

Latin America: trial and error. Propositions for the transformation of labor policies

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The aim of this paper consists in approaching some of the social and labor challenges currently faced by Latin America, which are indeed pending assignments as they now represent problems worsened by decades of misguided policies and aggravated by an increasingly global economy. Thus, the need arises for re-thinking the framework of labor relationships and employment conditions in the region to foster effective labor policies capable of reversing the effects of the widespread economic crisis in the region.-

To approach these challenges, we have considered a structure made up by three interrelated parts: the first part, which we have entitled "***The post-industrial world***" deals in turn with three matters: labor deregulation as a global occurrence, the impact of deregulation in Latin American laws and the absence of a cause and effect relation between deregulation and job generation. Then there is the second part, called "***Unemployment, poverty and unregistered work***", which deals with the dire social situation and its repercussions on labor and social security law, examples of which are shrinking salaries, non-registered and under-registered work, disregard for workers' physical and psychological health and lack of funding for social security. And finally the third part, entitled "***Towards social labor law***", is geared towards the establishment of adequate employment conditions and the need for extending the frontiers of labor relationships on the basis of the experience gathered and the social, economic and technological transformations that the world has undergone, seeking to prevent a further shrinkage of the scope of protection and the subject matter of social labor law and to lay down the main guidelines for a new labor law. This paper also includes a further section, under the heading "***Propositions for the transformation of labor policies***" to underline the most relevant aspects of labor and to discuss the challenge inherent in the construction in Latin America, though most specifically in Argentina, of a new social labor law genuinely based on protecting the dignity of workers.

1. "The post-industrial world"

1.a Labor deregulation as a global occurrence: It is a long-established fact that starting in the seventies, a new economic and political world order that can be called "post-industrial" came into being. States and economic groups came together and formed trans-national organizations (European Union, Mercosur, etc.), customs barriers were neutralized and the search started for optimizing trade in order to leverage on competitive advantages. One of the characteristics that best describe this stage has been the labor flexibilization process that consists in reformulating the legal mechanisms required to obtain higher output and profits through a reduction in labor costs. As a result, the rights of workers and the ensuing duties of employers decrease and the bargaining power of trade unions is curtailed. However, there is no evidence that this is good as a source of jobs and that it is positive for the workers, who are, in essence, the object of legal protection.

1.b Impact of deregulation on Latin America's laws: As regards the impact of deregulation on Latin America's laws, it can be asserted that deregulation has been the cause for the emergence in our region of the so-called "precarious employment", which refers to those working arrangements that do not meet the adequate minimum conditions because, for instance, the rendering of the services is temporary or unstable, the workers are not registered or not registered in full, the salaries are below the minimum subsistence levels (under-employment), etc.

The ILO has referred to this situation in its publication "*Decent work in the Americas: An agenda for the Hemisphere, 2006-15; Sixteenth American Regional Meeting, Brasilia, May 2006*,": "*there is no evidence whatsoever that larger doses of said reforms had improved the situation. Much to the contrary, recent experience leads to the belief that these reforms could have worsened it even more*", given that the results of the reforms implemented were "*rather disappointing*" in so far as *product per worker* grew at very slow pace, i.e., 0.21% per annum, between 1990 and 2005".

Argentina would be a good example, as back in 1975 the country had 22 million inhabitants and less than 2 million below the poverty line with employees standing for 43% of total income (whereas in 1949 they stood for almost 50%).

By mid-2002, with a bit less than 37 million inhabitants, Argentina had almost 19 million people below the poverty line, which stood for more than 50% of its inhabitants, and income distribution showed to be most regressive, even more regressive than in 1989/1990. In relative terms, Argentina was the Latin American country that showed the most acute impoverishment. However, during the nineties, some sectors would hold that if the country wanted to generate jobs, reduce unemployment (and under-employment) and precarious work (and non-registered work) and gain higher productivity and economic growth, it needed to “flexibilize/deregulate” labor relations and trim the so-called “labor cost” in order for productivity and competitiveness to rise and for salaries and registered work to improve. The widespread belief was that the above goals could not be met by maintaining the degree of protection afforded by traditional labor laws in force in the region (guarantee-based) and that there was a cause-effect relation of sorts between these factors and labor law, with the influence of the economic system being relegated to the background. These *new* ideas about labor relations took hold through legislative amendments in Chile and Perú, and also in Panamá, though partially. Other countries embarked upon a defense against flexibilization and they increased protections also through legislative enactments: Brazil’s 1998 Constitution; Venezuela’s 1990 Organic Labor Act; Colombia’s 1991 Constitution; Paraguay’s 1992 Constitution; República Dominicana’s 1992 Labor Law Code and Paraguay’s Labor Code in 1993. By way of example, Brazil’s 1998 Constitution and Paraguay’s 1993 Constitution both introduced various labor rights to prevent a shrinkage in scope through legislative amendments given that the Constitution is more difficult to amend. It is to be noted, though, that most of these reforms amounted to partial adjustments (Bensusan 2004) that did not deal with the advantages or disadvantages of the interactions or complementarities amongst the various institutions involved in labor relations. –

