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Master's Thesis of Law

A Study on Workers' Rights in
Brazilian Indirect Forms of
Employment

- With Focus on So-called 'Outsourcing' Law -

브라질의 간접고용에서의 근로자 권리에
관한 연구
- 소의 아웃소싱법을 중심으로 -

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Graduate School of Law
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**A Study on Workers' Rights in
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- With Focus on So-called 'Outsourcing' Law -

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ABSTRACT

Over the last decades, Capitalism has transformed under the aegis of flexible accumulation by disrupting the Fordist and Toyotist pattern of production and generating a flexible way of working. In terms of Labor Law, the inevitable effects of flexibility on the labor relationship caused the emergence of indirect forms of employment, such as part time jobs, temporary workers, outsourcing, and subcontracting. Once explained as a strategic plan to survive the fierce competition of the new globalized world, enterprises opt to outsource labor so that they can reduce costs, amplify productivity, and offer a lower price than their competitors.

In Brazil, indirect forms of employment are ruled by the Superior Labor Court's Precedent No. 331, which outlawed the practice of so-called outsourcing through establishing that the outsourcing of core activities is unlawful. This ruling, which has prevailed for more than two decades, has played the important role of objectively distinguishing between core and non-core activities in order to define the legitimacy of the outsourcing. Therefore, the question of the existence of subordination is not primarily analyzed to define the legality of the outsourcing.

When workers are outside the scope of employment or when they are indirectly used by a third company that is not their employer, it places them in a position of precarious labor relationships, weakened union representation, lack of social security, and insufficient protection for industrial accident. Because indirect forms of employment cause a perverse degradation of

worker's rights, it became necessary to strengthen workers' protection; however, Brazilian legislators have opted for more flexibility. The recently approved regulations, especially Law No. 13,429/17 and Labor Reform no. 13,467/17, broadens the scope of outsourceable activities. With that, the objective and material differentiation of core and noncore services falls as recent regulations authorize any and all activities, including core business-related activities.

This study analyzes the principal regulations related to indirect forms of employment in Brazil, especially those services provided on a continuous basis. Even with the recent legislation authorizing all activities, the present work focuses on limiting the practice of outsourcing by interpreting the law through the constitutional principles of human dignity, the value of work and the social function of enterprise. Not limited to that, this study proposes the criterion of humanizing the practice of outsourcing through the application of isonomy. Hence, all outsourced workers shall be guaranteed equal salary, benefits, and working conditions. Further, as the Brazilian Constitution limits the freedom of association, the collective agreement applying to regular employees shall be equally extended to outsourced workers, as both provide labor for the same company in the same workplace.

Keywords: Brazil, outsourcing, indirect employment, labor relationship, Brazilian Constitution, Precedent 331, core activities, noncore activities, Consolidation of Labor Laws

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CHAPTER I – INTRODUCTION

1. 1. Background and Purpose

Since the 1970s, globalization has enabled the world economy to become integrated to the extent that developments in one part of the world almost instantly affect what happens elsewhere.¹ Transnational companies are able to install their subsidiaries in places that have low operating costs and better government subsidies.² Countries begin to lose their autonomy in order to play in this global market, and governments must ‘stay out of the way’ in this ‘new imperial era’.³ In the labor market, the modern market dictates that the ‘Welfare State’ and social programs hinder economic growth and national competitiveness.⁴ As a result, mobility for flexibility of labor standards starts to take place.

Flexibility, which is understood as the constant adaptation of legal norms to economic transformations for the effective regulation of the labor

¹ STANDING, Guy. *The Precariat: The New Dangerous Class*, Bloomsbury, 2011, p. 27

² CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 20

³ CHOMSKY, Noam. *Profit over people: Neoliberalism and Global Order*, Seven Stories Press, 2002, p. 9

⁴ CAMPANA, Priscila. *O impacto do neoliberalismo no Direito do Trabalho. Desregulamentação e retrocesso histórico*, 2000, p. 135

market, aims to stimulate economic progress and social development.⁵ Flexibility is seen as the removal of rigidity from some laws in order to permit greater disposability to alter or reduce commands when required.⁶ It is a set of rules intended to provide mechanisms that aim to reconcile economic, technological, political, and social changes in the relationship between capital and labor.⁷

Flexibility has many dimensions: wage flexibility, which refers to the adjustment of salaries according to changes in demand; employment flexibility, which eases the rigidity of worker dismissals, reducing its costs and providing a costless employment alternative that implies reduced employment security and protection; job flexibility, which refers to the ability to move employees to another department within the company and the ability to change job structures at minimum costs; and skill flexibility, which means the capability to easily adjust the skills of workers.⁸

According to Bourdieu's *Acts of Resistance*, flexibility is achieved by disciplining the workers based on the fixed idea that economic forces cannot be resisted and by creating in them a sense of unworthiness. In his words, "the new mode of domination, based on the creation of a generalized and perma-

⁵ ROBORTELLA, Luiz Carlos Amorim. *O Moderno Direito do Trabalho*, São Paulo, LTr, 1994, p. 97

⁶ NASCIMENTO, Amauri Mascaro. *Iniciação ao Direito do Trabalho*, 2003. p. 67

⁷ MARTINS, Sergio Pinto. *Direito do Trabalho*. São Paulo: Atlas, 2003. p. 24

⁸ STANDING, Guy. *The Precariat: The New Dangerous Class*, Bloomsbury, 2011. p. 6

ment state of insecurity aimed at forcing workers into submission, into acceptance of exploitation [...] very appropriate and expressive concept of *flexploitation* - phenomena of flexibility and exploitation”.⁹

With the progression of globalization and with governments and corporations pressuring one another to make their labor relations more flexible, the number of people in insecure forms of labor multiplied. Not only that, but social inequality also grew with the spread of flexible forms of labor.¹⁰ More and more people are falling victim to labor exploitation, therefore being subject to flexible labor relations that neither provide employment protection nor guarantee labor rights. As a consequence, the traditional working class is disappearing with the rise of other atypical forms of employment replacing waged workers with temporary, partial or outsourced ones.

According to David Harvey, the new labor market structure is composed of core group and a periphery group.¹¹ The core group—a steadily shrinking group characterized by classic labor contracts—, is made up of permanent full-time employees and is central to the long-term future of an organization. This group enjoys greater job security, better promotion and re-skilling prospects, and relatively generous pensions, insurance, and other fringe benefit rights.¹²

⁹ BOURDIEU, Pierre. *Acts of Resistance: Against the Tyranny of the Market*, 1988, p. 85

¹⁰ STANDING, Guy. *The Precariat: The New Dangerous Class*, Bloomsbury, 2011, p. 6

¹¹ Explanation provided by David Harvey from the figure taken Institute of Personnel Management's Flexible patterns of work (1986). HARVEY, David. *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change*, 1991, p. 150-152

¹² HARVEY, David. *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change*, Wiley-Blackwell, 1991, p. 150

The periphery group is a product of the new accumulation system that prioritizes the 'just-in-time' principle. Generally characterized by high labor turnover rates, this group has fewer career opportunities. It includes part-time, temporary, and casual workers; fixed-term contract staff; and subcontractors. This current trend of companies reducing or altogether eliminating their 'core' workers has risen, especially with the increasing new forms of indirect employment. This new category of workers can quickly be taken on board, and quickly and costlessly laid off when times get bad.¹³

In Brazil, this periphery group grew in the era of neo-developmentalism (2003-2013) under the Lula and Dilma presidencies, when labor regulation started to follow the modern forms of employment. It especially appeared in indirect forms of employment, which is comprised of three parties: workers, intermediary companies and client companies.

Labor law and collective bargaining were constructed on the basis of direct relationships between employers and employees. But who is responsible when a third party becomes an intermediary? Who has the right to control, command, and give directions: the client or the intermediary? However, for workers, they only need to know that they must report to two supervisors.¹⁴

These forms of employment are not generally allowed, as they decrease the power of defense of hyposufficient and make way for more labor exploitation. In most countries, indirect employment is exceptionally and extraordinary allowed, provided that the labor being supplied has a fixed period of

¹³ HARVEY, David. *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change*, Wiley-Blackwell, 1991, p. 151

¹⁴ STANDING, Guy. *The Precariat: The New Dangerous Class*, Bloomsbury, 2011, p. 34

time. However, in Brazil, outsourcing has been implemented according to the 'Brazilian way.' That is, employers are replacing their regular employees with indirect employees because it is cheaper.

Case after case demonstrates how outsourced workers are considered 'invisible' in the workplace. They are invisible to receiving orientation and training, to receiving safety equipment, and to being treated with dignity. According to research conducted by the Inter-Union Department of Statistics and Socio-Economic Studies (DIEESE)¹⁵ in partnership with Unified Workers' Central (commonly known as CUT)¹⁶, if the total number of outsourced workers' working hours were equal to those of formally hired workers, 882,959 new jobs would be created. Further, the report informs that the difference between the average remuneration rate of regular and outsourced workers is around 24.7%; outsourced workers work three more hours per week than do regular employees; the average tenure for regular workers is 5.8 years, while for outsourced workers it is 2.7 years; in the electrical sector, 61 out of 79 deaths caused by work accidents involved outsourced workers; in civil construction, 75 out of 135 deaths were outsourced workers; in the ten largest operations of slavery-like working conditions, almost 3,000 out of 3,553 involved outsourced workers. This clearly shows the direct link between modern outsourcing and work precariousness, especially characterized by the surpassed idea of labor as a commodity.

¹⁵ It was founded in 1955 to develop research to be used as support for workers' demands, to be a starting point on their labor issues. DIEESE is active in advisory on collective bargaining, research, education and public policies studies.

¹⁶ CUT, or Unified Workers' Central is the main national trade union center in Brazil. Formed in August 28, 1983, CUT is the largest and most important trade union federation in Brazil, representing 7.4 million workers in all productive areas. It is also the largest trade union center in Latin America and the fifth largest in the world. (CTUR, *Trade Unions of the World*. 2005. John Harper Publishing.)

Although this reveals the urgency for state intervention to protect victims of the neoliberal system by regulating outsourcing, the Brazilian government has opted to legalize the outsourcing of any work. Before the new regulations, only supporting or peripheral activities, such as cleaning services or vigilance (security) services, were allowed to be indirectly contracted. Therefore, the outsourcing of services related to core business competency remained illegal. However, the new regulations place no restriction on which activities can be outsourced, making way for more labor exploitation and consequent social exclusion.

With this background, the purpose of this study is to reveal the rights and protections that workers are entitled to according to Brazilian labor laws, but are currently being denied due to new forms of indirect employment. Although the new regulation authorizes the use of the indirect labor force without social charges for the company, these market practices actually face constitutional limitations. In this light, as constitutional protection covers all people without distinction, it is clear that constitutional labor protections shall be extended to outsourced workers.

1. 2. Composition and Scope of the Study

This study first analyzes the concepts of employer and employee, and the extent to which the Brazilian Constitution protects the employment relationship in Chapter II. Also, as international treaties are considered material sources for Brazilian regulations, International Labor Organization (ILO)

Convention 158 and Recommendation 198 are jointly applied to support employment protection.

