–354.

24 The *enforcement dimension* is explored in Section 3 and 4.

25 The Preamble also draws inspiration from the 1948 UN Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1948 American Declaration of the Rights and Duties of Man, the 1947 Inter-American Charter of Social Guarantees, and the 1948 Charter of the Organization of the American States.



(Article 7), elimination of forced labour (Article 8), and elimination of child and adolescent labour (Article 9). Further, the 2015 revision introduced four provisions related to working time: a maximum workday of eight hours, the right to daily and weekly rest time, and the right to paid annual leave (Articles 11 to 13). It also adopted a provision related to the right to a minimum wage (Article 14) and the protection against unfair dismissal (Article 15). Moreover, relying upon ILO Conventions 155 and 167, the 2015-Declaration introduced an eleven-paragraph right to health and safety at work, which is essential in a post-pandemic world (Article 25).

Collective rights were reinforced, too. The 2015 revision substantially improved and emphasized the importance of freedom of association by imposing two duties upon Member States: a ‘negative duty’ whereby they cannot intervene in the creation and management of trade unions; and a ‘positive duty’ whereby Member States commit to ensure the right to create and freely manage trade unions as well as to recognize and respect the role of trade union representatives (Article 16). In addition, the 2015 revision imposed an obligation on Member States to promote the exercise of collective bargaining across different levels of the public sector (Article 17). Drawing upon ILO Convention 144 on Tripartite Consultation, social dialogue was recognised as a key element of industrial relations to bring together governments, employers, and workers to develop, implement, and promote international labour standards (Article 20). The only minor drawback of the 2015 revision was the regulation of the right to strike. Whilst the original Article 11 guaranteed the right to strike to ‘every’ worker, the current Article 18 set out that *only* ‘workers and trade unions’ can enjoy this right. Leaving out the term ‘every’ has the potential to weaken the position of professions such as the armed forces and the police, whose right to strike is usually contested<sup>26</sup>.

As per ‘public policy’ provisions, the 2015 revision emphasized the importance of ‘employment’ to achieve sustainable development (Articles 21 and 22). Furthermore, the 2015-Declaration reiterated the need to have strong labour inspectorates to ensure the effectiveness of workers’ rights (Article 26), and the need to protect social security rights (Article 27).

The Declaration has gone from merely ‘copying’ the rights enshrined in ILO instruments and national constitutions to the adoption of substantive norms such as those related to child labour, working time, health and safety in the workplace. It has also strengthened the protection of freedom of association, and has reinforced the importance of social dialogue as a mechanism to develop labour policies. This reform has resulted in the development of a common regional framework that Member States must respect.

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<sup>26</sup> ARESE, César. Op.cit. p. 564.

## **2.2. The Declaration as an *Atypical Act***

Mercosur is an intergovernmental organisation, which relies almost entirely upon Member States. Unsurprisingly, this institutional architecture has largely had an impact upon the effectiveness of Mercosur norms, and, more specifically, upon the legal nature of the Declaration. In the aftermath of the Declaration of Montevideo, trade unions urged Member States to adopt a regional social charter that would enshrine fundamental labour<sup>27</sup>. They argued for the adoption of a legally binding protocol of the TA that would oppose the implementation of national reforms that sought to make labour markets regulations more flexible<sup>28</sup>. However, in 1998, the Argentine, Brazilian and Uruguayan companies' representatives staunchly refused the adoption of the Declaration as a protocol. In the same vein, Member States' governments expressed their reluctance to adopt a legally binding instrument and favoured the political declaration avenue. Their pressure took effect and the Common Market Group ('CMG') – the Mercosur executive branch – decided that the Declaration would not be a protocol and would not be subjected to the Mercosur dispute settlement system<sup>29</sup>. Instead, the Declaration was adopted via a presidential declaration signed by all the four Member States' Presidents.

The exclusion of the Declaration from the POP – which defines the sources of Mercosur law (Article 41) – would, in principle, mean that the Declaration is not a legally binding source of Mercosur law<sup>30</sup>. Nevertheless, prestigious scholars, trade unions, and several national judges have considered that the Declaration legally binding<sup>31</sup>. The most widespread approach argues that the Declaration is an international treaty because it recognizes fundamental rights that are already protected by the most important international human rights instruments, in particular ILO conventions, which, in turn, in some cases these instruments belong to the Member States' constitutional rules (*bloques de constitucionalidad*)<sup>32</sup>. Their

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27 BARBAGELATA, Héctor. "Consideraciones Finales". En Instituto de Derecho del Trabajo y de la Seguridad Social de la Facultad de Derecho, Universidad de la República (Cinterfor/OIT) (Ed). *El Derecho Laboral del Mercosur Ampliado*. Montevideo: Fundación de Cultura Universitaria, 2000, p. 630-652.

28 RIBEIRO DE SANT'ANA, Marcílio. "A declaração sociolaboral do MERCOSUL completa 10 anos: de hosanas a exéquias?". *Comunicação & Política*. 2008, vol. 28, no. 3, p.193-214.