1.c. Absence of a cause and effect relation between deregulation and job generation:

With the above having been said and for the purpose of capitalizing on the experience gained, it is of the outmost importance to approach a foundational problem in the labor relations system that focuses on determining the incidence of labor costs on employment generation. The main thing is to analyze and quantify the bond between regulation over labor relationships and unemployment and productivity, which can be in turn divided into secondary goals: determining whether employment generation and unemployment reduction call for flexible labor relations; analyzing whether increased productivity and economic growth are possible with the current protections afforded by labor laws; establishing whether labor cost reductions lead to increased employment, decreased unemployment and reduction in non-registered work. Even if we were to admit as an established fact that the new forms of production render the employment of a significant portion of the population less necessary in the light of an economy with increased dependence on technology and decreased need for labor, the debate revolves around determining whether labor laws should loosen up and accept the impact of globalization as a world occurrence, or whether, quite the opposite, the need arises for strengthening worker protection in times of social and economic crisis such as the one we are currently experiencing.

The proponents of deregulation hold that it is labor rigidity what prevents employment creation and that the reduction of the rights of workers would go a far way towards solving this. The true incidence of the legal design of the system of labor relations on employment generation is determined through the establishment of the total cost it represents in production, amongst other aspects. –

However, it can be asserted that the problem in the region is one of productivity rather than labor costs, therefore, even if said costs were decreased, there would be no increase in productivity. If labor costs were to represent 20% of the price of a product, a 10% or a 20% reduction in said 20% would be quantitatively not meaningful and would not enhance the competitiveness of a company; it remains to be said that the percentage of salaries in production costs does not exceed 12% in Latin America’s manufacturing industry. Having said this, the aim should be to obtain savings in the remaining 80%.

What cannot be ignored is that of all the costs of a company, labor costs are the most susceptible of management by employers: raw materials and machinery or taxes, are, instead, external impositions.

It can be concluded that the level of worker protection is not a factor that determines the total cost of production or the sales price of a product. Both in Europe and the United States, salaries stand for a significant portion of gross domestic product, sometimes in excess of 50% (approximately 70% in the United States and in Sweden they are close to 90%) and countries are more competitive whereas in Latin America, salaries stand for a low portion, smaller even than 40% (it varies according to the sector) and these countries are not competitive.

2. Unemployment, Poverty and Unregistered Work.

For adequately diagnosing the situation of labor relations in Latin America, a brief explanation is required concerning their social context. Statistics and reality point to some central issues: 1) *a serious social situation characterized by poverty and unemployment*; 2) *the repercussion of these factors on Labor and Social Security laws, the most conspicuous of which are unregistered work, absence of protection for workers' physical and emotional health, salary reduction and lack of funding for Social Security.*

2.a Social situation: The severe social and economic situation that the region is experiencing can be easily perceived from the region's reality and arises clearly from statistics, in which a process of growing pauperization can be perceived, hand in hand with a high unemployment rate.