Chapter III describes the principal points of outsourcing regulation in Brazil until the promulgation of the recent outsourcing law and Labor Reform. It explains the importance of Precedent 331 of the Superior Labor Court (TST), which ruled the practice of outsourcing for more than two decades, on stating the limits of core and noncore activities to declare the outsourcing's lawfulness.

Chapter IV lists the effects of outsourcing on workers' rights. It especially demonstrates how indirect employment relationships violate and diminish workers' rights, causing precarious working conditions and harming the individual workers' lives. This chapter also provides a distinction between outsourcing and mere unlawful labor intermediation, the latter of which indeed damages the whole new working class.

Chapter V provides a solution for the increase in labor exploitation. It proves that outsourcing is only found to be legitimate when it effectively respects the limits of the principle of human dignity and the social function of property. Further, in order to prevent labor exploitation through the practice of outsourcing, this chapter also provides the application of the principle of isonomy for outsourced workers.

Lastly, the conclusion reinforces the importance of limiting the practice of outsourcing. It especially emphasizes the uniqueness of distinguishing core and noncore activities to define whether the outsourcing is lawful or not, which suggested a considerable good influence to others countries, including Korea.

The scope of this study is focused on permanent outsourced workers, those who provide services on a habitual basis. Although the regulations include temporary workers, who are also analyzed in chapter III, permanent outsourced workers are more frequently exposed to precarious working condition. Thus, in order to better understand the main purpose of this study, permanent outsourced workers represent the scope of the present analysis.

1.3. Definition of ‘Outsourcing’

The term ‘*terceirização*’, created in 1970 by an engineer, is a neologism originating from the Latin word *terciarius* (meaning third in order or level). Unlike other countries (France, Spain, Italy and Portugal) where the practice of externalizing or transferring activities to a third party is termed ‘subcontracting,’ which implies the existence of a relationship between two companies¹⁷, the Brazilian term *terceirização* is exclusive. This term itself demonstrates the true intentions of the Brazilian enterprises to transfer the status of “employer” to a third party, consequently transferring the responsibility for labor duties and obligations as well.¹⁸

The term *terceirização* neither expressly appear in the context of related legislation, nor does it have a legal definition. Regulations express it as the provision of services to third parties. However, scholars, labor law professors, researchers, judges, and prosecutors have already consensually accepted the

¹⁷ MARCELINO, Paula; CAVALCANTE, Savio. *Por uma definição de terceirização*, 2012, p. 333

¹⁸ CARELLI, Rodrigo de Lacerda. *Terceirização como Intermediação de Mão de Obra*, 2014, p. 58

use of the term *terceirização* to refer to those practices. In this sense, this study uses the translation ‘outsourcing’ for the word *terceirização*, as most scholars, judges and prosecutors of Brazilian labor law do.

That said, outsourcing is commonly understood as the process of transferring activities that were originally executed within the company, to a specialized third company. It is ‘a management process in which some activities are passed on to third parties with which the company has established a partnership relationship, so that the outsourcing company would be able to concentrate on tasks essential to business operation’.¹⁹

There are two different forms of outsourcing: *external outsourcing*, in which a company *takes out* steps of its productive cycle, and *internal outsourcing*, in which a company *brings in* outside workers. External outsourcing, which happens when a company externalizes stages of its productive cycle, it indicates that the final product is the main concern. It occurs in automobile manufacturers, for example, when the company outsources production steps to its partners, whose workers provide labor in the same plant. Internal outsourcing, in turn, happens when one company uses employees hired by another company; here, the provision of services is the primary matter of concern. Internal outsourcing moves the employer out of the legal employment relationship.²⁰

External outsourcing can be included in the Brazilian ruling of Consolidation of Labor Law, Article 2, Paragraph 2, which states that “Whenever

¹⁹ CARELLI, Rodrigo de Lacerda. *Terceirização como Intermediação de Mão de Obra*, 2014, p. 58

²⁰ VIANA, Márcio Túlio. *A terceirização revisitada: algumas críticas e sugestões para um novo tratamento da matéria*, 2012, p. 199-207

one or more companies—even in the cases that each of them has its own legal personality; that they are under the direction, control or administration of another entity; that although each one has autonomy, they belong to an economic group—they shall be jointly and severally liable for the obligations of the employment relationships.”²¹ In short, it means that the principal company and its partners from the same economic group are jointly liable for the workers.

Internal outsourcing (further expressed by outsourcing), which is the object of the present study, is the practice that *brings in* outside workers to provide services. It happens in call-centers, for example, in which the company internalizes employees of another company, but these workers are excluded from a labor relationship with the one who benefits from his or her labor; in other words, the real employer is displaced from the employment relationship.²² This instrument, which disqualifies the traditional employment relationship, characterizes indirect forms of employment and deprives workers of receiving proper protection under labor laws.

²¹ Consolidação das Leis Trabalhistas, Artigo 2, § 2o Sempre que uma ou mais empresas, tendo, embora, cada uma delas, personalidade jurídica própria, estiverem sob a direção, controle ou administração de outra, ou ainda quando, mesmo guardando cada uma sua autonomia, integrem grupo econômico, serão responsáveis solidariamente pelas obrigações decorrentes da relação de emprego. (Redação dada pela Lei nº 13.467, de 2017)

²² VIANA, Márcio Túlio. *A terceirização revisitada: algumas críticas e sugestões para um novo tratamento da matéria*, 2012, p. 199-207

CHAPTER II – PROTECTION FOR EMPLOYMENT RELATIONSHIP

An employment relationship is the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship that reciprocal rights and obligations are created between the employee and the employer. It is the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labor law and social security.²³

As is widely known, where there is a regulation allowing indirect forms of employment, there will also be an attempt to disguise the employment relationship, placing workers in the dangerous situation of being deprived of the protections due to them. The practice of trilateral relations in the labor market has increased in the last two decades along with the evolution of globalization. This phenomenon has resulted in a large number of workers being disqualified to receive protection under labor law, as they are outside of the framework of employment relationships.

²³ International Labour Conference, 95th Session, 2006, p. 3

The neoliberal model has reinforced the practices of labor commodification, especially the extreme flexibility of labor standards and the deregulation of social rights. Thus, it has destabilized work as an instrument of affirming both the workers' citizenship and also the employment relationship.²⁴

This chapter will focus on the protection of direct employment relationships both on the international and national levels. On the international level, the employment protections given by ILO through Convention 158 and Recommendation 198 will be analyzed; on the national level, the Brazilian Constitution, especially the article 7, and the Consolidate of Labor Laws' provisions on the definitions of employer and employee will also be studied.

2. 1. Protection by ILO

The International Labor Organization (ILO) is an agency of the United Nations, which was established in 1919 by the Treaty of Versailles, with the aim of promoting world peace linked to social justice. Along with the Declaration of Philadelphia, which strengthened the directives of the ILO, they emphasized the need for States to ensure fair working conditions in order to avoid internal destabilization that could lead to international crises. Thus, under the influence of workers' movements and in the light of the directives of the ILO, the legal systems of the economically hegemonic countries in the

²⁴ DELGADO, Gabriela Neves. *Direito Fundamental ao trabalho digno*, 2006

twentieth century have elevated the state to the condition of guaranteeing welfare to its citizens, either through the imposition of limits on exploitation of labor, or through the creation of instruments to protect citizens against social risks such as old age, unemployment, and incapacity to work.²⁵

The ILO has the mission of promoting opportunities for men and women to have access to decent and productive work in conditions of freedom, equity, security and dignity. Decent work, a concept formalized by ILO in 1999, summarizes its historical mission of promoting opportunities for men and women to have productive and quality work in conditions of freedom, equity, security and human dignity. It is considered a fundamental condition for overcoming poverty, reducing social inequalities, ensuring democratic governance and sustainable development.²⁶

The existence of an employment relationship is the condition that determines the application of the labor and social security law provisions addressed to employees. Because of this, the ILO provides several guidance to extend labor rights' protection to all workers who provide labor under certain conditions. The principal ILO employment relationship protections are Convention no. 158. and Recommendation no. 198.

²⁵ EBERT, Paulo Roberto Lemgruber. *O direito do trabalho no século XXI: em busca de uma nova estruturação*, 2012, p. 215

²⁶ SILVA, Leda Maria Messias da; NOVAES, Milaine Akahoshi. *Dumping social e dignidade do trabalhador no meio ambiente de trabalho: propostas para a redução da precarização*, 2015, p. 29

2. 1. 1. The Importance of the ILO's Employment Protection to Brazilian Legislation

Brazilian Labor Law is characterized by allowing the plurality of sources of law, which can be state, non-state or international. International sources are understood those treaties signed between two or more States, as well as the conventions and recommendations given by the ILO. In order to an ILO's convention integrates Brazilian Labor Law, it shall be ratified by the National Congress through legislative decree, released by the promulgation of the President of the Republic. Once ratified, it has the effect of cancelling internal legislation that is against the provisions contained within the convention.²⁷

The main reason for the existence of the ILO is its normative function. The conventions contain norms that generate individual subjective rights. In turn, the recommendations provide principles that serve as inspiration and a model for national legislative activity and to support judicial decisions. In order to be part of the national legal system, the conventions are required to be ratified by the State. The declarations, recommendations and resolutions do not depend on ratification for their validity; they serve as a model for the public authorities to legislate, judge and implement policies.²⁸

²⁷ SILVA, Otavio Pinto. *Fontes do Direito do Trabalho*, 2001, p. 213

²⁸ BRINGEL, Elder P. B.; FERRAZ, Maria C. M. *A OIT e sua função normativa: Convenções não ratificadas pelo Brasil e implementação de direitos fundamentais*.

Nevertheless, the international guidelines for the protection of human labor are incorporated in the Brazilian Constitution and Labor Laws as a material source of law, regardless of their approval. In the words of Sussekind, “recommendations and unratified conventions constitute a material source of law, since they serve as inspiration and model for national legislative activity, administrative acts, instruments of collective bargaining.”²⁹

The responsibility of States is independent of the ratification of the respective conventions; it derives from the simple fact that they refer to principles enshrined in the ILO’s fundamental principles.

With that said, the importance of Convention 158 and Recommendation 198 is that they provided principles of employment continuity and the primacy of facts respectively, as a source to protect employment relationships.

2. 1. 2. Convention No. 158 - Termination of Employment Convention, 1982

The main point of the Termination of Employment Convention is to protect labor relationships against unjustified dismissal. As stated in Article 4, “The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”³⁰ In other words, this international rule protects workers

²⁹ BRINGEL, Elder P. B.; FERRAZ, Maria C. M. *A OIT e sua função normativa: Convenções não ratificadas pelo Brasil e implementação de direitos fundamentais.*

³⁰ ILO Convention 158, Article 4.

against arbitrary or unjustified dismissal provoked by the employer. In accordance to Article 10, in the case that a termination is found to be unjustified by national courts, the dismissal may be declared invalid and the worker may return to his job, or, if this is not possible according to national policies, the worker is entitled to an indemnity or compensation.³¹

The principal standard provided is that the termination of the labor contract shall have justified reason, whether related to the employer's ability or to preserving the proper functioning of the company. By valuing the employment itself, the Convention 158 establishes limits to the employer's managing power, by deterring the abuse of power in worker's dismissal.³²

Convention No. 158 is the complete enshrinement of the principle of continuity of employment. It results from the imperative public order rules, characterized by State intervention to protect employees and, in this sense, instigate the permanence of workers in an employment relationship—protection based on the employee's obvious vulnerability.³³

³¹ Convention 158, Article 10. "If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate."