29 Mercosur/SGT-10/Act 1/98, 21 May 1998.

30 MANSUETI, Hugo. "Circulation of Workers in the Law of MERCOSUR". En FRANCA FILHO, Marcílio Toscano et al. (Eds). *The Law of MERCOSUR*. Oxford: Hart Publishing, 2010, p.241-258; CRISTALDO, Jorge *Armonización normativa laboral del Mercosur. Una propuesta unificadora*. Asunción: Editora Litocolor, 2000.

31 CASTELLO, Alejandro. Op.cit. p. 642; LIXINSKI, Lucas. "Human Rights in Mercosur". En FRANCA FILHO, Marcílio Toscano et al. (Eds). *The Law of MERCOSUR*. Oxford: Hart Publishing, 2010, p.351-364.

32 Constitution of Argentina, Arts. 33 and 75 s. 22; Constitution of Brazil, Art. 5.2; Constitution of Paraguay, Art. 45; and, Constitution of Uruguay, Arts. 72 and 332. See: CASTELLO, Alejandro. Op.cit. p.642; PEÑA, Myriam. *La declaración sociolaboral del Mercosur: su aplicabilidad directa por los tribunales paraguayos*. Asunción: Instituto de Investigaciones

*jus cogens* nature makes them directly applicable within the Mercosur and Member States' legal orders. Therefore, the Declaration is a legally binding instrument that must be respected and if it were not complied with, that would engage Member States' international responsibility<sup>33</sup>.

Notwithstanding the appeal of the international law argument, this article considers that it is necessary to analyse the legal nature of the Declaration from a Mercosur law perspective. It is worth noting that regional integration organizations do not have a *numerum clausus* sources of law. Although the Declaration was adopted via a presidential declaration, given its objectives, its content, and its impact upon regional and national legal orders, the Declaration is more than a 'simple' political declaration. It constitutes a legally binding *atypical act*.

The preamble of the Declaration states that Mercosur aims to achieve economic integration with social justice. To do so, it relies upon the 1998 ILO Declaration on Fundamental Principles and Rights and the fact that Member States have ratified several ILO conventions. This has been further strengthened by the 2015 revision, which reiterates that the Declaration, which is the backbone of the Mercosur labour dimension, aims to further develop a regional social dimension.

Furthermore, the content of the Declaration evidences that it is more than a simple political proclamation. As previously developed, this instrument enshrines a wide range of fundamental labour rights protected in human rights and international law instruments, which in many cases have been granted constitutional status in the Member States' legal orders<sup>34</sup>. The 2015 reform has incorporated a particular provision, which stipulates '[n]otwithstanding the previous subsection, all individuals and legal entities, in order to be part of the projects financed by MERCOSUR funds, shall comply with the content of the rights established in this Declaration' (Article 31(4)). However minor, this constitutes another step forward in the strengthening of the Declaration.

Moreover, the concrete and tangible impact of the Declaration upon Mercosur and Member States' legal orders makes an important case in favour of its legally binding nature. On the one hand, the Declaration has been the basis upon which the most important regional labour plans have been designed and adopted<sup>35</sup>. On the other hand, the Declaration expressly states that Member States commit to respect the rights recognised therein (Article 28). Although the national executive and legislative powers have

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Jurídicas, 2014; MALM GREEN, Lucas. Op.cit. p. 95; BARBAGELATA, Héctor. "El bloque de constitucionalidad de los derechos humanos laborales". *Revista de Derecho Laboral*. 2004, vol. XLVII, no 214, p. 213-234; ERMIDA URIARTE, Oscar. *La Dimensión Social del Mercosur* 33. Montevideo; Fundación de Cultura Universitaria, 2004.

33 ARESE, César. Op.cit. p. 557.

34 See section 4.

35 For further analysis, see: PUCHETA, Mauro. Op.cit., p.325–354.

played a limited role in implementing the Declaration, national judges have extensively referred to it in their judgments to protect labour rights. Moreover, the recent recognition of the Declaration, in principle, as part of the general principles of Mercosur law by the Mercosur Administrative-Labour Court<sup>36</sup> confirms that it does constitute a legally binding atypical act.

### **3. INTERGOVERNMENTALISM AND THE LIMITED ENFORCEMENT OF THE MERCOSUR DECLARATION**

#### **3.1. The socio-labour commission as a social dialogue mechanism**

Following in the footsteps of the ILO supervision bodies, and relying upon Article 20 of the Declaration<sup>37</sup> the CMG created the Socio-Labour Commission ('SLC') as a tripartite auxiliary body, which consists of governments' representatives, trade unions and employers. The SLC has two main functions: firstly, it examines any consultation related to the implementation of the Declaration, and, secondly, it monitors and enforces the rights recognized in the Declaration.