Poverty: Inequality has always been and is still today one of the most significant challenges facing Latin America and the Caribbean and for the time being at least and despite the economic progress seen in the most recent five-year period (4.5% at the regional level), inequality continues to exist and to a larger extent than in other regions of the world^[1]. Thus, it has been held that Latin America and the Caribbean “**are the regions of the world with the most significant income inequalities**”, and what is even worse is that this level of inequality has shown to be inflexible for the past 20 years. It has also been said, quoting a publication released by the World Bank that inequalities in Latin America are rooted mainly in the interrelation amongst four factors: 1) unequal access to education, 2) the income earned by educated people is disproportionately high; 3) the poor have more kids with whom to share their income, and 4) public expenditures are ineffectively applied^[2]. Therefore, the economic growth referred to has been insufficient to revert the poverty levels in the region: at present almost a third of Latin American workers lives in households where each family member lives on less than US Dollars two per day. By the same token, workers who live with up to US Dollar one per day amount to 8.3% in the region. Therefore, at the regional level, the goal equivalent to **wellbeing with equity** is still a pending assignment, because although the so-much heralded growth seen in the region in these past five years is a necessary condition to attain labor and social progress, it is by no means sufficient. It has also been said that the region is the so-called paradox of “**growth without well-being**”. Already in 2005 and as addressed by the ILO in its Labor Outlook 2004 (*Panorama Laboral 2004 OIT*) it was shown that productivity in Latin America was similar to that of 1980, which means that unless the factors that constitute a hindrance to increased productivity are corrected, the possibilities of moving forward in social and labor matters in the region shall continue to be the same they were two decades ago. Thus we will be able to understand also why the poverty indices in the region are pretty similar to those seen at the beginning of the eighties. Now, the most widely used indicator to reflect the economic development of a country is the “*product per inhabitant*”, which is closely related to the so-called *labor productivity*^[3]. It has been perceived that for instance countries such as Colombia, Venezuela and Perú, whose labor costs are even lower than those of countries such as Brazil and Mexico or Argentina should in principle be more competitive than the latter. However, this is hardly the case. At the world level, for instance, Perú, as well as Venezuela and Colombia, stand out for being “less competitive”, that is, in accordance with the Global Index of Competitiveness of the World Economic Forum, these countries have a lower level of global competitiveness when compared to Brazil and Mexico, and they nonetheless show lower unit labor costs than those countries^[5].

In other words, the fact that a country exhibits smaller labor costs (both in terms of labor and product per worker) is not necessarily an indication that said country has a higher level of labor competitiveness. A country's competitiveness is not based solely on the cost of its labor.^[6]

2.b. Unemployment: The region's unemployment rate continues to surpass the global average (6.3%). At present, the urban unemployment rate is in the region of 8.5%. It has to be pointed out that the report entitled “Global Employment Trends, Brief Report, January 2007” found that the unemployment rate in the region would have been close to 8% in 2006, but this difference when compared to the data released in the annual publication Labor Outlook 2006 (*Panorama Laboral 2006*), is due to the fact that this report focuses only on urban areas whereas the reports on the global employment trends cover the whole country^[7].

According to the figures prepared by the authorities in the region's countries, those that showed the most marked drop in their unemployment rates in 2008 were: Dominican Republic (from 15.6% to 14%), Brazil (9.5% to 8.0%), Panamá (7.8% to 6.5%), Trinidad y Tobago (6.3% to 5.0%) and the Bolivarian Republic of Venezuela (8.7% to 7.5%) with lesser decreases having been observed in Ecuador (7.8% to 6.8%), Argentina (8.8% to 8.1%) and Perú (Metropolitan Lima from 8.8% to 8.6%).

However, Chile saw an increase in its unemployment rate (from 7.1% to 7.9%), and so did México and Colombia.^[8]

Now, though it has been pointed out that urban unemployment in the region has shown a sustained decrease for the fourth year in a row, the generation of actual jobs is another point pending treatment in the agenda of the region's governments as it is calculated that approximately 17.6 million urban workers are unemployed and are actively looking for a job. Another problem afflicting the region that paradoxically is the other side of the coin of dropping unemployment is the so-called demand by the underemployed represented by those persons who work less than 35 hours per week and wish to work more, as these people represent almost 15% of the population of urban workers.

In 2008 the main characteristic to describe the region has continued to be segregated employment structure which sees formal and informal work coexist in almost equal proportions: 51.5% and 48.5% of the total of urban workers with a job, respectively, with the proportion of women with a job in the informal sector (51.4%) exceeding that of men (46.3%). And these figures are an average as countries such as Perú, Panamá and Ecuador estimate that on average informal work affects 61.5% of the population. According to the official data most recently released by the Argentine Ministry of Labor, the rate of unregistered work in employees older than 14 years of age is 36.8%. These data are also reflected in the so-called labor fragility index. Labor fragility, which derives from the concept of labor vulnerability is defined as the integration of poor quantity and poor quality of work, labor precariousness and deficient wages that in turn are evidence of the gap between the situation as defined and sought by rules and regulations as the objective and the data seen in the facts^[9].