³² ALVARENGA, Rubia. "*A organização internacional do trabalho e a proteção aos direitos humanos do trabalhador*". 2007. p. 67

³³ ALVARENGA, Id. at p. 67

According to Plá Rodríguez, the principle of continuity of employment refers to the current tendency of labor law to attribute to the employment relationship the longest duration, in favor of workers.³⁴ Continuity of employment is mainly expressed in the right to stability in employment. It means that a worker shall be protected from arbitrary dismissal, which implies the right to keep the job throughout his working life unless there is a cause for dismissal. It points to workers' continuity and permanence in employment as a natural tendency of the productive process.³⁵

In Brazil, this convention was approved in September 16, 1992 by the National Congress, through the Decree-Law No. 68, ratified in January 4, 1995, and enforced in April 10, 1996. Surprisingly, 7 months later the government denounced the ratification, announcing that the aforementioned convention would cease to be in force in Brazil from November 20, 1997.³⁶

The reason for cancelling this convention is that Brazilian Labor Law already has its own compensation for unfair dismissal, which is a penalty of 40% of the Service Assurance Fund. Therefore, if Convention 158 had not been denounced, another rule would have emerged on the issue of compensation for unfair dismissal, hence causing confusion over which rule applies.

However, even with the denouncement of Convention 158, the content of this ruling, which is the principle of employment continuity and protection

³⁴ GEMIGNANI, Daniel. *Contemporary challenges and the required reading of the principles of labor law: principles of unbreakability, the primacy of reality and continuity*. p. 231

³⁵ SCHNELL, Fernando. *Abordagem histórica e teleológica do princípio da continuidade da relação de emprego*, p. 70

³⁶ ALVARENGA, Rubia. *A organização internacional do trabalho e a proteção aos direitos humanos do trabalhador*, 2007, p. 67

against arbitrary dismissal, remains as a source of guidance for legislators and judges. It incorporates the labor doctrine, which is useful when the law is omissive or confusing.

2. 1. 3. Employment Relationship Recommendation No. 198 (2006)

Increased changes in the world of work has given rise to new forms of employment. These modern forms of labor relationships have made employment statuses unclear. With this lack of clarity, workers who should be protected by labor and employment law have not been receiving that protection; in fact, modern regulations have expelled these workers to another scope of relationships.³⁷

Knowing the problems created by indirect forms of employment, namely the lack of protection for workers outside the scope of the employment relationship, the ILO responded with Recommendation No. 198. Recommendation No. 198 focuses on combating disguised employment relationships and the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at the national level.³⁸

Employment Relationship Recommendation No. 198, adopted on June 15th, 2006, aims to encourage States to implement policies that properly ad-

³⁷ International Labour Conference, 95th Session, 2006, p. 6

³⁸ Ibid.

addresses the issue in a dynamic manner by adapting the legal definition of employment in accordance with the realities of working relationships, in order to guarantee adequate protection to workers who are in fact in an employment relationship.³⁹

Disguised employment refers to an employer practice in which he or she does not treat an employee as such, in order to hide the employee's true legal status. It occurs when the company hires workers to provide services under forms of civil and commercial contracts, with the intention of nullifying or attenuating the protection afforded by the law or evading tax and social security obligations.⁴⁰

The provisions contained in this guidance clearly recognize that some categories of workers can legitimately be denied the protections that are provided to others categories of workers who were directly hired.⁴¹ Knowing this, the recommendation indirectly attacks the practice of outsourcing, as outsourcing contracts are typically disguised employment relationships that 'legitimately' impede upon workers' access to labor law protections. In this unclear relationship, the employer treats the individual who provides services differently than he would direct hires.⁴²

In order to protect employment relationships and combat disguised labor relations, the ILO expressed in the 95th Conference Session the principle of primacy of facts to determine the existence of an employment relationship.

³⁹ International Labour Conference, 95th Session, 2006, p. 55

⁴⁰ International Labour Conference, Id. at p. 12

⁴¹ CREIGHTON, Breen and McCrystal, Shae. *Who is a "worker" in international law?* 2016, p. 716

⁴² International Labour Conference, op. cit., 7-8

According to this principle, this formation should be guided by facts rather than the name or form given to it by the parties. It depends on what happened in reality, and not on how the involved parties describe the relationship.⁴³

Also, Plá Rodriguez accordingly defended that in the case of a disagreement between what happened in practice and what emerges from documents or agreements, preference should be given to the former—that is, to what happened in the field of facts.⁴⁴

With that said, the purpose of Recommendation No. 198 is to ensure that workers are not excluded from protections that they ought to have access to, through the use of disguised employment or other avoidance strategies. It aims to protect employment relationships based on facts, and to ensure that workers are not denied protection through the manipulation of contractual arrangements.⁴⁵

2. 2. Brazilian Constitution on Employment Protection

2. 2. 1. Brazilian Constitutions and Evolution of Social Rights

⁴³ International Labour Conference, 95th Session, 2006, p. 7-8

⁴⁴ RODRIGUEZ, Américo Plá. *Princípios de Direito do Trabalho*, São Paulo: LTr, 2000, p. 338

⁴⁵ CREIGHTON, Breen and McCrystal, Shae. *Who is a “worker” in international law?*, 2016, p. 716

The social state can be defined as a state model that guarantees the minimum material for a dignified existence to its citizens—hat is, it secures the minimum housing, health, education, and food necessities. It corresponds, therefore, with a state that manages to give minimally effective economic and social rights. This state model began with the Constitutions of Mexico in 1917 and of Germany in 1919. The latter was a strong inspiration for the elaboration of the Constitution of 1934 in Brazil, which was characterized by the inclusion of a new roll of social rights.⁴⁶

Work obtained its status as a fundamental right at the height of the welfare state in European countries. In Brazil, the dynamics of the consolidation of the Labor Law were established at different times: the period of institutionalization from the 1930s to 1945, the period of expansion of labor legislation from 1945 to 1988, and the period of constitutional democratic consolidation of Labor Law from 1988 to the present.⁴⁷

Since 1934, all of the Constitutions have included provisions on employment protection, aiming to preserve the temporal stability of the employment relationship and to promote the social inclusion of the worker to the company, which is an economic institution marked by a social function.⁴⁸

The Constitution of 1934, the first constitution to provide social rights, mentioned the temporal stability of the employment relationship in Paragraph

⁴⁶ BARACHO, Hertha Urquiza, MAIA, Mario S. F. *A efetividade dos Direitos Sociais no Brasil: comentários sobre o papel do judiciário*, 2007, p. 55

⁴⁷ DELGADO, Gabriela Neves. *A CLT aos 70 anos: rumo a um direito do trabalho constitucionalizado*, 2013, p. 269

⁴⁸ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 96

1 of Article 121, by stating the right of indemnification to the worker dismissed without just cause. In the Constitution of 1937, Article 137 prescribed the possibility of stability in employment relationships. At that time, along with the Consolidation of Labor Laws of 1943, the principle of the continuity of employment is seen in two different protections: the proportional indemnity regarding the time of service and the employment stability after 10 years of labor.⁴⁹ In 1946, the democratic Constitution extended this principle of stability to the rural workers in Article 157.

The military government takeover in 1974 broke the exclusivity of the stability employment regime envisaged in the CLT, and it instituted the alternative and optional system of Guaranteed Fund for Length of Service (FGTS) in 1966; this replaced the stability regime with the monthly deposit for the benefit of the worker. Following the Constitution of 1967 in Article 158, II, the alternative of “stability” was maintained, “with indemnification or an equivalent severance fund to dismissed workers.”⁵⁰

After a long period of growing dissatisfaction with military rule, Brazil returned to democracy in 1985 with the election of President Tancredo Neves,

⁴⁹ Articles 477 and 942 of CLT. Art. 477 - É assegurado a todo empregado, não existindo prazo estipulado para a terminação do respectivo contrato, e quando não haja ele dado motivo para cessação das relações de trabalho, o direito de haver do empregador uma indenização, paga na base da maior remuneração que tenha percebido na mesma empresa. Art. 492 - O empregado que contar mais de 10 (dez) anos de serviço na mesma empresa não poderá ser despedido senão por motivo de falta grave ou circunstância de força maior, devidamente comprovadas.

⁵⁰ PINHEIRO, Maria E. D. *Estabilidades no emprego. Evolução das estabilidades no Brasil – abordagem histórica*, 2016

the first elected president in over 20 years.⁵¹ This resulted in the establishment of a national constitutional assembly, whose work culminated into the adoption of a new federal Constitution on October 5, 1988.

The new Constitution contained numerous guarantees regarding employee rights, significantly expanding employee benefits in Articles 7 to 9.⁵² The aim of these changes was to increase workers' benefits and reverse the previous period's restrictions on workers' rights to organize.⁵³

As work is a valuable instrument to ensure the dignity of workers, the Constitution of 1988 built a broad normative system of protection for the employment relationship, making the protection of employment relationships the duty of the country.⁵⁴ One indication of the importance of employment is found in the fact that in the 1988 Constitution, the rights of workers are included in the chapter of *fundamental rights and guarantees*.⁵⁵

The Constitution of 1988 abolished the decennial stability and maintained the compensatory indemnification for unjust dismissal. Employment protection against arbitrary dismissal and the restriction of employers' power to dispense unilaterally are evidence that the Brazilian Constitution aims to protect direct employment relationships.

⁵¹ Unfortunately, the new president became ill and died soon after the election and before assuming the mandate. His vice president, Jose Sarney, was sworn in as president and served the full five-year term.

⁵² VAUSE, W. Gary; PALHANO, Dulcina de Holanda. *Labor Law in Brazil and the United States-Statism and Classical Liberalism Compared*, 1995. p. 597

⁵³ GONZAGA, Gustavo and others. *Labor Turnover and Labor Legislation in Brazil. Economia*, p. 168

⁵⁴ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 92-97

⁵⁵ BUCHANAN, Richard. *The Future of Brazilian Labor Law under the Federal Constitution of 1988*, p. 215

2. 2. 2. Constitutional Employment Protection

In the same line with ILO Convention 158, the Brazilian Constitution of 1988 discusses protection against unfair dismissal in Article 7, Item I. It is a social right of employees to have the “employment protected against arbitrary dismissal or against dismissal without just cause, in accordance with a supplementary law which shall establish severance-pay, among other rights.”⁵⁶ The Constitution follows the principle of continuity guaranteeing the protection of labor relationships against dismissal without a minimally relevant reason. This protection is for the employment relationship between the employers—those who hire, organize, direct and supervise the production activity, and the employee—those who perform the work in a habitual, personal, salaried and subordinate way.⁵⁷

Convention 158, Article 7, Item I of the Brazilian Constitution declares compensatory indemnity for unfair dismissal. Further, according to the first paragraph of Law 8036 of 1990 in Article 18, when the dismissal is without just reason, the employer shall deposit 40% of the total amount deposited in the employee’s FGTS account.⁵⁸

⁵⁶ Constitution of 1988, Article 7. The following are rights of urban and rural workers, among others that aim to improve their social conditions: I - employment protected against arbitrary dismissal or against dismissal without just cause, in accordance with a supplementary law which shall establish severance-pay, among other rights;

⁵⁷ ALVARENGA, Rubia. *A organização internacional do trabalho e a proteção aos direitos humanos do trabalhador*, 2007, p. 66

⁵⁸ Law No. 8,039/1990. Article 18, § 1º Na hipótese de despedida pelo empregador sem justa causa, depositará este, na conta vinculada do trabalhador no FGTS, importância igual a quarenta por cento do montante de todos os depósitos realizados na

In addition to employment protection, the Constitution states the right of prior notice of dismissal; Article 7, item XXI states that “notice of dismissal in proportion to the length of service of at least thirty days, as provided by law”. It indicates the reinforcement of protection against the increasing practice of unmotivated rupture of the employment contract.⁵⁹ According to that, employers shall give a prior notice of thirty days to employees so that he or she may seek a new job; further, the employee is entitled to receive 30 days’ wages, even without working.