The latter function could be an encouraging sign that the Declaration is a legally binding instrument that can be enforced by a regional body. However, the rather weak institutionalisation of Mercosur has meant that its regional bodies lack decisional authority, enforcement capacities, and an ability to represent the regional common interest beyond and over Member States<sup>38</sup>. The implementation of the Declaration has not been an exception. As a result of the business groups' pressure, the SLC has not been vested with any enforcement powers in the event of the violation of the Declaration<sup>39</sup>. This flawed structure constitutes a major weakness in the Declaration enforcement framework and explains, to a large extent, the limited role played by the SLC<sup>40</sup>.

The creation of an independent supranational institution was put forward to ensure the effectiveness of the Declaration<sup>41</sup>. It is true that the 2015-Declaration and the CMG Resolution 22/18, which repealed and replaced the CMG Resolution 12/00 that had set up the SLC, made less ambitious changes. It is true that the 2015-Declaration and the CMG Resolution 22/18, which repealed and replaced the CMG Resolution 12/00 that had set up the SLC, made less ambitious changes. However, this reform strengthened the SLC's role as a social dialogue mechanism<sup>42</sup>. It can design action plans

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36 See section 3.2.

37 CASTELLO, Alejandro. Op.cit., p. 649.

38 JAEGER JUNIOR, Augusto. "Metodologia Jurídica Europeia e Mercosulista: Considerações Fundamentais". *Revista de la Secretaría del Tribunal Permanente de Revisión*. 2014, vol. 2, no.3, p.117-157.

39 DE ALMEIDA FREITAS, Valter, *A circulação do trabalho no MERCOSUL e na União Europeia*. Santa Cruz do Sul: EDUNIS 2009.

40 LOPES RIBEIRO DA SILVA, Walküre. Op.cit., p.366.

41 SCHAEFFER, Kristi. Op.cit. p. 839.

42 CASTELLO, Alejandro. Op.cit. p. 649; ARESE, César, Op.cit. p. 555.

and recommendation projects to foster compliance with the Declaration (Articles 3(f) and 10). Furthermore, it can examine trade unions, employers' associations, and governments' requests regarding the scope of the Declaration (Articles 3(g) and 17). Though these *opinions* are not legally binding, they may impact upon the national authorities' interpretation of the Declaration. Furthermore, the SLC examines national reports (Memorias) – drawn up by Member States with the contribution of trade unions and employers' organizations – and suggests possible reforms to national legal orders (Article 29). To conclude, it can be pointed out that the SLC has been one of the most active regional bodies fighting against the Covid-19 crisis by adopting declarations and lobbying to regulate teleworking at the regional level in future reforms<sup>43</sup>.

### 3.2. The Ambivalent Role of Mercosur Courts

The main judicial body in Mercosur is the PRC whose primary function is to guarantee a homogeneous interpretation of Mercosur law<sup>44</sup>. Unlike its European counterpart, though, the PRC has had a modest activity and remains currently constrained due to its intergovernmental nature and its limited enforcement powers (Article 31-32 PO)<sup>45</sup>. Moreover, the lack of *direct locus standi* in favour of individuals to make claims in the event of breach of Mercosur law, and the need to go through the national section of the CMG and potentially through the CMG to challenge Mercosur law constitutes another major institutional hurdle.

Furthermore, Article 25 of the 1998-Declaration and today Article 31(3) of the 2015-Declaration expressly sets out that “States Parties highlight that this Declaration, and its follow-up mechanism shall not be invoked or used for ends other than those established, particularly safeguarding its application to commercial, economic and financial matters.” Therefore, the lack of compliance with the Declaration cannot trigger, for instance, the suspension of tariff advantages<sup>46</sup>. It is not surprising that no labour matters have been heard by the PRC.

In contrast to this, the Mercosur Administrative-Labour Court, which hears cases related to Secretariat of Mercosur's and other regional bodies' employees<sup>47</sup> has delivered four judgments, which have referred

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43 Mercosur/CSLM/Acta 01/20, 16 June 2020 and Mercosur/CSLM/Acta 02/20, 15 November 2020.

44 OLMOS GIUPPONI, Belén. “Sources of Law in MERCOSUR: Analysis of the Current Situation and Proposal for the Future”, En FRANCA FILHO, Marcílio Toscano et al. (Eds). The Law of MERCOSUR. Oxford: Hart Publishing, 2010, p.57-72.

45 WOJCIKIEWICZ ALMEIDA, Paula. La difficile incorporation et mise en œuvre des normes du Mercosur. Aspects généraux et exemple du Brésil. Paris: LGDJ, 2013.

46 CASTELLO, Alejandro. Op.cit. p., 650.

47 Mercosur/CMG/Resolution 54/03, 10 Dec. 2003 (updated by Mercosur/CMG/Resolution

to the Declaration. In its judgments 1 and 2<sup>48</sup>, which dealt with different employments issues between the Secretariat of Mercosur and its employees, the Administrative-Labour Court considered that other than the specific regime for Mercosur's employees, the Declaration, amongst other instruments, was applicable<sup>49</sup>. Under a new legislative framework (CCM/Decision 07/07), this approach was followed in its third judgment. Given the incompleteness of the regime of Mercosur's employees, the Administrative-Labour Court based relied upon the general principles of regional and international law, specifically the ILO Declaration on the Fundamental Principles and Rights at Work as well as the Declaration to deliver its decision<sup>50</sup>.