2.c. Absence of Protection for Workers' Physical and Psychological Health:

Another problem is to be found in the conditions and environment where work is carried out and the degree of protection of the physical and psychological health of workers, who as a consequence of the prevailing social conditions are afflicted by stress and live in a situation of general preoccupation and anguish. For instance, in Argentina, the statistics published by the Superintendence of Workers' Compensation Insurance showed that in late 2007, over a total of 430,000 companies that had bought this type of insurance, approximately 80% fails to fully comply with the occupational health and safety standards (that is 350,000 companies). In the year 2008, 19% of employees in the construction industry sustained an industrial accident in the year and on average, 10% of workers suffered an accident. There was a 25% increase in serious accidents; agricultural activities saw the biggest increase in the number of accidents.

2.d. Lack of funding for social security: The Social Security system responsible for affording protection in the event of biological, pathological and social contingencies not only for workers in a labor relationship but also for the self-employed and unemployed is also seriously strained. Although for more than 10 years we have seen an improvement at the regional level, on average, 40.2% of employees in Latin America has not received medical insurance and/or pension contributions, with the deepest vulnerability caused by lack of protection seen in personnel in cleaning services, in those working for companies with less than 10 workers and in the self-employed. The region continues to exhibit a significant number of workers who are "outside" the scope of Labor and Social Security Law (and thus, outside the reach of the protection it affords), which, as we have already said, *"is not a mere circumstance of legislative incidence but rather ends up having an impact on the set of institutions that are indispensable for configuring the Welfare State and what would constitute a democratic model of labor relations"*^[10]

3. Towards a new social labor law

3.a Employment Conditions: Employment is the most urgent social demand in the region. The condition necessary to combat unemployment and increase the quality of available jobs is that the economy should grow in a sustained manner. Once this is attained, the need will arise for an adequate regulatory framework for the labor market as well as for proactive policies aimed at improving the generation of good jobs, that is, social equity, as well as microeconomic competitiveness.

This means that the aim should not only be an increase in the number of positions, but also that the new jobs should meet the essential requirements of increasing productivity, regular and fair income, dignified working conditions, legal protection and social security, in other words, employment must endeavor to attain a modern, equitable and sustainable competitive society. For attaining these aims, a regulatory framework is necessary in order to manage work in consonance with the new technologies and methods for organizing production, which should abide by the rights of workers: to increase the labor competencies of the population and to improve their

adequacy concerning the requirements posed by demand as a part of a competitiveness strategy with equal opportunities; to reduce informality and to suppress illegal labor practices in the formal sector; to render the operation of the labor market consistent with the conditions of the global economy through the development of mechanisms to moderate the effects of externalities on employment.

Stability is an important variable in the quality of employment and in the reduction of labor uncertainty, though it is also an important variable in a strategy of corporate competitiveness based on innovation, on continued training and on the participation of workers. This is, from all viewpoints, preferable to a situation of high turnover in labor in which investment in training is minimum (or even not null) and workers are not committed to the success of the company.

The new technologies can be incorporated after checking that their use shall not adversely affect the health of workers. The need also arises for assessing the long-run social cost of work in long and exhausting days carried out in inadequate conditions and environments. If our starting point is that health is an irreplaceable asset and a value and if lost it cannot be compensated, the capital, that is, the accumulated human work, is what has to adapt to men, which constitutes the only efficient cause of the productive process.

Investments are needed in infrastructure –technology and working conditions and environments, on one hand, and mainly in human capital, through an improvement in salaries, adequate regulation of work, and above all, professional training, what could be described as “neokeynesianism”. James Heckman (a Nobel laureate in economics in the year 2000) has referred to the need for investing in the training of the youngest. Modernization in labor relations requires contracts of employment for an indefinite period, that is, the principle of continuity in the labor relationship, the reduction of working days, the permanent formation and training of professionals, mechanisms for social protection and contention, dynamics in collective bargaining agreements as an autonomous instrument to adapt the regulatory framework to the factual assumptions and the specific needs of each activity, art, profession or company.