Not only that, but the protection of employment relationships enables employees to access other rights described in Article 7 such as unemployment insurance, social security deposits, paid annual leave, and retirement pension. Those rights depend on the successive working period to be enjoyed, as well as the longevity of the employment relationship.⁶⁰

By guaranteeing employees protection against unmotivated termination of contract, the Constitution aims to ensure not only the maintenance of their subsistence, but also their integration into the life and dynamics of the company, as employment is also a means of personal fulfillment and community integration.⁶¹

It can be affirmed that the recent Constitution promotes direct employment relationships. This is because in the social rights listed in Articles 7 and

conta vinculada durante a vigência do contrato de trabalho, atualizados monetariamente e acrescidos dos respectivos juros. (Redação dada pela Lei nº 9.491, de 1997)

⁵⁹ DELGADO, Mauricio Godinho. *Curso do Direito do Trabalho*, 2012, p. 1135

⁶⁰ DELGADO, Gabriela Neves; AMORIM, Helder Santos. *A inconstitucionalidade da terceirização na atividade-fim das empresas*, 2014

⁶¹ PORTO, Lorena Vasconcelos, *Terceirização: fundamentos filosóficos, sociológicos, políticos, econômicos e jurídicos da jurisprudência do TST (Súmula nº 331)* 2014, p. 162

8, the Constitution takes into account two natures of protection: temporal and spatial. The former is based on the principle of continuity of the employment relationship, which is directly linked to the rights prescribed in Article 7 such as compensatory damages in unfair dismissal (I), unemployment insurance (II), deposits of social security (III), annual vacation with remuneration at least one third higher than the normal salary (XVII), and right to retirement pension (XXIV)—those rights that depend on the successive working period to be enjoyed. Spatial protection, in turn, is based on the maximum integration of the worker into the company's life and the value of the direct relationship between the worker and the direct beneficiary of the work. It is relate to the right to organize based on professional categories in Article 8 and the right to strike in Article 9. Also, the claim for the maximum integration of workers into the company's business is revealed in its Article 7, XI, which guarantees workers' participation in the profits or results of the company.⁶²

Therefore, the employment relationship is a constitutionalized legal institute as a fundamental guarantee of the worker. One of the main characteristics of protected employment, highlighted in Recommendation 198, lies in the claim for a legal relationship of employment that is maximally stable over time, and to be signed directly between the worker and the service taker as the final beneficiary of his or her work.⁶³

⁶² DELGADO, Gabriela Neves; AMORIM, Helder Santos. “*A inconstitucionalidade da terceirização na atividade-fim das empresas*”, 2014

⁶³ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 95

2.3. Protection by Labor Legislation

The Consolidation of Labor Laws (CLT) was approved by Decree-Law No. 5452, dated on Labor Day (May 1, 1943), exclusively for the protection of urban workers (this protection was extended to rural workers as the with the promulgation of the Constitution of 1988). On that day of festivity, Getulio Vargas, known as “the father of the poor”, signed the CLT in the Stadium of San Januário, where he used to give speeches. As the only Brazilian ruler who had shown special sensitivity to social questions to that day, and he was therefore concerned with regulating labor laws in the country. He also came to be identified as the “founder of Social Justice in Brazil”.⁶⁴

Since the creation of the CLT, employment is protected with the primary objective of improving working conditions and fixing a minimum level of civilization for all workers, due to their peculiar condition of vulnerability in the modern capitalist society. In the labor relationship, the employee is the vulnerable party and the employer is the owner of the means of production.⁶⁵ Because of this, labor laws have the role of regulating this disproportionate relationship by setting imperative regulations to ease the unending struggle of capital and labor. Labor contracts, in this sense, are intended to limit the freedom of both employees and employers; while employees are subject to their employers’ orders, employers’ properties are limited to be used in accordance to social function.

⁶⁴ VIANA, Márcio Túlio. *70 Anos de CLT: Uma historia dos trabalhadores*, 2013, p. 272

⁶⁵ MIRAGLIA, Livia Mendes Moreira. *O direito do trabalho como instrumento de efetivação da dignidade social da pessoa humana no capitalismo*, 2009, p. 152

2. 3. 1. Employee and Employer: Articles 2 and 3 of the CLT

The CLT has the role of defining who the employee is and who the employer is so that the employment relationship shall be formed. In that sense, Article 2 and 3 conceptualize the figures of employer and employee. Article 3 states employee is any natural person who provides services of a non-contingent nature to an employer, under his or her dependency on payment of salary.⁶⁶ The definition of employee is important because it is the threshold criterion for the application of employee rights under the CLT.

An employer is defined in Article 2 as “any business, individual or collective, which assuming the risk of economic activity, hires, pays wages, and directs the personal rendering of services.” Further, the CLT provides a broad definition of employer, as it establishes joint liability for employers participating in industry organizations. In that sense, as stated in Article 2, Paragraph 2, “Whenever one or more companies, although each of them has its own legal personality, are under the direction, control or administration of another, or when, though each one has autonomy, they belong to an economic group, they shall be jointly and severally liable for the obligations of employment relationship.”

Thus, whoever is within the scope above shall be considered an employee or an employer, even if it is against the will of the contractors and their

⁶⁶ CLT, Art. 2º. Considera-se empregador a empresa, individual ou coletiva, que, assumindo os riscos da atividade econômica, admite, assalaria e dirige a prestação pessoal de serviços. Art. 3º. Considera-se empregado toda pessoa física que prestar serviços de natureza não eventual a empregador, sob a dependência deste e mediante salário.

contractual arrangements. This because labor laws are imperatives rules, and their application is due the consideration of the primacy of facts; that is, the factual reality of the relationship is more appreciated than the way it formally presented.⁶⁷

Then, based on these concepts related to employers and employees, there are five requirements informing whether the employment relationship exists: services provided by a natural person, personality (non-substituable), non-sporadic basis (habitual way or permanent character), onerosity and subordination.⁶⁸

Briefly analyzing those requirements, personality understands that the nature of the provision of services must be *intuitu personae*; that is, the work must be performed by the contracted person himself, not by any other person. Non-sporadic basis means that the provision of work must be continuous, in the sense that the workers provide labor in function that is regular and normal of the company. The work carried out must have a permanent character. Onerosity is when the labor provided is compensated by a financial value based on salary; that is, the total of counter-payments paid to the employee by the employer, by virtue of the employment relationship agreed upon.⁶⁹ In this way, those who work for moral or religious reasons, such as volunteers would be outside this framework. However, the fact that the employer has never paid

⁶⁷ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 63-64

⁶⁸ DELGADO, Mauricio Godinho. *Curso do Direito do Trabalho*, 11st Edition, 2012, p. 203

⁶⁹ DELGADO, Id. at p. 287-291

for the provision of services does not entail the inexistence of this requirement. Finally, the requirement of subordination, also called dependency, is the most important requirement that typically defines the employment relationship. Thus, subordination is a state of real dependence created by law, giving the employer the right to command and give orders, while on the other side lies the duty of the employee to follow to these orders.⁷⁰

However, the modern form of work organization requires new reflections on the concept of subordination, in order to define whether a certain relation is in fact an employment relationship. In this sense, many scholars are defining subordination on another level, essentially from an objective perspective, integrating the worker into the productive process of enterprise. The object of this new theory is to characterize subordination based on whether the activity performed by the worker and the nature of that activity are essential to the functioning of the organizational structure of the company.⁷¹ With this definition, regardless of the existence of direct orders, what matters is whether the worker is providing services that constitute a company's dynamics. Although this theory is not yet generally agreed upon and applied, some sectors of jurisprudence are defining employment relationships based on objective subordination.

Nevertheless, the Brazilian Constitution and the CLT indicate that Brazil is highly statist and interventionist in its treatment of the legal formation

⁷⁰ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*. 2014. p. 63-64

⁷¹ FRAGA, Cristiano. *Subordinacao Estrutural: um novo paradigma para as relações de emprego*, 2011, pp. 13-14

of the employment relationship.⁷² The intuition of Brazilian legislator to protect direct employment relationship and make the use of indirect forms of employment in exceptional cases is evident.

2. 3. 2. Employment Relationship Protection: Article 9 of the CLT

To reinforce the principle of the primacy of facts and to protect the real employment relationship, Article 9 of the CLT provides a provision of nullity stating, “shall be null and void the acts performed with the purpose of distorting, preventing or defrauding the application of the precepts contained in this Consolidation”.⁷³

Although it is an old regulation (1943), this penalty has more meaning these days as modern labor contracts tend to hide the real status of the employer through civil or commercial contracts that are employment relationships in practice. By virtue of Article 9, this disguised employment relationship is punished, and the employment contract subsists with the consequent application of reciprocal rights and obligations from labor laws.⁷⁴

In light of Article 9, an outsourcing service agreement signed between contractor—the direct beneficiary of worker’s labor, and the worker, with the

⁷² VAUSE, W. Gary; PALHANO, Dulcina de Holanda. *Labor Law in Brazil and the United States-Statism and Classical Liberalism Compared*, pp. 603-605

⁷³ CLT, Artigo 9. “Serão nulos de pleno direito os atos praticados com o objetivo de desvirtuar, impedir ou fraudar a aplicação dos preceitos contidos na presente Consolidação.”

⁷⁴ DELGADO, Mauricio Godinho. *Introdução ao Direito do Trabalho*, 1995, p. 302.

purpose of undermining the application of labor law is considered null and void.⁷⁵ That is, any covenant, agreement, or contract that tries to prevent the verification of the conditions of the employee and the employer is considered null and void.⁷⁶

Brazilian labor laws strongly protect labor contracts against fraud and other modern practices that hinder the application of labor law, especially triangular labor relationships. Labor laws have fought throughout the history to conquer the recognition of laborer vulnerability and its needs for special protection; for that reason, labor laws have an imperative character that prevails over any other agreement contrary to its principles.

