Chapter XVI

"Good practices" and crisis of the labour proceeding principles[1]

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I. CLASSIC PRINCIPLES OF THE LABOUR PROCEEDING

Labour Procedural Law is not historically the result of a specialization from the civil or criminal proceedings, as known. Labour proceeding is from the very beginning not only based on its own principles and original mechanisms but also with a very specified purpose[2].

This purpose was more than settling disputes. Labour Procedural Law was particularly intended to complete the original protective function and characteristic of the Labour Law. This was achieved through mechanisms geared to facilitate the implementation of the rights derived from its execution.

The Spanish Industrial Courts created in 1908, and the joint committees created in 1922 that finally turned into the mixed juries in 1931 illustrate this point. Later, the Labour Courts were established in 1938 at the end of the Spanish Civil War, and the Central Labour Court (subordinated to the organization and competences of the Ministry of Labour and not to

1. This report has been carried out under the project financed by the Spanish Economy Ministry "Best Legal-Procedural Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).

2. Seetheclassicalstudy of Rodríguez-Piñero, M., *Sobre los principios informadores del proceso de trabajo*, RPS, no. 81 (1969), pages 21-83. Also Alonso Olea, M., Miñambres Puig, C., Alonso García, R. M., *Derecho Procesal del Trabajo*, *Valencia,* Tirant lo Blanch, 2004, pages 35ff.

the Ministry of Justice[3]) confirmed these core elements in order to ensure the effectiveness of Labour norms. Also, these elements were an essential complement to the substantive rules of the former work legislation, and later, of the Labour Law.

Therefore, the proper path for applying labour norms almost dates back for the same time as the substantive rules.

Furthermore, we should point out that the labour procedural system is mainly used at the request of the workers. The overwhelming majority of labour proceedings are initiated at the request of workers themselves; scarcely being used by employers (excluding those appeals that may be brought by them against workers claims). Labour proceedings are mainly addressed to collective disputes but hardly used for individual litigation (recovery of undue salaries; or when causing damages to the company, in cases of unfair competition or failure to respect a post-contractual non-competition covenant).

This would make us doubt if the Labour Procedural Law originally participated in Labour Law's "horizontal approach" (this means the extension of its scope to include figures from other legal disciplines), when actually it lies at the heart of the Labour Law itself.

In short, Labour Procedural Law not only consists of specific procedural rules based on the particularities of the subject-matter. It rather, but is shaped within a singular system with a differentiated jurisdiction, specific rules (innovative if compared with the civil proceeding) and in parallel with the ordinary civil proceeding.

Our purpose with these statements is not to deny the influence of the ordinary proceeding in labour proceeding (and vice versa), but to confirm the singularity of the labour proceeding and its approach as a core element in the shaping of Labour Law. Consequently,, as stated by Prof. Rodríguez Piñero[4] and Prof. Alonso Olea[5] we can not conceive it as a secondary or added feature.

Labour procedural rules were therefore always conceived as tools for improving the effectiveness of labour rights, being interconnected. Each substantive Law element was continued in the procedural rule that completed substantive aspects. Here, legal figures concerned are well-known and applied in practice as the conflict resulting from not

3. Particularly, Martín Valverde, A., *La formación del Derecho del Trabajo en España*, (*Estudio preliminar)*, in AA.VV., *La Legislación Social en la Historia de España. De la revolución liberal a 1936*, Madrid (Congreso de los Diputados), 1987, pages XII-CXIV.
4. Cit., particularly pages 32ff.
5. Ob. cit., pages 37ff.

performing the reinstatement of the worker. The dismissal demonstrated it as it was precisely applied to the most litigious matter under the scope of Labour Law.

In a nutshell, proceedings and Labour Law share a common objective despite being more apparent at the Procedural Law level: the conflict settlement. If Labour Law is more oriented to the conflict settlement, something similar can be confirmed when the labour proceeding is concerned. This is very evident in the collective dispute settlement procedure as the labour procedural rule establishes a continuity of the judicial activity with respect to the conflict settlement achieved by the parties. Only when the attempt of the parties for settling the conflict fails, the judge has to act.

In this case is very clear, perhaps even more than in others, the strong interconnection that exists between the labour proceeding and the substantive Labour Law[6].

This origin and configuration of Labour Law is what justifies its remarkable specialities, and the particular principles on which it is built and that inspire other proceedings belonging to different legal fields:

A. ORALITY

The labour proceeding is the oral proceeding par excellence.

The oral expression of the parties positions allows the judge to promptly and undoubtedly informed on the positions of the parties in an almost "tactile" manner. He also is able to easily understand what the parties want with the possibility of re-examining, investigating, and directly analyzing the parties positions or even their emotions. All this shall always appropriately be interpreted by the judge in order to fulfill the ultimate purpose of the proceeding: finding the truth and re-establishing justice through it.