4. Propositions, conclusions and outlook for a transformation in labor policies.

Undoubtedly this description shows that we are sustaining a severe crisis. And it also denotes that the time has come to make transcendental structural decisions and attempt once and for all a change in direction instead of merely alleviation measures. For centuries the Chinese have affirmed that “crisis is synonymous with opportunity”, and the history of countries has shown, that, overall, crisis have always left a positive balance. As regards the determination of the causes of crises, it is my understanding that it is wrong to restrict them to a mere juncture, such as fiscal deficit, public expenditures or the costs of politics; these occurrences are, in our opinion, simply a consequence, the logical and inescapable corollary of a model that did not rely on ethical and human values and that was incompatible with the notion of decent work.

If we bear in mind what we have been discussing, and that no such achievements will be possible through flexibilizing or deregulating labor law, we can lay down a “new” starting point for regulating labor law in the region and offering some propositions:

1) Labor is not only one more economic resource: The center of reference must not be the market but the workers: these men and women enjoy dignity because they are persons and as such they deserve protection. At present human work all over the world, as in many times in history, is not adequately valued, it is going through an involutory process and in the facts (though certainly not in declamations) is transformed once again into merchandise, into yet another factor of production. It is then appreciated that in much the same way as labor law met the need of preventing exploitation of human work in the face of a grave situation at the end of the nineteenth century and beginning of the twentieth century, the deregulation of this protection system is bringing about a new social occurrence: exclusion.

If the social situation was not caused by labor law, the solutions must not be attempted through amending labor laws for the worse. Rather, the aim should be to alleviate the inefficiencies and inabilities of the economic system to create or maintain employment. Hardly can the solution be to decrease labor costs by leaving workers unprotected and degrading working conditions and environments: should employers have no need for workers, they would not hire workers just because they are “inexpensive”. By the same token, if employers need these workers, they would still hire them to meet that need although these workers may be more “costly”.

- The much-hailed relationship between deregulation and employment generation as touted by certain legal scholars does not exist, as it is a proven fact that de-regulating reforms did not contribute to employment generation: rather, they were detrimental to the quality of the remaining employment, which circumstance has been recognized by

the ILO itself. Much to the contrary, the need today is for generating decent work, with stability and care for physical and psychological health.

It is for this reason that the need arises for clear and essentially fair rules in which the object of legal protection should be the worker, which should be respectful of dignity and human rights and which should seek to generate decent and stable work, serve as an incentive for contracts of employment with no defined term, shorten working days, have services rendered in adequate environments, revalue collective bargaining agreements and negotiation processes, provide permanent professional training, and endeavor to rely on agile and efficient courts with jurisdiction over labor matters. To change directions we need to leave aside the individualism prevailing in the current world economic order where the market plays a leading role and we need these men and women to resume the role they should have never given up on. Any legislative reform must be consented to and thought out by the worker (and men and women should be the center). Consideration is to be given to the work conditions and environments, which are directly related to the protection of the physical and psychological health of workers. Workers' physical and psychic fatigue may many times come as a consequence of the work carried out. The need arises for assessing the long-term social cost of working for long and exhausting hours in inadequate conditions and environments. If our starting point is that health is an irreplaceable asset and a value that if lost can never be compensated, the capital – accumulated human work – is what must adapt to man, as man is the only efficient cause of the productive process. As a result of economic, productive and technological transformations (globalization of the economy and emerging phenomena) the need arises also to re-analyze the contents, the scope of protection and even the object of the protection afforded by labor law. If we want to do as much, we need to question the very concept of labor relationships and of technical, economic and legal subordination as these are the axes of contracts of employment. In other words, what is the use of a labor law that protects only workers in a labor relationship when that field is shrinking by the second and labor law sees its scope and recede for absence of the object of protection? Maybe, if we go back to the sources and consider that the object of labor law is to protect workers, we might have to think about re-formulating its scope, about laying down the foundations for a real social law — as is currently the case in Europe — expanding the legal field and including the self-employed as well as all the contracts that involve human work in such protection. An adequate response would be one that enhances the contents of labor law and transforms its rules and regulations to adapt them to the new realities, though having men and women at their center and preserving their dignity. To do so, the State needs to recover its protective and interventionist functions.