In that sense, labor law has the main role of regulating subordinate relations—that is, employment relationships—and it does not intend to regulate economic business activity.⁷⁷ However, the increase of indirect forms of employment, that is a phenomenon defended as a part of the natural market process, violates the fundamental principles of labor laws, which mandates the application and has a public character.

Labor Law does not have the autonomy and legitimacy to declare the legality or illegality of the business of outsourcing, but it can identify a mockery of labor legislation—a case that is not a true outsourcing, but simply a practice of interposing a company for the withdrawal of direct employment.⁷⁸

⁷⁵ SÁ, Arquimedes Vieira de. *Dumping social e terceirização: uma análise Projeto de lei da Câmara n. 30/2015*, 2016, p. 13

⁷⁶ CARELLI, Rodrigo de Lacerda. *O ativismo judicial do Supremo Tribunal Federal e o debate sobre a terceirização*, 2014, p. 247

⁷⁷ CARELLI, Id. at p. 68

⁷⁸ CARELLI, Id. at p. 68

According to labor law, service provision contracting and subcontracting are lawful, under the condition that they truly and factly are service contracts and subcontracts. However, they are unlawful and consequently null when they hide a factly employment relationship behind the contract arrangements. It is fundamental, therefore, to observe whether the agreement is consistent with the form and essence of its type of contract, or if there are distortions that, in performing and executing the agreement, actually reveal a labor relationship under the cover of an agreement admitted by the Civil Code. This is the case when the worker provides personal and permanent services, but receives directions and orders from the contractor— who is the beneficiary of his labor—rather than from his employers. In doing so, the worker is assuming the risks of the economic activity.⁷⁹ This type of employment characterizes the majority of modern forms of employment.

The possibility of controlling fraud and the dissimulation of labor relations, as guaranteed in Article 9, consists of a true general clause to support all labor regulations. This gives the Labor Court not the power to create legal norms, but to apply justice in concrete cases based on facts to judge the individual employment relations.⁸⁰

Therefore, in the light of Articles 2, 3 and 9, the CLT clearly intends to protect all true employment relationships from any civil and contract arrangement, including outsourcing, that aim to hinder the application of labor laws.

⁷⁹ SÜSSEKIND, Arnaldo. *Instituições de direito do trabalho*. 2000, p 281 *Apud*: CARRELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 76.

⁸⁰ MELLO FILHO, Luiz Philippe Vieira de; DUTRA, Renata Queiroz. *A terceirização de atividade fim: caminhos e descaminhos para a cidadania no trabalho*, 2014, p. 211

In this way, both the Constitution and the CLT protect everyone who provides labor through subordination and under payment on permanent basis, regardless the contractual name that this worker receives.

CHAPTER III - THE REGULATION OF INDIRECT FORMS OF EMPLOYMENT

Chapter III examines the evolution of the regulation of indirect employment in Brazil. It briefly presents the beginning of this practice in the public sector, which was later extended to the private sector as well. With the implementation of the outsourcing of peripheral activities in the private sector, the second part shows the importance of the restriction established by the Superior Labor Court through Precedent 331, which governed the practice of outsourcing for more than two decades. Part 3 organizes and explains the recently approved regulations on outsourcing, which seem to allow the outsourcing of any services, which is a current issue among labor researchers, professors, and judges. Lastly, it briefly analyzes Bill 30, which is in the process of approval, and directly affects the outsourcing of all activity including core business competencies.

3. 1. Background of Precedent 331 of TST

In Brazil, the process of decentralization came with the major automobile industries in 1950. With the argument of improving quality, productivity and competitiveness, major companies introduced the work restructuring model based on the principle of dedicating themselves to the essence of business. At this time, automobile industry was not characterized by making and

producing cars, but rather by assembling auto parts produced by another company into vehicles. This strategy of transferring activities unrelated to the essence of the business to third parties was introduced in Brazil and it was applied to the production of vehicles. However, this technique of labor outsourcing began to spread with greater intensity in the late 1980s and early 1990s, when neoliberal principles gained influence in Latin America governments.

The elaboration of Law 6,019/1974 in 1974 introduced a legal mechanism for companies to face the competitiveness of the globalized economic system, opening the doors to outsourcing by enabling them to hire skilled labor at lower costs and with no direct responsibility for the employees.⁸¹ Driven by market demand, this law regulates temporary work, in which a labor force is provided to a service taker company to meet its transitory needs for personnel substitution or extraordinary service demands (Article 2).⁸²

Outsourcing in Brazil increased significantly in the 1980s with the promulgation of Law 7,102/83, which authorized labor outsourcing in the services of patrimonial surveillance and transport of values by financial institutions (Article 3, I). The authorization was posteriorly extended to the private sector in 1994 with the formulation of Law 8,863 (1994).

In capitalist countries characterized by advanced industrialization, the process of expelling and externalizing activities began in the 1980s. However,

⁸¹ SANTOS, Anselmo Luis dos; BIAVASCHI, Magda Barros. *A terceirização no contexto da reconfiguração do capitalismo contemporâneo: a dinâmica da construção da Súmula nº 331 do TST*, 2014, p 25

⁸² DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*. 2014. p. 38

in Brazil the private sector was only allowed to outsource temporary activities, at that time because the practice of continuous subcontracting labor by an interposed company was considered illegal or unlawful in the private sector, although authorized in the public sector.⁸³

In the public sector, the outsourcing of services began in 1967 with the argument of decentralizing the public services prescribed in the Constitution of 1967. Legislation regarding the outsourcing of services in the private sector only began to emerge in the beginning of the of 1970s, with the introduction of the Toyotist production model's process of implantation in Brazil.

The 1990s were marked by reformulation in the State to deregulate social institutions and the economic market, under the influence of the neoliberal principle of the Subsidiary State. Due to the emergence of labor deregulation and flexibilization, this period was marked by innumerable privatizations of public companies and high levels of unemployment in the labor market. Through this environment, the outsourcing of services was disseminated throughout business, affecting all sectors of the economy.⁸⁴

Contrary to the experience of developed countries, outsourcing in Brazil has significant specificities. According to a SINDEPRESS⁸⁵ study on outsourcing in Brazil, examining the State of Sao Paolo between 1985 and 2005, Brazilian companies that outsourced work were not aiming to qualify their

⁸³ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 40

⁸⁴ DELGADO, Id at p. 44

⁸⁵ Sindicato dos empregados de empresa de prestação de serviços e terceiros is the Union of workers of third party service provider of the State of Sao Paolo. (SINDEPRESS)

products; rather, they were essentially concerned with saving their companies from the stagnation of the 1980s. This meant that national companies were bound to a subordinate and passive entrance into globalization. For this reason, outsourcing became a defensive restructuring process, largely characterized by the minimization of costs and strategies of resistance or survival.⁸⁶

3. 1. 1. Labor Outsourcing in the Public Sector

In the public sector, the Brazilian Constitution of 1967 required public tender for workers providing its labor to Public Administration. In this sense, for a labor relation between a worker and a public institution to be established, workers were required to be approved through a service examination. In this sense Article 6, Item III of Decree-Law 200 (1967) applied the principle of decentralization to public activities. With that, the government began to transfer activities related to service distribution, such as electricity distribution and activities related to some task operations, such as cleaning service, to the private sector.⁸⁷

The decentralization of public services is grounded in Article 10, Paragraph §7, which says, “in order to better perform the tasks of planning, coordination, supervision and control and with the aim of preventing the excessive growth of the administrative machinery” the government shall release itself from the execution of its operation, resorting, whenever possible, to broadly

⁸⁶ POCHMANN, Marcio. *A superterceirizacao dos contratos de trabalho*.

⁸⁷ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 40

decentralized indirect execution.⁸⁸ Nevertheless, the question of the extent of outsourcing in public administration—for instance, the group of tasks, activities and functions that could be the object of outsourcing—remained. To heal this question came the Law 5,645 (1970) answered this question by exemplifying some of those activities.⁸⁹

Law 5,645, ratified in 1970, identified the activities that were allowed to be indirectly contracted by the public sector. Article 3, the sole paragraph of this law, points to activities related to “transport, preservation, custody, securities transactions, and other similar transactions would preferably be subject to indirect contract”.⁹⁰

In this exemplary roll, all activities mentioned in Article 3 referred to support activities, instrumental and secondary tasks. The legal authorization for outsourcing was limited exclusively to non-core activities, merely instrumental activities.⁹¹

The Constitution of 1988, Article 37, Item II, maintained the constitutional service examination requirement to hire personnel: “investiture in a public office or position depends on previously passing an entrance examination consisting of tests or presentation of academic and professional credentials, according to the nature and the complexity of the office or position, as provided by law, except for appointment to a commission office declared by law as being of free appointment and discharge”.

⁸⁸ DELGADO, Mauricio Godinho. *Curso do Direito do Trabalho*, 11st Edition, 2012, p. 439

⁸⁹ DELGADO, Id. at p. 439-440

⁹⁰ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*. 2014. p. 41

⁹¹ DELGADO, *op. cit.*

The following Decree Law 2,271 (1997) revoked the previous regulation and entered into force ruling over indirect labor provided for Public Administration. In that, accessory, instrumental or complementary activities related to activities of “conservation, cleaning, security, surveillance, transportation, information technology, cupbearer services, reception, telecommunications and maintenance of buildings, equipment and installations services were allowed to be preferably indirectly contracted” (Article 1, Paragraph §1). However, this law prohibited the indirect contracting of services related to core activities, or “activities inherent to functional categories covered by the plan of positions of the organ or entity” (Article 1, Paragraph § 2º), which are filled with public servants with approved service examinations.⁹²

3. 1. 2. Labor Outsourcing in the Private Sector

The use of outsourcing, a typical instrument in Brazil’s private sector, has increased since the 1990s. Although the subject of this study is the outsourcing of labor, which is the supplying of manpower in specialized services by an interposed company, this section will provide a briefly summary of service delivery contracts in the construction sector—another sector characterized by manpower supplied through an interposed company, due to an exception given exclusively by the Consolidation of Labor Law.

Another exception of subcontracting labor through an interposed company is temporary work regulated by Law 6,019 (1974). Some authors do not consider those previous atypical forms of work an outsourcing because they

⁹² LANCELLOTTI, Marlos Roberto. *Os limites da Terceirizacao para Prestacao de Servicos na Administracao Publica*, 2010, p. 37

are not performed under the autonomy of a service provider, presenting the element of subordination. Although the question whether or not these forms are outsourcing will be discussed later, the relevant question is that all of them can be utilized to disguise an employment relationship. Because of the possibility of labor law fraud, this part will analyze each form and regulation.

i. Subcontracting in Civil Construction

According to the Consolidation of Labor Law in Brazilian labor legislation, there was one provision exceptionally authorizing the subcontracting of labor in the civil construction sector: the contract between a contractor and a subcontractor in construction services contract.