There seems to be an interesting change in the Administrative-Labour Court approach in its judgment 4 where, unlike previous decisions, the regional tribunal changed the wording in the 'applicable law' section and seems to explicitly consider the Declaration as part of the Mercosur's general principles of law. If this interpretation were to be upheld in future judgments, that would reinforce the notion of the Declaration as a legally binding instrument. This remains to be seen.

### **3.3. A Stronger Regional Judicial Body: The Way Forward**

The role of the judiciary is essential for the enforcement of regional norms and the fostering of regional integration projects. The EU, characterized by 'political integration by jurisprudence'<sup>51</sup>, has recognised a major role to the Court of Justice of the European Union. Their active role has been crucial to ensure the unity of the regional legal order and its primacy over domestic legal systems<sup>52</sup>. This is even more important within embryonic regional organisations<sup>53</sup>. Nevertheless, given the intergovernmental nature of Mercosur, their dispute resolution systems remain in hands of their Member

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32/15, 15 July 2015).

48 Judgment 01/2005, *Maureen Margaret Mackinnon Gómez c. Secretaría Administrativa del Mercosur*, 26 September 2005; Judgment 02/2005, *Raulino Carvalho de Oliveira c. Secretaría Administrativa del Mercosur*, 23 September 2005.

49 Mercosur/CCM/Decision 30/02, 06 December 2002; Mercosur/CMG/Resolution 42/97, 05 September 1997; and Mercosur/CMG/Resolution 01/03, 04 April 2003.

50 Judgment 03/2015, *María del Carmen García c. Instituto Social del Mercosur*, 10 December 2015.

51 DABÈNE, Olivier. Op.cit. p., 65.

52 MOLINA DEL POZO, Carlos Francisco. "La importancia de la jurisdicción en la conformación del derecho comunitario. El papel de la jurisprudencia del Tribunal de Justicia de la Unión Europea en la articulación del proceso de integración europea". *Revista de la Secretaría del Tribunal Permanente de Revisión*. 2024, vol. 11, no. 21, e529, p. 1-29; MATTLI, Walter & SLAUGHTER, Anne-Marie. "Revisiting the European Court of Justice". *International Organization*. 1998, vol. 52, no. 1, p. 177-209.

53 PEROTTI, Alejandro. "Algunos desafíos que presenta la constitución de un Tribunal de Justicia Comunitario". *El Derecho*. 2011, vol. 241, p.867-885.

States<sup>54</sup>. Therefore, regional and national courts face significant challenges to ensure the enforcement of Mercosur norms.

Since the transition from intergovernmentalism to supranationalism seems implausible, it is necessary to consider reforms that can be implemented within the current institutional and legal framework. In this regard, locus standi restrictions, which today only allow Member States to bring actions before the PRC, should be eased. Individuals, be it natural or legal persons, need to navigate an extremely complicated procedure to challenge any action or omission committed by any of the Member States. Individuals are not entitled to directly lodge a claim for arbitration. They do not have either direct access to Mercosur tribunals. It is true that individuals may have an indirect access through advisory opinions requests made before national courts<sup>55</sup>. Furthermore, individuals can rely upon Mercosur legal instruments before national courts to challenge domestic legislation – as explained in the following section<sup>56</sup>.

Despite some the internal differences<sup>57</sup>, it is possible to enhance the Mercosur dispute resolution system by expanding the ‘access’ dimension<sup>58</sup>. There are two possible avenues to bring about this reform: firstly, as put forward in the bill on the Creation of a *Permanent Court of Justice for Mercosur* (Project No 02/10), which was supported by the PARLASUR in 2017, authorising individuals as well as intermediary bodies, such as trade unions and business organization, to lodge claims against Member States due to failure to comply with Mercosur law, as well as to request advisory opinions would constitute a step forward in the strengthening of the regional legal order<sup>59</sup>. It is worth noting that this ‘liberal’ approach vis-à-vis the individual’s locus standi is shared by regional courts beyond Europe<sup>60</sup>. Secondly, as far as the Socio-Labour Declaration is concerned, it would be possible to include it within the material scope of the PRC. This would need a procedural reform regarding locus standi, which would authorise workers, employers, trade

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54 GONÇALVES DE OLIVEIRA FERREIRA, Lucas. “Teoria da juridificação de sistemas de solução de controvérsia aplicada a análise de processos de integração regional do Mercosul”. *Revista de la Secretaría del Tribunal Permanente de Revisión*. 2024, vol. 11, no. 21, e528, p. 1-29.

55 WOJCIKIEWICZ ALMEIDA, Paula. “Access of Individuals to Mercosur Tribunals: Filling the Gap Via Advisory Opinions”. *Revista do Programa de Pós-Graduação em Direito da UFC*. 2018, vol. 38, no. 2 jul./dez., p. 585-597.