It also (theoretically) enables an accessible and easy proceeding developed at a rapid pace and without unnecessary technical requirements. Orality contributes to speeding the proceeding. It is not necessary to allow the parties time to express their observations in written; thereby avoiding timelines, reviews and examinations.

Orality enables the judge to quickly find the material truth, and consequently to guarantee the ultimate objective pursued: the restoration of Law.

6. Article 156 of the Royal Legislative Decree 2/1995 approving the Consolidated Version of the Regulatory Law of the Social Jurisdiction.

B. JUDICIAL INTERVENTION

This principle is linked to the previous one. This principle means that a judge must be present in all stages of the proceedings. According to this principle, only judge that has heard the parties and have been present in the taking of evidence is the competent for giving a judgement. A different judge from the one who assisted to trial cannot pass a judgement; provided that as this "experience" or personal monitoring of the dispute cannot be extrapolated. This judge leaves a conviction and data that other judge after reviewing an "inert" evidentiary material and a succinct trial (nowadays replaced by the digital recording) cannot recreate.

Undoubtedly, by respecting this principle the judge will better, faster and more direct in a manner assess the subject-matter. Like wise this principle will be the basis for settling the dispute in both a faster and more appropriate manner.

III. "PRINCIPLE OF CONCENTRATION"

This principle is intended to achieve a rapid process without undue delay. According to this principle, homogeneity in trial proceedings is pursued so they are not extended beyond what is strictly necessary.

IV. PRINCIPLE OF URGENCY

This is the principle according to which simplifying the proceeding is pursued. Its aim is also to achieve the absence of stages or prior hearings, and the establishment of mandatory and rapid time-limits for developing the different procedural steps.

By this principle, the legislator seeks to shorten time-limits so labour justice is performed in a rapid manner.

This principle is also aimed to avoid the trial: the compulsory attempt at conciliation; both at judicial and extrajudicial levels. Originally, this objective was pursued exclusively through the administrative procedure with a curious "intervention" of the public administration in the labour judicial system; and later, of trade-union bodies in certain cases. Finally, this principle pursues the objective of providing the worker the opportunity of having his rights restored in a faster manner.

V. FREE-OF-CHARGE PROCEEDINGS (FOR THE WORKER)

From the very beginning, this type of proceedings have respected the principle of access to justice free of charge. This means that the worker

(in addition to public institutions but not employers) shall benefit from proceedings free of fees, charges and costs.

Even the absence of requiring the worker to be represented in legal proceedings pursued the objective of saving charges for the worker; as he could be heard in Court without paying costs and Attorney fees.

The lawyer's signature in the appeal for reconsideration (which in this case is unavoidable as so it is the technical charge of an appeal of this nature) could be also be conceived for this purpose. This requirement was limited to the minimum necessary in order to fulfill this objective; so the representation by an Attorney General was not mandatory.

VI. "GREATER FORMAL FLEXIBILITY"

We should point out that the labour proceeding always has benefited from form a greater flexibility regarding procedural required forms. However, nowadays this flexibility may not appear in a less striking manner because it appears in other jurisdictions: facilities when remedying procedural defects, greater freedom when accepting and taking evidence (witnesses), and accepting documents that regardless of their ratification in trial or validation as authentic copies (even if they are e-mails) can be freely assessed by the Judge. Not requiring the representation of the parties by an Attorney also implies the designing of a less formalized proceeding aimed at finding out the "material truth" of the subject-matter. This search of the material truth would be performed by the Judge. Being this truth revealed by this manner the Judge will also be able to rule in accordance to the Law and later enforce his judgment.

VII. THE CURRENT CRISIS OF THESE PRINCIPLES

However, we have to be aware that nowadays all these principles are to some extent in crisis. In many cases, there seems to appear a serious crisis by which their original function is challenged. This crisis is not just due to distortions or bad practices in the system due to unforeseen conducts or the lack of material resources (some of the reasons, as we will show below). But they are also a result from the subsequent reforms of the labour procedural law that, despite the objective of respecting the labour proceeding singularities, has been brought in line with the remaining procedural figures existing in Spain.

The following provides an overview of the above mentioned principles in order to analyze this crisis:

A. ORALITY

The undoubted advantages of orality have been already expressed. However, the complexity of labour proceedings and their economic relevance makes us reflect on the crisis of this principle. Would it be logical in this context that the defendant (usually the company) could only orally answer the claim when the proceeding is being performed without being able to present case law, legislation, observations and material details concerning the subject-matter? In this sense, would the necessary balance required in every proceeding be inevitably broken when a party does bring the claim in written and the defendant cannot contest it in such a manner?