In order to understand this exception, it is necessary to define a construction contract in civil terms. In a construction service delivery contract, the object signed for is the execution of construction work. It is a contract of result, as it involves predetermined and conclusion of services such as the construction of a wall or the painting of a house. Therefore, a company is allowed to contract a person or a company to provide these services—such as the construction, repair, or installation of a work— for a specific period of time. This phenomenon can be seen in both the public and private sectors.⁹³

This type of contract, which is regulated by Articles 610 to 626 of Civil Law, is defined as a contract in which one of the parties (contractor, individual or entity) undertakes work for another party (owner of the construction);

⁹³ JORGE, Heber Reboucas. *Terceirizacao a estratégia fundamental do capital*, 2011, p. 113

without subordination, with or without supply of material, for payment of remuneration.⁹⁴

There is no relation of subordination between the worker and the contractor, since the contractor in charge of the construction is a potential company that assumes the risks of business activity, having the autonomy to inclusively subcontract partially or all of its needed services to another company or worker. The contractor is fully responsible for and autonomous in managing the services, as matters here is the delivery of the service. In the case that contractor company opts to subcontract in accordance with labor law, he or she is responsible for the labor obligations derived from subcontracted workers. In this hypothesis, legislation provides protection for workers involved in this subcontracting contract. Assuming the possibility of labor legislation fraud within this form, the CLT states in the caput of Article 455 that “in default of labor obligations by subcontracting company, the worker can claim directly against the main contractor.” Thus, the law establishes joint responsibility of the contractor for defaulted labor credits.⁹⁵

With regard to the responsibility of the construction owner, who now pursues civil contract with the contractor, the legal provision seems to exclude his or her responsibility since it only refers to the hypothesis of subcontracting. In this sense, according to the Superior Labor Court provided in Jurisprudence Orientation no. 191, the exclusion of any form of liability for the

⁹⁴ JORGE, Heber Reboucas. *Terceirizacao a estratégia fundamental do capital*, 2011, p. 113

⁹⁵ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 39

construction owner except when the construction owner is a construction company or developers they are subsidiary responsible party for labor debts.⁹⁶

Some authors understand this form as the matrix of outsourcing, as the labor law uniquely authorizes it as a form of labor subcontracting.⁹⁷ However, some authors deny that this form of subcontracting is a form of outsourcing, since labor subcontracting is characterized by the leasing of manpower. In this position, professor Amauri Mascaro Nascimento says that labor subcontracting in civil construction is not to be confused with outsourcing, since the former is a contract of results and the latter is a contract of labor.⁹⁸ Along the same vein, professor Marcio Tulio Viana stressed that although subcontracting touches the boundaries of labor outsourcing, it differs because subcontracting involves negotiations about the result itself, while outsourcing deals primarily with the people rendering these results.⁹⁹

ii. Temporary Work: Law 6,019/74

In 1974, Law 6,019 (1974), created the figure of a temporary worker, permitting labor contracting in specific circumstances. It is also said that temporary work is one of the first forms of outsourcing recognized by legislation

⁹⁶ PINTO, Maria Cecília Alves. *“Terceirização de serviços: responsabilidade do tomador*, 2004, p. 127

⁹⁷ PINTO, Id. at p. 127

⁹⁸ MANFIO, Fernanda. *O Enquadramento Sindical dos Empregados Terceirizado*, 2014, p. 17-18

⁹⁹ VIANA, Marcio Tulio. *A terceirização revisitada: algumas críticas e sugestões para um novo tratamento da matéria*, 2012, p. 209-201

and further validated by jurisprudence.¹⁰⁰ In this sense, as professor Viana said, temporary work is seen as a classic form of internal outsourcing, as the worker provides its labor force not to a company that gives him a salary, but to a third party that contracts his or her labor.¹⁰¹

This law imposed serious requirements for legally contracting temporary workers, due to the possibility of fraud of labor relations. The first is precisely related to the reasons for temporary subcontracting: the temporary substitution of regular staff or extraordinary addition of services. As stated in Article 2, the law disciplines temporary work as one rendered by an individual to a company in order to meet its temporary need for replacing its regular and permanent personnel, or in order to attend extraordinary addition of services.¹⁰² Thus, temporary work is permitted to substitute vacation leave, maternity leave or another occurrence, and also to supply in extra demand cases in exceptional or seasonal periods.¹⁰³

The distinction regarding what types of work can be performed by temporary workers is irrelevant since the temporary worker is there to replace a regular worker, who could be in function of either core business activity or

¹⁰⁰ PINTO, Maria Cecília Alves. *Terceirização de serviços: responsabilidade do tomador*, 2004, p. 127

¹⁰¹ VIANA, Marcio Tulio. *Terceirização e Sindicato – um Enfoque para além do direito*, 2003, p. 138

¹⁰² PINTO, op. cit.

¹⁰³ Law of temporary workers No. 6.019/74. Article 10 - The contract between the temporary employment agency and the service taker or client, with respect to the same employee, may not exceed three months, unless authorized by the local body of the Ministry of Labor and Social Security, according to instructions by the National Labor Department.

accessory activity. Thus, no matter what function a temporary worker is doing, the substantial and formal requirements of Law No. 6,019 (1974) must be observed; otherwise, this practice is considered illegal.¹⁰⁴

The second important requirement is in regard to the period. The use of a temporary worker cannot exceed the determined term of three months, with the possibility of extension with the authorization of Ministry of Labor. However, this study will later demonstrate that this period is extended to 180 days with a possibility of a 90 day extension according to the new Outsourcing Law of 2017.

In addition to limiting the term, the Law No. 6,019 established joint liability for the payment of social security contribution and payment of salary during the period of temporary work, as provided in Article 16.¹⁰⁵ Further, if the temporary worker provides the same category of labor as direct employee does, the Article 12 state the same salary for the temporary worker. In the context of Article 12, temporary workers are entitled to receive all of the benefits received by regular workers such as 13th proportional salary, a weekly working time of 44 hours, an additional 50% pay for overtime, and additional costs of insalubrity and hazardous conditions.¹⁰⁶

¹⁰⁴ PORTO, Lorena Vasconcelos, *Terceirização: fundamentos filosóficos, sociológicos, políticos, econômicos e jurídicos da jurisprudência do TST (Súmula nº 331)*, 2014, p. 156

¹⁰⁵ PINTO, Maria Cecília Alves. *“Terceirização de serviços: responsabilidade do tomador*, 2004, p. 126

¹⁰⁶ PINTO, Id. at p. 127

There are also a number of requirements regarding the labor supplier company, in terms of registering and patrimony, and forbidding any company to pursue the business of the labor supplier.¹⁰⁷

Some authors do not consider temporary work a form of outsourcing, but rather consider it labor intermediation. Labor intermediation is prohibited under Brazilian labor law, since it characterizes the merchandizing of the labor force. For those authors, temporary work is an exception to this prohibition of labor leasing. As stated by Ciro Pereira da Silva, “there is a tendency to confuse outsourcing with the hiring of temporary labor. This is an entirely different process, regulated by Law no. 6,019/74, temporary labor allows the creation of ‘rental’ companies of labor for specific purposes, such as peak production and for a predetermined period of time not exceeding three months.”¹⁰⁸

In addition, the temporary worker is subordinate to his employer and to the client as the contract “lives and develops in the womb of the client company.” Thus, there is a ‘concurrent command’ or ‘subordination in double dose’.¹⁰⁹ These features of being subordinate to both companies and also the feature of renting labor force is the constitution of labor leasing, which if not expressly regulated by law, is considered unlawful. Still, this contracting model of this law causes a deviation in Brazilian labor law, because it contrasts with the classic bilateral relationship protected by the CLT, building a

¹⁰⁷ CARELLI, Rodrigo de Lacerda. *Terceirização como Intermediação de Mão de Obra*, 2014, p. 87-88

¹⁰⁸ SILVA, Ciro Pereira da. *A terceirização responsável modernidade e modismo*. 1997, p. 28

¹⁰⁹ VIANA, Márcio Túlio. *Terceirização e Sindicato: Um enfoque para além do direito*, 2003, p. 138

trilateral relationship of labor supply, although in a limited and restricted period of time.¹¹⁰

However, whether it is outsourcing or not, because this figure can be a risk to characterizing labor exploitation by hiding the labor relationship behind the work contract, this law imposed restrictions on this form of contracting.

iii. Surveillance Service: Law 7.102/83

The outsourcing of surveillance services is regulated by law 7,102 (1983), which was amended by Law 8,863 (1994). At first, the outsourced activity envisaged in Law 7,102/83 authorized only surveillance services of the banking segment. Posteriorly, with the changes provided by Law 8.863/94, its scope was extended to the patrimonial surveillance of any public or private institution, including the security of individuals, in addition to transportation of any type of loading.¹¹¹

Law 7,102 of June 20, 1983, provided rules for the constitution of private companies that operate surveillance and value transport services. Through this law, the services of transportation of valuable patrimonial and personal surveillance were authorized to be outsourced in the private sector

¹¹⁰ DELGADO, Mauricio Godinho. *Curso do Direito do Trabalho*, 11st Edition, 2012, p. 440

¹¹¹ MANFIO, Fernanda. *O enquadramento sindical dos empregados terceirizados*, 2014, p. 15

on a permanent basis.¹¹² However, the law clearly established in Article 3 that those services can only be provided by a specialized company whose personnel has vigilantly completed a previously approved training course.¹¹³

Law 7,102/83 was the precursor to disciplining the contracting of inter-company services, treating the company as an autonomous unit operating exclusively from the supply labor force.¹¹⁴ If it is considered the element of specialization to figure the outsourcing system, these forms of contract surveillance services can be considered the pioneers of outsourcing in the private sector. Note that there is no configuration of subordination here, the function and the work is performed by an autonomous service provider, who holds the techniques to provide the services.

3. 1. 3. Precedent 256 (1986) of the Superior Labor Court

In the 1980s, the gradual increase of companies expelling activities to other companies driven by the phenomena of outsourcing made the Superior Labour Court react. To resist this movement, the Superior Labour Court edited Precedent¹¹⁵ 256 in 1986, which restricted the subcontracting of labor

¹¹² CARELLI, Rodrigo de Lacerda. *Terceirização como Intermediação de Mão de Obra*, 2014, p. 88

¹¹³ MANFIO, Fernanda. *O enquadramento sindical dos empregados terceirizados*, 2014, p. 16

¹¹⁴ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*. 2014. p. 40

¹¹⁵ Enunciado or Sumulas are the reiterated record of a majoritarian interpretation adopted by the court before a specific subject from the judgment of similar cases. They have two purposes: to publicize the jurisprudence and to promote the uniformity of decisions in others jurisdictions.

and outsourcing. It said that ‘except for cases of temporary work and surveillance services, provided for in Law 6,019 dated January 3rd, 1974, and Law 7,102, dated June 6th, 1983, it is illegal to hire workers through an intermediary company, forming the employment relationship directly with the service taker.’¹¹⁶ Precedent 256 came to impose restriction to legal outsourcing, authorizing companies to subcontract labor in only two cases which are the temporary work and surveillance services.

Precedent 256 was extracted from Court Decision: Emenda no. 1/1969 that said: 1) the constitutional economy and social order, founded on principles of work value and the dignity of the human person, assures workers integration into the life and development of the company that benefits from its work; 2) contracts of civil nature may only be admitted exceptionally in case of transitory service and not binding normal activity of the service taker; 3) if the services is provided in normal and regular activities of the service taker, this relation is characterized as leasing of labor power and is considered unlawful; 4) labor law has fought against labor exploitation for over a century; 5) this purpose is threatened as civil contracts for labor intermediation emerges to replace the bilateral labor relationship.¹¹⁷ In other words, the intention of the Court to protect the value of work by restricting the increasing of atypical forms of contracting labor by an interposed company is apparent.