56 GONÇALVES DE OLIVEIRA FERREIRA, Lucas. Op. cit., 21, PUCHETA, Mauro, Op. cit.

57 See: LENZ, Tobias. “Diffusion and Decentralized Bargaining in International Organizations: Evidence from Mercosur’s Dispute Settlement Mechanism”. *International Studies Review*. 2021, vol. 23, p. 1859–1883.

58 As defined by KEOHANE, Robert, MORAVCSIK, Andrew & SALUGHTER, Anne-Marie. “Legalized Dispute Resolution: Interstate and Transnational”. *International Organization*. 2000, Vol. 54, No. 3, p. 457-488.

59 See: LONDINSKY, Pablo. “TPR: perspectivas futuras”. *Revista de la Secretaría del Tribunal Permanente de Revisión*. 2023, vol. 11, no. 20, e498, p.1-15.

60 FRIMPONG OPPONG, Richard. “Legitimacy of Regional Economic Integration Courts in Africa”. *African Journal of Legal Studies* 2014, vol. 7, p. 61-85.



unions and business organisations to challenge State Parties if they would not comply with the Socio-Labour Declaration.

#### **4. NATIONAL JUDICIAL ACTIVISM AND THE EFFECTIVENESS DECLARATION**

The intergovernmental nature of Mercosur means that Member States, which have delegated no sovereign powers to any regional entity, are in charge of the enactment and enforcement of regional norms<sup>61</sup>. Member States must, therefore, ensure that Mercosur law is implemented and complied with within their legal orders<sup>62</sup>. Article 1 TA mandates that Member States have a legal obligation to harmonize their legislation in order to achieve Mercosur goals. Furthermore, Article 38 POP sets out that the parties commit themselves to adopt the necessary measures to ensure compliance with Mercosur law.

Whilst national executive and legislative powers, traditionally reluctant to confer powers upon regional organizations, have paid little attention to the Declaration<sup>63</sup>, the activism of the Member States judiciary has been pivotal to make sure that the Declaration did not turn into dead letter. National courts' case law has overwhelmingly considered the Declaration as a justiciable instrument. Although they were initially hesitant, national judges have consistently referred to the Declaration, along with other national, regional and international instruments, in the legal reasoning of countless judicial decisions. This has undoubtedly rendered the Declaration one of the most important Mercosur legal instruments.

In Argentina, provincial supreme courts<sup>64</sup> and several employment appeal courts<sup>65</sup> have relied upon the Declaration, viewing it not only as a vital regional integration instrument alongside ILO conventions, which are hierarchically above ordinary law, but also as an integral component of the *bloque de constitucionalidad* as a source of subjective rights. In the same vein, the Argentine Supreme Court has drawn upon the Declaration alongside with other constitutional norms and human rights international instruments

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61 GARDINI, Gian Luca. "MERCOSUR: What You See is not (Always) What You Get". *European Law Journal*. 2011, vol. 17, no. 5, p. 683-700.

62 SCOTTI, Luciana. "Diálogo de Fuentes: Las Normas Regionales del Mercosur y las Nuevas Disposiciones del Derecho Internacional Privado Argentino". *Revista de la Secretaría del Tribunal Permanente de Revisión*. 2016, vol. 4, no. 7, p.152-184; Wojcikiewicz Almeida, Paula. *Op.cit.*, p. 307.

63 One exception has been the Uruguayan 2006 Freedom of Association Act (Law 17940, 02 January 2006), which relying upon Article 9 1998-Declaration, protects trade union representatives.

64 Suprema Corte de Justicia de Mendoza, *Sindicato Unido de Trabajadores de la Educación c. Gobierno de Mendoza p/ Acción de Inconstitucionalidad*, 08 May 2018, which has relied upon the Declaration to protect freedom of association and social dialogue.

65 First judgment: C.N.A.T., Sala VI, *Stringa Domingo Alberto c/ Unilever de Argentina S. A. s/ despido*, 23 October 2000. For a detailed list, see: ARESE, César. *Derechos Humanos Laborales*. Santa Fe: Rubinzal Culzoni 2014.

in the ratio decidendi of several key cases to protect workers' rights. *Aquino*<sup>66</sup> represents a pivotal, marking the first instance in which this court incorporated the Declaration in its recital 12<sup>67</sup>. In a landmark judgment that deemed the Occupational Safety and Health Act (*Ley de Riesgos del Trabajo*) unconstitutional, the Supreme Court, after citing a myriad of international and human rights instruments and the Declaration, highlighted that attaining the objective of economic development with social justice was one of its main goals. In the same vein, in the *Álvarez* judgment, another landmark case where the applicants had challenged again the constitutionality of the Occupational Safety and Health Act (*Ley de Riesgos de Trabajo*), the Argentine Supreme Court reiterated the importance of the Declaration, along with other human rights and international instruments, as the legal basis to protect equal treatment in employment and occupation<sup>68</sup>. *Asociación de Trabajadores del Estado* constitutes another major case where Argentine Supreme Court declared the unconstitutionality of the domestic trade union system relying upon multiple international human rights instruments, ILO instruments as well as Article 14 of the 1998-Declaration<sup>69</sup>. References to the Declaration have been further included by the Buenos Aires Employment Courts of Appeal even in the aftermath of the 2015 revision, particularly in cases related to equality and non-discrimination in the workplace<sup>70</sup>.