We should consider that as we know, labour proceedings are not limited to whether a specific amount is owed to the worker or not; or whether a particular act constitutes a disciplinary dismissal or not (according to the Spanish Labour Legislation, Article 54.2 of the *Estatuto de los Trabajadores* —Workers Statute— the disciplinary dismissal would be the one performed by the employer's will on grounds of serious and negligent breach of the contract by the worker. In contrast, labour proceedings include all kinds of claims and are characterized by an immense technical complexity: regarding pension schemes, collective dismissals, complex issues concerning fundamental rights, occupational accidents and injuries, insurance... These cases lead to trials that may be extended for hours and to a huge corpus of evidentiary material. This gives rise to the question whether orality is nowadays as realistic and advantageous as it was at its beginning.

The following aspects, at least, be analyzed the following aspects: claims often do not together specify in writing their observations on the subject-matter in a reasonable or detailed way; also these observations presented at trial are increasingly more complex, as they have to be founded on case law criteria or on a doctrinal basis where appropriate. It should also be pointed out that this absence of the formal possibility to answer in writing leads in an objective manner to a lack of equality between the parties; as the claimant has granted this possibility without limits on the length or content of the claim.

But similarly appellants suffer from the fact that observations made by defendants deprive them of the possibility to counter-argument in an appropriate and accurate manner and to carefully study those observations; as they are being exposed for the first time at the Court.

As a result, combining orality with a previous presentation of observations (by both parties) has to be reconsidered; particularly in extremely complex proceedings.

The 2011 Spanish Law regulating the Social Jurisdiction (hereinafter and following the Spanish acronym, LRJS) has promoted certain changes in this sense. We could mention for example the possibility of the parties to bring "brief calculations notes or summary numerical data" to trial (Article 85.6 LRJS). This would legitimate to some extent the presentation of written notes at trial. This shall be performed within the limits of the restricted objective established in the law, which does not prevent either from exceeding these limits of exposing mere calculations. Other example would be the possibility of bringing "brief complementary conclusions" to trial, in writing and preferably through telematic means (Article 87.6 LRJS). This would be foreseen when documentary or expert evidence is of an "extraordinary volume or complexity".

Beyond this, the practice of submitting written notes or legal observations at trial has been extended. Here the parties (particularly the defendant) present their factual and legal considerations concerning the proceeding in a written manner. However, this practice, which is not legally regulated, has its limits: not every Judge admits this practice, not always is known by the other party (here the *audialteram partem* rule will inevitably be jeopardized), and it cannot either be included in the Judge's orders. This may mean that Judges of Spanish High Courts (Tribunal Superior), in the event of an appeal, cannot assess nor examine its content.

Ultimately, the orality principle has been practically and (not enough yet) legally modified as it cannot be completely fulfilled. This non-compliance is due to the complexity of the labour legislation and of the matters that are under the competence of labour Courts. Also because of the material relevancy of labour proceedings. For all these reasons a deep review on at least those proceedings that are more relevant or technically complex is recommended. The principle of orality currently presents jointly with its advantages, serious shortcomings that may jeopardize the seek of both the material truth and the equality of the parties; being these principles the mandatory basis of every trial.

B. "PRINCIPLE OF CONCENTRATION"

Efficiently examining complex matters at a single trial becomes very difficult, particularly when dismissals are concerned. Pre-trial evidences, conclusions and final proceedings are important constraints.

Therefore, the labour proceeding has to bring its unique functions back as these functions shaped it as an inherent part of Labour Law. This shall be performed through a proper review on the topic and appropriate tools. The labour proceeding gives the legislator and governments a very clear and serious message: if the necessary means are not put in place,

no matter how procedural rules are reviewed, all would be worthless. The mere review of procedural rules as performed in other legal orders provides thus only a part of the solution.

C. PRINCIPLE OF URGENCY

Among all the existing principles in crisis, the principle of urgency is with no doubt the most undermined. As we stated before, urgency has generally been represented through the removal of pointless red tape and by fixing clear deadlines for carrying out procedural steps. It is known that the absence of prior hearings, short and mandatory time-limits for most of the procedural steps, limitations for suspending trials, the concentration of legal acts among others. are very present in this principle.

But, is this principle real? Do its practical effects justify these short time-limits and simplified procedural steps? The answer cannot be positive. Firstly, most obviously, is that such mandatory and short time-limits that the law establishes are rarely complied. This non-fulfillment is not due to judges will nor to their inadequate training or diligence. In contrast, is known that Social Court judges are traditionally assuming heavy workload and a technical competence at the highest level within the judiciary.