Precedent 256 brought about some important guiding topics. In this line, it established as clearly legal exceptions in the hypothesis of outsourced employment, expressing that the general rule of hiring is the standard of the

¹¹⁶ DELGADO, Gabriela Neves; AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 42

¹¹⁷ DELGADO, Id. at p. 42

CLT. As a consequence of this guidance, if the outsourcing is considered unlawful it was determined as the formation of a classic employment relationship with the effective service taker. The importance of this resistance is that through Precedent 256 two considerations were firmly valued to the labor jurisprudence culture: the idea of outsourcing as an exceptional process and the determination of employment relationships with the service taker in the case of unlawful outsourcing.¹¹⁸

This understanding began to mark a large part of the judicial decisions, either for recognition of direct employment relationships between the worker and the beneficiary of the work, the service taker, or for recognition of the joint responsibility of both contractors.¹¹⁹

However, Precedent 256 did not mention outsourcing in public sectors, which was already occurring through the Decree-Law 200/1967 and Law 5,645/70. In addition, outsourcing had already spread to the Brazilian business market in the early 1990s. Those movements made the Superior Labor Court review Precedent 256.

3.2. Two decades of Precedent 331 of the Superior Labor Court

¹¹⁸ DELGADO, Mauricio Godinho. *Curso do Direito do Trabalho*, 11st Edition, 2012, p. 446

¹¹⁹ SANTOS, Anselmo Luis dos; BIAVASCHI, Magda Barros. *A terceirização no contexto da reconfiguração do capitalismo contemporâneo: a dinâmica da construção da Súmula n° 331 do TST*, 2014, p. 26

In 1993, the Superior Labor Court cancelled Precedent 256 and edited Precedent 331, published on December 21, 1993. Precedent 331 came to regulate the increasing number of services being externalized in the major companies. In this sense, it encompassed four groups: temporary work, surveillance service, cleansing and conservation services and specialized services linked to noncore contractor activities. The present study will focus on services that are provided on a permanent basis, which are surveillance service, cleansing and conservation services and specialized services linked to noncore activity, because workers in these categories are more subject to labor exploitation and precariousness.

3. 2. 1. Precedent 331 of the Superior Labor Court

In the midst of strong liberal winds pushing for flexibility of social protection standards, the strength of the outsourcing movement had notable impacts on jurisprudence. In that line, in December 1993 Precedent 256 was canceled and replaced by Precedent 331, which was revisited in 2000.¹²⁰

The decision to review the prior understanding was due to the repeated and consecutive Court decisions to admit cleaning and conservation services

¹²⁰ SANTOS, Anselmo Luis dos; BIAVASCHI, Magda Barros. *A terceirização no contexto da reconfiguração do capitalismo contemporâneo: a dinâmica da construção da Súmula nº 331 do TST*, 2014, p. 26

as subject of outsourcing. Aware of that, the Public Ministry of Labor requested that the Superior Labor Court revise Precedent 256, proposing that the public administration be exempt from the restriction on outsourcing.¹²¹

The new interpretation embodied what the regulation referred to as outsourcing in the public sector. From the review, TST relaxed its understanding and began to recognize the legality of contracting any specialized services on peripheral activities in the public sector as well as in private entities.¹²²

Precedent 331 has stated that:

SERVICES AGREEMENT. VALIDITY.

I – The hiring of workers by an intermediary company is unlawful, and, as a result, a direct employment relationship is established with the service client, except in the case of temporary work. (Law 6.019 of 03/Jan/74)

II – The irregular hiring of a worker through an intermediary company does not generate an employment relationship with the direct and indirect public administration agencies and foundations. (Art. 37, II, of the 1988 Federal Constitution)

III – The hiring of surveillance services does not establish an employment relationship with the services client (Law 7.102, of 20/Jun/83); this is valid also for conservation and cleaning services as well as for

¹²¹ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 46

¹²² DELGADO, Id. at 46

specialized services linked to the non-core activities of the client, provided that the elements of personal (*intuitu personae*) character and the direct subordination are absent.

Item I is along the same line as Precedent 256, which regulates that, except in the case of temporary work relations, hiring workers through a third company is always unlawful, forming the employment relationship with the service taker. In other words, it means that labor intermediation is forbidden in any way, under any circumstances, with the only possible exception of labor intermediation of temporary work, provided that they follow the strict requirements imposed by the law.¹²³ These requirements are the situations expressly specified by Law 6,019/74, which are transitional necessities of the replacement of regular and permanent personnel or extraordinary increase of services of a service taker company.

Item II regulates that in the case of that the service taker is a public entity the direct labor relationship is not automatically formed in compliance with the constitutional rule of public examination of article 37. This rule says that in order to enter into the public service, the server or the worker must be first be approved in public examination.¹²⁴

According to professor Rodrigo Lacerda Carelli, who defends the difference between labor intermediation and outsourcing of services, Item III deals with outsourcing of services. Contrary to other authors and judges who consider Item III an exception of item I, Carelli classifies Item I as labor intermediation while Item III is actually outsourcing. Item III, verifies that it

¹²³ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p 81-82

¹²⁴ CARELLI, Id. at p 81-82

established the nonexistent employment relationship between the service taker and the outsourced worker who provides surveillance services, conservation and cleaning service as well as specialized services linked to non-core activities. However, this bond is not formed provided that there is no direct personality and subordination.¹²⁵

Precedent 331 is composed of four large groups of workers, one of which has a nature of temporary employment and the remainder who are classified as lawful permanent outsourcing. There are four groups of services contemplated: temporary work from Law 6,019/74, surveillance services from Law 7,102/83, maintenance and cleaning services, and specialized services related to non-core activities or accessory activities of the service taker.¹²⁶

The first group of permanent outsourcing described in Item III is “surveillance services” regulated by Law 7,102 (1983), for which the vigilant is not to be confused with the watchman. The latter is a non-specialized or semi-specialized employee who is linked to the service provider (usually working in condominiums, construction guards, small stores, etc.). the former is a member of a special category subject to its own rules regarding the training of the workforce. The second group includes conservation and cleaning activities. The third, which is the most important for the present study, relates to specialized services linked to non-core activities. Those activities are not

¹²⁵ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*. 2014. p 81-82

¹²⁶ DELGADO, Gabriela Neves. *Limites constitucionais da terceirização*, 2014, p. 47

expressly discriminated, but they are characterized as activities that do not fit in the core business activities of the service taker.¹²⁷

In relation to those permanent services, Precedent 331 established that the personality and direct subordination of outsourced workers cannot be present in relation to the service taker.¹²⁸ If there is subordination or personality, the assumptions of labor relationships apply. Then, an employment relationship is established linking the worker not to the supplier company that hired him, but to the company that made the use of his services.¹²⁹ This bond is formed in the hypotheses of permanent outsourcing, being that temporary workers can exercise their activities with personality and under direct subordination in relation to the service taker, without denaturing the employment relationship with the service provider.¹³⁰

In addition, in the case of the permanent outsourcing, personality and direct subordination between the outsourced worker and the service taker are considered fraud against labor law. This fraudulent outsourcing, also illegal, is remedied by the formation of direct employment between the worker and the service taker.¹³¹

¹²⁷ DELGADO, Mauricio Godinho. *Curso do Direito do Trabalho*, 11st Edition, 2012 p. 449-450

¹²⁸ DELGADO, Gabriela Neves. *Limites constitucionais da terceirização*, 2014, p. 47

¹²⁹ VIANA, Márcio Túlio. *A terceirização revisitada: algumas críticas e sugestões para um novo tratamento da matéria*, 2012, p. 216

¹³⁰ DELGADO, op. cit. p. 47

¹³¹ DELGADO, Id. at p. 47

The jurisprudential interpretation promoted by Precedent 331 was to limit the spread of outsourcing in all economic spheres by authorizing exceptionally and guaranteeing workers proper protection. At that time, all other triangulated work situations not mentioned were considered fraudulent and unlawful.¹³²

i. Core Activities and Non-core Activities

Precedent 331 had the important role of delimiting the fundamental difference between lawful and unlawful outsourcing.¹³³ The category of ‘specialized services linked to non-core activities’ in Item III authorized the private sector to outsource services that were already being outsourced in public entities, according to Law 5,645/1970. This Law inspired the labor jurisprudence to distinguish between essential activities and auxiliary activities. From this inspiration came Item III of Precedent 331, allowing the outsourcing of non-core activities. Precedent 331, however, provides no clear definition of a company’s ‘main activities’ and ‘core activities’, leaving labor judges in charge of determining what they believe a company's main activity is, based on their own understanding.¹³⁴

Professor Godinho Delgado conceptualizes core activities as labor functions and tasks that fit the core of the business’s dynamics, composing the essence of this dynamic and also contributing to define the position and

¹³² DELGADO, Gabriela Neves. *Terceirização: paradoxo do direito do trabalho contemporâneo*. p. 143 in DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 47

¹³³ DELGADO, Mauricio Godinho. *Curso do Direito do Trabalho*, 11st Edition, 2012. p. 448

¹³⁴ DELGADO, op. cit., p. 47

classification of the business and economic context. They are nuclear and definitive activities of the business dynamics of the service taker company. On the other hand, non-core activities are those functions and tasks that don't fit the core of the business, meaning that they do not constitute the essence of business dynamics. namely, they are activities referenced in Law 5,645/1970: transportation, storage, custody, operation of elevators, cleaning and others similar activities.¹³⁵

According to Wilson Alves Polonio, there are two chains of understanding to distinguish between core activities and non-core activities. The first current says that a core activity is related to the essence of the service, which leads to the conclusion that a non-core activity is not essential to the business. For instance, if there is a service that implies discontinuity of normal operations of a company if shut down, it is considered necessary and essential to corporate purpose. In this case, this service is considered a main or core activity. The second current suggests that a core activity is intrinsically related to the corporate purpose of the company, while a non-core activity is related to others. According to this current, all of the administrative services not directly related to corporate purpose, such as transport and maintenance of machinery and equipment, can be outsourced.¹³⁶

According to Professor Marcio Tulio Viana, a core activity is one that relates directly to the object of the business and to the very cause that gave rise to the company. For example, the main purpose of a school is teaching, which means that teaching depends primarily on teachers while secretariat

¹³⁵ DELGADO, Mauricio Godinho. *Curso do Direito do Trabalho*, 11st Edition, 2012, p. 450

¹³⁶ POLONIO, Wilson Alves. *Terceirização: aspectos legais, trabalhistas e tributários*, 2000, p. 25-37.

services facilitate the activity of the teachers. In this example, it is clear that the core activity is teaching, while the supporting activity is the secretariat services. However, the support activity cannot be always classified as a non-core activity irrelevant to obtaining the business's purpose. This means that when the relevance of non-core activity is greater, it can fall into the field of main activity rather than accessory. The cleaning service in a screw factory, for example, is classified as non-core activity; however, the story changes if the cleaning services are provided for a hospital.¹³⁷

For Carelli, distinguishing between both services is considered secondary to defining whether the service contract is an authorized form of outsourcing that does not violate labor laws. For him, the limitation of the legality of outsourcing relies on the difference between the true outsourcing and mere intermediation of the labor force.¹³⁸

ii. Service Taker's Responsibility

Subsidiary liability reinforces or supplements the primary responsibility. There is a vertical stratification, which implies the successive calling of those responsible; first the principal, then the subsidiary. This is the so-called benefit of order. For the subsidiary responsible for making the payment in the

¹³⁷ VIANA, Márcio Túlio. *A terceirização revisitada: algumas críticas e sugestões para um novo tratamento da matéria*, 2012, p. 215

¹³⁸ CARELLI, Rodrigo de Lacerda. *Terceirização como Intermediação de Mão de Obra*, 2014, p. 82

name of the principal debtor, it is necessary to prove the default or insolvency of the principal debtor.¹³⁹

That being said, the Items IV, V and VI rule over the service provider's responsibility. It is established of the subsidiary liability of the service taker when there is a default of labor obligations by the employer:

IV – The default on labor obligations by the employer entails the services taker's subsidiary liability for those obligations, provided that they have taken part in a procedural relationship and are also included in a judicially enforceable debt instrument.