In the same vein, the Uruguayan Supreme Court has considered the Declaration as part of the 'constitutional bloc' of the Uruguayan legal system<sup>71</sup>. This approach has been consistently followed by Uruguayan employment appeal courts<sup>72</sup>, which, relying upon, *inter alia*, the Declaration as part of the

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66 *Aquino, Isaac c/Cargo Servicios Industriales S.A. s/accidente - ley 9688*, 15 July 2004; *Silva, Facundo Jesús v Unilever de Argentina SA*, 18 December 2007 regarding health and safety at work; 330:5435; *Aerolíneas Argentinas SA v Ministerio de Trabajo*, 24 February 2009 regarding working conditions and the obligation of the state to enforce labour legislation; *Torrillo, Atilio Amadeo y otro c/ Gulf Oil Argentina S.A. y otro*, 31 March 2009 regarding health and safety in the workplace; *Pérez, Aníbal Raúl c/ Disco S.A.*, 01 September 2009 regarding the protection of wages.

67 PEROTTI, Alejandro. "El Fallo 'Aquino' de la Corte Suprema: Una Introducción a la Aplicación Judicial de la Declaración Socio-Laboral del MERCOSUR". *Revista de Derecho Privado y Comunitario*. 2005, vol. 3, p.607-633.

68 *Álvarez, Maximiliano y otros c. Cencosud S.A. s/acción de amparo*, 07 December 2010, recital 7.

69 *ATE s/ acción de inconstitucionalidad*, 18 June 2013.

70 These are only two recent examples out of many judgments: C.N.A.T., Sala IV, "*Perillo, Adriel Marcelo c/ BBVA Banco Francés S.A. s/ Despido*" - JUZGADO N° 03, 12 October 2023; "*Pelossi, Fabian Alfredo c/ Inc S.A s/ Juicio Sumarísimo*" - JUZGADO N° 41".

71 Judgment 106/2006, *Comision Tecnica Mixta de Salto Grande c. Damado Campos, Walter - Ejecucion de Laudo Extranjero de Condena*", Fa. 1- 57/05, 21 July 2006; Judgment 775/2014, *Asociación Departamental de Empleados Municipales de Canelones y Otros c/ Intendencia Municipal de Canelones – Ley Nro. 17.940 – Casación*, 28 August 2014.

72 Tribunal Apelaciones Trabajo 4T, Judgment 354/2014, *G.M., Oscar C/ Bowil SA y Otros – Proceso Laboral Ordinario (Ley 18.572), Recursos Tribunal Colegiado*, 19 November 2014 (Article 9 1998-Declaration, Freedom of Association); Judgment 29/2015, *Domínguez*,

constitutional bloc, have considered labour rights, in particular decent work, as a key element to protect workers' dignity<sup>73</sup>. Furthermore, drawing upon Article 4 of the Declaration, it has been decided that the Uruguayan judiciary power has a legal obligation to respect the principle of non-discrimination when delivering judgments in matters related to employment<sup>74</sup>. Consequently, the Declaration cannot only be relied upon against other individuals, such as employers, but also against the State in a broader sense. Uruguayan courts have also consistently drawn inspiration from the Declaration to protect the right to freedom of association, which is unsurprising given the fact that the Uruguayan 2006 Freedom of Association Act (Law 17940, 2 January 2006) refers to Article 9 of the 1998-Declaration<sup>75</sup>.

Similarly, Paraguayan courts have used the Declaration as a legally binding instrument<sup>76</sup>. Prior to any judgments explicitly referencing the Declaration, Myriam Peña, a former judge of the Paraguayan Supreme Court, maintained that the Declaration was legally binding<sup>77</sup>. However, there seems to be an interesting evolution in a recent case heard by the Paraguayan Supreme Court, where Article 4 of the 1998-Declaration was invoked. Relying upon this provision, which protects the principle of equality and non-discrimination in the workplace, this court declared the unconstitutionality of a 2014 reform to the Aeronautical Code, which forced companies to give preference to Paraguayan pilots<sup>78</sup>.

Relying upon this provision, which protects the principle of equality and non-discrimination in the workplace, this court declared the unconstitutionality of a 2014 reform to the Aeronautical Code, which forced companies to give preference to Paraguayan pilots.

Traditionally, Brazilian courts have been much more reluctant to rely upon Mercosur norms. In 2019, as far as the authors of the present

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*Norberto y otro c/ G4s Security Services Uruguay SA – Reinstalación Tutela Especial*, 05 February 2015 (Article 9 1998-Declaration, Freedom of Association); Judgment 275/2016, *UOC y Otro c/ Dofin S.A. – Reinstalación*, 07 September 2016 (Article 9 1998-Declaration, Freedom of Association).