2) Effective Enforcement of Labor Laws (oversight and penalties): Although labor law imposes penalties, there are many instances in which they are not enforced. The State must be reinstated in its role as guarantor of labor relationships and thus it must effectively discharge its oversight functions. If we want to succeed in the enforcement of the rules and regulations currently in force that seek to protect workers and that arise from the substantial law of labor, we need to redouble our efforts to improve the social situation. These oversight functions must, for instance, ensure that work is carried out in conditions and environments that should be adequate. Health is irreplaceable and its loss cannot be compensated. Through measurements taken in job positions, adjustments could be made to the harmful aspects, damages may be prevented and future economic costs may be reduced. Social and labor realities in Latin America call for adequate labor management which should strengthen the weakened institutions responsible for affording social protection, which should prevent “flees” of the protection guaranteed by said institutions and also needs Courts with Jurisdiction over Labor Matters to act on time, to be free from excessive formal requirements that end up enjoining the effective protection of workers' rights.

3) The Importance of the Courts with Jurisdiction over Labor Matters in the Dynamics of Labor Relationships and as a Tool for Labor Policies : In labor matters, justice must be done in due time and manner. *“Like the beauty of a melody, the kindness of a law does not depend only on who composes it but also on who plays it”* (Carnelutti). From a quantitative point of view, delays in legal proceedings are an indirect source of dismissals and of conciliations for small amounts. From a qualitative point of view, the value of court decisions is of transcendental importance as a source of law: doctrines expand thanks to the judgments that apply them. Judicial interpretation must strike a balance in inequalities: judges may not consciously give up on their moral duty to administer justice. Their function does not consist in producing legal science on the basis of abstract speculation, but rather in laying down precedents, resorting to prudence in the effective realization of the law. It is for these reasons that I agree with that position (as maintained by Bensusan) that the main

problem that the region is faced with no longer revolves around how to deregulate labor markets or how to raise salaries or increase protection in emergency situations but rather on how to improve the quality of institutions. It is through an improvement in institutions that effective protection can be afforded to workers dispensed by actual institutions that should guarantee, like the ILO has pointed out, the efficacious protection of fundamental rights such as those inherent in labor law.

References:

[1] It must also be highlighted that said "growth" was the smallest in all the regions of the globe (Middle East and North Africa, Eastern Asia, Sub-Saharan Africa, South East Asia and the Pacific; Central and Eastern Europe and the Community of Independent States).-

[2] Inequality in Latin America and the Caribbean: Breaking with history? http://wbi0018.worldbank.org/LAC/LAC.psf/ECAdocByUnid2ndlanguage/4112F594BAB8_5256DB3005DB262?opendocument.

[3] As quoted on page 63 of ILO's publication "2004 Labor Outlook for Latin America and the Caribbean" (*Panorama Laboral 2004, America Latina y el Caribe. OIT*), although "*the importance of product per inhabitant as an indicator of the economic progress of a country has been long debated (.....), there is a frequent failure to mention that the central determining element of this indicator is the level of productivity of a country.*" Therefore, it has been said that "*Product per inhabitant in Latin America for 2002 has come close to US Dollars 3,900 in 1995 currency, whereas in the United States product per inhabitant was 10 times said amount.* And the report goes on to corroborate that "*Such a low level of product per inhabitant is a reflection of the fact that the region is lagging behind in terms of economic development*".-

[5] Data based on the Global Competitiveness Index of the World Economic Forum.-

[6] Along these lines it has been explained that the level of labor costs as an indicator of competitiveness is only relevant in connection with labor productivity because (...) if the product per worker is high, labor costs may also be high without affecting competitiveness. In other words, **labor productivity is a determining factor in international competitiveness to a larger extent than labor costs**". On page 69 of the work cited.-

[7] According to the report, 2007 will exhibit a downward trend in regional urban unemployment, estimated at 8.8%.

[8] 2008 Labor Outlook for Latin America and the Caribbean. ILO (*Panorama Laboral 2008 America Latina y el Caribe. OIT*).

[9] We must not confuse the concept of labor vulnerability with the so-called poverty index that refers to the actual and effective absence of a job. Labor fragility is a notion that goes beyond that condition and predicts future possibilities of being actually unemployed.

[10] www.oit.org.pe. (Panorama Laboral 2006 – ILO's Regional Office for the Americas and the Caribbean, Lima, in the work cited.)

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