However, the excessively high number of matters per Court (practically there are no exceptions within each and every Court) makes this principle unachievable. In this sense, we are not going to expose an exhaustive statistical analysis. A study of the Spanish Supreme or other Courts' rulings is enough to notice the large time gap existing between the facts that are under judicial review and the final judicial decision. Particularly when these facts are referred to subject-matters that because of their nature should not receive a preferential or summary treatment. Once the claim has been brought, there is sometimes a delay that takes more than 2 years for summoning the parties to appear before the Court. This is unusual even when other jurisdictions are concerned, as they do not appear require urgency as one of their key principles.

In practice we can usually note that the right to an effective remedy (which is on the other hand constitutionally required and therefore unavoidable) leads to all kind of causes of prolongation of trials: suspension of trials because of an extraordinary set of circumstances on which the proceeding might be based, the need of extending claims and of performing all type of judicial proceedings... Jointly, some matters complexity derives to all kind of measures of inquiry and pre-trial judicial proceedings, or even to final proceedings upon request by the judge himself. This limits with no doubt the urgency principle requirements.

However, these limitations are in reasonable every respect. Urgency shall not be considered as a basis for depriving the judge and the parties from having the necessary knowledge of the evidence required for settling the dispute, and by which the judge can appropriately be instructed on the factual grounds of this dispute.

But, as already stated, the major reason why this urgency principle is undermined is clearly that labour Courts are overloaded. Even being aware of the limits of those public resources addressed to this objective, it should be acknowledged that if the number of Social Courts is not increased, it is almost impossible to comply with this principle. This would dramatically reduce the effectiveness of Labour Law itself. But also, this would challenge the reason of designing a labour proceeding as a unique proceeding; with the features of being simpler, more accessible, and particularly, faster. Thus, which is the point of designing quicker procedural steps, concentrating prosecution and jeopardizing other procedural steps that are useful for clarifying matters in an appropriate manner? Also, which is the purpose of limiting the possibility of appealing precisely on grounds of urgency, if finally the practical result is not that conceivable on this respect?

D. FREE-OF-CHARGE PROCEEDINGS

This principle seems to be respected enough as far as workers are concerned, as they are not intended to pay court fees. Nevertheless, it also appears that the aspect which further increases the costs of the proceedings (the requirement of being represented by an Attorney before the Court) cannot be avoided. Given the current situation stated above, it is almost unfeasible that a worker can bring a claim before the Social Court without the adequate legal assistance, despite this not being legally requested. It is true that he can benefit from free legal aid and an ex officio lawyer shall be appointed to him. However, we should not forget that in order to grant this, the worker has to comply with the requirements of a specific module evaluating the economic situation of applicants, which is established by the applicable law. This module is ultimately established at double of the minimum wage. This means that the free legal aid and the principle of free-of-charge proceedings are not guaranteed to all workers, but only to those who are within the ranges established by this module.

E. "GREATER FORMAL FLEXIBILITY"

This principle cannot be considered to be in crisis, but it is true also that it is not a such distinctive nor specific principle in the labour proceeding. The trend towards both the elimination of excessive formalities and

simplification of court proceedings is somehow appearing in other jurisdictions. Evaluating whether this trend is being performed at a higher or lower level in those jurisdictions than it is in the area of the social order shall remain under subjective assessments. Nevertheless, it is true that an homogenizing tendency is appearing in this area.

In short, beyond the legal and technical improvements, reshaping (legal) procedural rules is not that much needed (however they can always be subject of improvement). In contrast, it is highly recommended to grant judicial structures for the existence of a larger number of Courts with enough resources so a relaxed and efficient labour justice is guaranteed. Also adapting norms to the new complex legal-labour reality shall be foreseen.

VIII. WHY HAS THIS CRISIS OCCURRED?

Why are the different "classical" principles of the labour proceeding not so clearly identified in it? And is the social jurisdiction nowadays in such an unsatisfactory situation? Providing final answers to these questions is not easy, but we can highlight the following aspects explaining this situation:

— The first one is linked to the mandatory respect of the right to effective remedy. When this principle is applied to the labour proceeding, those requirements that homogenize it with other jurisdictions appear. This way many peculiarities should no longer be considered, as the requirements demanded by the Spanish Constitutional Court must compulsorily be applied to it.

— The second one, the increasingly complexity of labour rules and the larger number of matters under the social jurisdiction may, as stated above, contribute to this crisis. If the "classical" Labour Law is itself complex, we should reflect on the legislation on prevention of occupational risks, pensions, sanctions, social security... This particularly affects the former legislator's intentions: the possibility of the parties of bringing actions on their own behalf or the orality are in many cases limited.

— The third reason is related to the lack of resources of the social jurisdiction, which faces the increasing litigiousness existing in this area. This lack may be due to the fake assumption that the Social Court judge can deal with more disputes per year than others from different jurisdictions.

— The fourth one is based on the fact that the legislator itself has renounced to some extent to establish, regarding the labour