73 Tribunal Apelaciones Trabajo 1T, Judgment 280/2019, *Cardinal Analía y otro c/ Asociación Civil Amigos de Padre Pío. Recursos Tribunal Colegiado*, 11 September 2019.

74 Tribunal Apelaciones Trabajo 1T, Judgment 368/2019, *Poblete, Elda c/ Agesil S.A. Recursos Tribunal Colegiado*, 13 November 2019.

75 As recent illustrative judgments, please see: Tribunal de Apelaciones del Trabajo de 2o turno, *AA y otro c/ Ministerio del Interior – reinstalación tutela especial*, sentencia definitiva no 133/2023, 23/06/2023; Tribunal de Apelaciones del Trabajo de 3er turno, *AA y otros c/ BB–acción de amparo*, sentencia 13/12/2022.

76 Cámara Laboral de Apelaciones, *DIAGRO S.A. c/ Resolución No. 668 de fecha 14/11/2001, dictado por el Vice Ministerio del Trabajo y Seguridad Social*, 04 March 2003; Sala II, *María de Lourdes de Barros Barreto B. y otra c. Interventores de Multibanco SAECA s. Amparo Constitucional*, 23 May 2005.

77 PEÑA, Myriam. Op.cit. p. 57.

78 CSJ Paraguay, *Acción de Inconstitucionalidad promovida por Aerolink S.A. c/ Art. 1° de la Ley N° 5221/14 que Modifica el Art. 93 de la Ley N° 1860/02 "que Establece el Código Aeronáutico de la Republica del Paraguay"*, Acuerdo y Sentencia No. 131, 22/02/2023.

article are aware, for the first time, the Supreme Labour Court (*Tribunal Superior do Trabalho*) relied upon Article 4 of the Declaration to underline the importance of the principle of equality and non-discrimination in the workplace within the Brazilian legal order. It referred to this provision along with other instruments of constitutional nature<sup>79</sup>. This seemed to be in line with the approach of the TST president at the time the decision was made who considered that the Declaration could constitute a constitutional norm in light of the 2004 constitutional reform regarding human rights. This marks significant progress, especially considering that prior to 2019, the Supreme Labour Court had only made incidental mentions of the Declaration in four instances, albeit without integrating it into the core reasoning of those judgments<sup>80</sup>. However, in a more recent development, relying upon an extensive array of international instruments and Articles 2 and 4 of the Declaration, a regional labour court, *Tribunal Regional do Trabalho da 4ª Região*, concluded that a conduct which involved harassment in the workplace violated the worker's dignity which is protected by constitutional norms<sup>81</sup>.

In another case, where an employer was held liable for failing to guarantee safe and healthy working conditions, the same court concluded that there was a 'direct' violation of the Declaration, along with other international and regional human rights instruments as well as ILO Conventions, which enshrine the worker's right to a health and safety working environment<sup>82</sup>. Interestingly, the judgment concluded by stating that the judiciary had a duty to ensure the effectiveness of human rights in employment relationships.

All in all, the Declaration, whose legal nature has been discussed since its adoption, has been consistently relied upon by first instance and appeal labour courts, as well as national supreme courts to protect workers' rights across Mercosur Member States. This constitutes a strong indication that the Declaration is a legally binding instrument, and the judiciary has played a significant role in bringing this instrument to life.

## 5. THE FUTURE OF THE SOCIO-LABOUR DECLARATION

### 5.1. A Supplement to Domestic Legal Orders

The Declaration has been a watershed in the recognition and protection of workers' rights in regional trade blocs. Despite the Mercosur institutional hurdles, inherent to an intergovernmental organization, both regional,

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<sup>79</sup> Tribunal Superior do Trabalho, Recurso de Revista n° TST-RR-1076-13.2012.5.02.0049, *Juliana Aparecida Tanso Spiandon c. Itaú Unibanco S.A.*, 24 April 2019.

<sup>80</sup> VILAR LOPES, Gills and VILAR LOPES, Dalliana. *Uma análise mercosulina do Direito do Trabalho nas decisões do Tribunal Superior do Trabalho (TST)*. En 38º Encontro Nacional da ANPOCS, Caxambu/MG. Anais GT29 (2014).

<sup>81</sup> Tribunal Regional do Trabalho da 4ª Região, 8ª Turma, 0020477-30.2018.5.04.0211 ROT, em 26/11/2020.

<sup>82</sup> Tribunal Regional do Trabalho da 4ª Região, 8ª Turma, 0020299-53.2020.5.04.0812 ROT, 19/05/2021.

but mainly national courts have transformed the Declaration into a living instrument upon which workers and citizens can rely. Despite this rather positive evolution, a crucial question has arisen is: how should Mercosur move forward to further ensure the effectiveness of the Declaration? Given the current context of Mercosur, it seems unlikely that there will be any major institutional changes. Consequently, the role of national actors – executive and legislative powers, and particularly the judiciary remains crucial to further use the Declaration as a bulwark to protect fundamental workers’ rights. It has been argued that there are two areas of domestic labour legislation that could be reformed in light of the 2015 revision, namely: working time and freedom of association.

Working time regulation in Argentina and Uruguay would be at odds with the current content of the Declaration. The current Argentine legislation enshrines a maximum of a 48-hour work week and authorizes a 9-hour workday without overtime pay. These provisions, in principle, seem to be incompatible with the Declaration which sets an 8-hour workday as a maximum (Article 11). In the same vein, the Uruguayan Domestic Service Act<sup>83</sup> and the Rural Workers Act<sup>84</sup> do not guarantee a minimum daily rest. Article 12 of the Declaration expressly recognizes that workers have the right to a minimum daily rest. Although the Declaration does not establish a precise limit, relying upon the ILO and other international instruments, which recognise a nine-hour daily rest, national actors, be it judges or legislators, could challenge and/or reform the current legislation<sup>85</sup>.

On the other hand, inspired largely by the ILO Conventions 87 and 98, the Declaration considers freedom of association, collective bargaining and the right to take collective action as essential elements of industrial relations within Mercosur (Articles 16, 17 and 18 respectively). Furthermore, the preamble to the Declaration refers to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which considers freedom of association and the right of collective bargaining as fundamental principles. It has been argued that national actors could rely on these provisions to challenge at least some features of the current Argentine and Brazilian trade unions regime. Both countries have adopted a system of ‘unicidad/unicidade sindical’ whereby only one trade union can be created in a specific sector in the same territory<sup>86</sup>.

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83 Law 18065, 05 December 2006, Uruguay.

84 Law 18441, 24 December 2008, Uruguay.

85 CASTELLO, Alejandro. Op.cit. p. 647.

86 Law 23551, 23 March 1988, Argentina, and 1988 Brazilian Constitution, Article 8, II. GODINHO DELGADO, Mauricio. “Constitución de la República, Sistema Laboral Brasileño y Derecho Colectivo del Trabajo”. *Derecho Laboral. Revista de Doctrina, Jurisprudencia e Informaciones Sociales*. 2015, vol. 57, no. 259, p. 347-374; VALDOVINOS, Oscar. “La reforma de la Ley de Asociaciones Sindicales: una deuda impaga en un contexto mutante, pleno de desafíos”. *Revista de Derecho Laboral*. 2014, no. 1, p.227-268.

In principle, this conflicts with the principle of freedom of association because it gives excessive powers to one specific trade union, which would be against a 'democratic' trade union system. In addition, the State enjoys too much power in regulating and registering trade unions' activities. An illustrative example of this is the legal challenge brought by one of the major Argentine trade unions in the public sector, relying upon multiple international human rights instruments, ILO instruments as well as Article 14 of the 1998-Declaration, the Argentine Supreme Court in the case *Asociación de Trabajadores del Estado* declared the unconstitutionality of the trade union regime<sup>87</sup>. No major legal reform has not taken place in the aftermath of this judgment. However, it is possible to see that the Declaration offers an avenue to national actors, be they executive, legislative or judicial, to reform and strengthen national labour laws.

## 5.2. A New Revision is Overdue

Article 32 of the Declaration sets out that the 2015 version shall be revisited after 6 years. This should have been done by 2021. However, given that a major crisis took place in this period, the Covid-19 pandemic, it is understandable that such a revision has not taken place yet.

There are two key elements that must be considered in a future revision: on the one hand, it has been argued that the Declaration should become a protocol to the TA. This would put an end to the debate regarding its legal nature and would allow both regional and national actors to confidently rely upon the Declaration to effectively protect workers' rights and, eventually, to reform domestic legal orders. On the other hand, although the 2015 revision enriched quantitatively and qualitatively the content of the Declaration, there are new recent phenomena that have had an impact and are still shaping the current Mercosur labour markets, namely: platform work and climate change.

Whilst the significant development of the platform economy, specifically in the sector of ride-hailing and food delivery services has given precarious groups, such as migrants or informal workers, a chance to have access to the labour market, the conditions upon which they perform their jobs are in many cases unsafe and unhealthy in direct violation to the notion of decent work. Furthermore, the increasing impact of climate change upon Mercosur Member States constitutes another area which requires particular attention from the national and regional authorities particularly when it comes to adoption of green employment and just transition policies.

The Declaration has proven over time to be an effective legal instrument despite the intergovernmental nature of Mercosur. Both regional and national actors must keep using it creatively to ensure the protection of workers' rights across the region, particularly, in these unsettling times.

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<sup>87</sup> ATE *s/ acción de inconstitucionalidad*, 18 June 2013.

## **AUTHORS' CONTRIBUTION**

Mauro Pucheta is the lead author of this paper.

Atahualpa Blanchet has contributed to the development of section 4.

## **CONFLICT OF INTERESTS**

Authors declare that there is no conflict of interests.

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