V- Direct and Indirect Public administration agencies have a subsidiary liability, under the same conditions as item IV above, if it is evidenced its fault conduct at the fulfillment of the obligations set in law 8.666, from June 21, 1993, especially at the inspection of the fulfillment of such contractual and legal obligations of the services' provider as employer. Mentioned responsibility does not result from the mere lack of fulfillment of labor obligations assumed by the company regularly contracted.

VI – The subsidiary liability of the services' client comprises all the labor payments resulting from condemnation, related to the period of the services' provision to it.”

¹³⁹ ENGELKE, Rozi; BELMONTE, Ligia. *Responsabilidade solidaria e subsidiaria na justiça do trabalho*, 2010, p. 96

The company that provides the services is the principally responsible for complying with labor obligations and labor credits. However, if the company fails to comply with these obligations, the service taker shall be subsidiarily liable for those rights.¹⁴⁰ For that to happen, the insolvency of the principal debtor needs to be proved.

Prior to the amendment promulgated by Resolution No. 174/2011, Precedent 331, Item IV stipulated that, in the case of lawful outsourcing, public administration entities and private entities were subsidiarily liable for labor obligations originating from the service provider's default. After this change in 2011, it was envisaged that the Public Administration responds in a subsidiary manner only if it is proven to be its fault, especially upon inspection of the service provider's compliance with contractual and legal obligations. In addition, this liability covers all of the amounts resulting from the condemnation related to the period of the services.¹⁴¹

The amendment occurred because of the existence of Law 8,666/93, which regulates the contracts of services with public entities. Article 71, §1, says that the “contractor (service provider) is responsible for labor, social security, tax and commercial charges resulting from the performance of the contract” and the “contractor's (service provider) default with those charges does not transfer to the Public Administration the responsibility for its payment.”¹⁴² This means that public entities cannot be automatically responsible

¹⁴⁰ JORGE, Heber Reboucas. *Terceirizacao a estratégia fundamental do capital*, 2011, p. 119-120

¹⁴¹ PORTO, Lorena Vasconcelos, *Terceirizaçã : fundamentos filosóficos, sociológicos, políticos, econômicos e jurídicos da jurisprudência do TST (Súmula nº 331)* 2014, p. 155

¹⁴² Law 8,666/93, Article 71

for labor credits not paid by the contractors. However, public entities have the duty to tender their services to a financially suitable company, and to inspect whether the companies contracted by them are complying with the provisions of the contract, including in regard to compliance with labor rights.¹⁴³

In the private sector, in order for liability to be established, it is necessary for private entities to have participated in the legal process and also have been included in the judicial enforcement instrument as stated in Item IV.

This responsibility was based on the presumption of fault of the service takers, once they are in charge of selecting the companies to provide services. Thus, is up to them to select companies that present good suitability to perform the services, as well as to verify if the services are being carried out lawfully, without violating any legislation including labor obligations.¹⁴⁴

Subsidiary liability is only attributed in the case of lawful outsourcing prescribed in Item I and III: temporary work, surveillance services, maintenance and cleaning services and specialized services linked to non-core activities. The following section will discuss the responsibilities that apply to cases of unlawful outsourcing.

3.3. New Outsourcing Regulation, 2017

3.3.1. Resistance to Approval

¹⁴³ VIANA, Márcio Túlio. DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Terceirizacao - aspectos gerais. A ultima decisao do STF e a Sumula 331 do TST. Novos enfoques*, 2011, p. 72-73

¹⁴⁴ JORGE, Heber Reboucas. *“Terceirizacao a estratégia fundamental do capital”*, 2011, p. 119-120

Brazil, unlike other Latin American countries, has no specific regulations for outsourcing. There was, however, some jurisprudence understanding, unified in Precedent 256, posterior Precedent 331, and some ongoing bill projects. Among the most controversial is Bill 4,330 of 2004, authored by Deputy Sandro Mabel, which allows outsourcing in all sectors, including core activities. Another bill of great repercussion was Bill 4,302, of 1998, which proposed the regulation of outsourcing through the increase of time of temporary work.¹⁴⁵

Bill 4,302/1998, by Fernando Henrique Cardoso, proposed the flexibility of Temporary Work Law n. 6,019/1974, expanding the period of time and the regulation of intermediation of labor, through service companies.¹⁴⁶ During the process, Bill 4,302/1998 underwent several modifications, including increasingly flexible conditions and conditions favorable to entrepreneurs. In August 2003, former president Luis Inacio da Silva (Lula) requested the withdrawal of this bill from the agenda of the National Congress, through Presidential Message no. 389/2003, but it did not succeed.¹⁴⁷ In any case, this project was paralyzed in Congress, waiting to be voted on since 2002.

The regulation of outsourcing returned to the congressional agenda in 2004 under the new design of Bill 4,330, elaborated by Sandro Mabel; this bill maintained the same lines as Bill 4,302/1998, but instead of temporary work, it proposed the direct regulation of outsourcing relations.¹⁴⁸

¹⁴⁵ MOLINARO, Carlos Alberto. SARLET, I. Wolfgang. *Algumas notas sobre a Terceirização e ao assim chamado multisourcing*, 2014, p. 133

¹⁴⁶ DAU, Denise Motta. *A expansão da terceirização no Brasil e a estratégia da CUT de enfrentamento da precarização do trabalho*. 2009. p. 6-7

¹⁴⁷ DAU, Id. at p.8

¹⁴⁸ DAU, Id. at p. 6-7

Thus, Sandro Mabel's Bill 4,330, which better attends the current market reality in the view of enterprises, also caused greater social resistance as it defended the outsourcing of core business activities.

The debate around the legalization of Bill 4,330, has generated a fierce opposition, and wide national mobilization, involving workers' organizations, labor judges, prosecutors, tax auditors, researchers, scholars, lawyers, and artists.¹⁴⁹

In October 2011 the Superior Labor Court held a public hearing in Brasilia with the theme Outsourcing of the Workforce. In this public hearing, several entities and outsourcing researchers established the National Forum in Defense of the Rights of Workers Threatened by Outsourcing (FORUM). At the time, FORUM manifested its opinion on Bill 4,330 by mainly denouncing the harms of outsourcing and proposing the prohibition of permanent outsourcing in activities considered essential to a service taker's business. Further, it defended the insurance of equal rights and equal working conditions between outsourced and direct employees, as well as joint responsibility. In 2012, FORUM held several public hearing attended by the Department of Statistics and Socioeconomic Studies (DIEESE), the National Association of Magistrates in Labour Courts (Anamatra), the Latin American Association of Labor Lawyers (ALAL), the Brazilian Association of Labor

¹⁴⁹ DRUCK, Graca. FILGUEIRAS, Vitor. *A Epidemia da Terceirizacao e a Responsabilidade do STF*, 2014, p. 106

Studies (ABET), Trade Union Centers and workers' leaders, professors, researchers, and scholars, in order to resist Bill 4,330.¹⁵⁰ Out of the 26 ministers comprising the Superior Labor Court (TST), 19 signed a letter condemning the approval of the Bill 4,330.¹⁵¹

The vote for Bill 4,330 was scheduled for September 2013, but the campaigns and politics against it caused such significant social and political repercussion that voting was delayed despite enormous pressure from enterprises and the National Congress.¹⁵²

With voting postponed, enterprises sought others means to pressure the legislation. They filed an appeal (RE no. 713.211) to the Supreme Federal Court to recognize the general repercussion of the legality of Precedent 331¹⁵³, which argues that the limitation of the practice of outsourcing in Precedent 331 violates the constitutional principle of free enterprise initiative and the freedom to hire, guaranteed in Article 5, II of the Constitution.¹⁵⁴

The Supreme Federal Court recognized the existence of general repercussion in June 2014, which has come to be called General Repercussion n. 725/STF. General repercussion, according do Civil Procedure Code, Article 1,035, means that he relevant issues from an economic, political, social or legal point of view that go beyond the interests of the specific cause are not

¹⁵⁰ SANTOS, Anselmo Luis dos; BIAVASCHI, Magda Barros. *A terceirização no contexto da reconfiguração do capitalismo contemporâneo: a dinâmica da construção da Súmula nº 331 do TST*, 2014, p. 30

¹⁵¹ DRUCK, Graca. FILGUEIRAS, Vitor. *A Epidemia da Terceirizacao e a Responsabilidade do STF*, 2014, p. 106

¹⁵² ANTUNES, Ricardo; DRUCK, Graca. *A terceirizacao como Regra?*, p. 229.

¹⁵³ DRUCK, op. cit., p. 106

¹⁵⁴ SANTOS, ob. cit., p. 30

beneficial only for the concrete case, but also for the collective interest. The court decision exposed that limiting the practice of outsourcing can interfere with the fundamental right of free enterprise initiative, directly violating Article 5, II of the Constitution that ensures the entrepreneur's freedom to organize his activity. In addition, it states that the freedom to hire conciliates with the hiring of a worker through outsourcing, including core activities.¹⁵⁵

After 11 years of debate, Bill 4,330 was approved by the Chamber of Deputies (Lower House) in April 8, 2015, compound by 513 deputies (324 votes in favor, 137 against, and 2 abstentions).¹⁵⁶ This filing was sent to the Federal Senate for a vote; however, Bill 4,330 is still waiting for approval by the Federal Senate.¹⁵⁷

On the other side, Bill 4,302/1998, which was submitted to Congress by the former president Fernando Henrique Cardoso in 1998, was approved by the Lower House and suffered some modifications in the Federal Senate; since then, it was returned to the Lower House to be voted on again in 2002. On March 22, 2017 Bill 4,302/1988 was approved and sent to President

¹⁵⁵ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, p. 68

¹⁵⁶ Carta Capital. *Terceirização: veja como votou cada deputado*. 08/04/2015 available: <<https://www.cartacapital.com.br/blogs/parlatorio/terceirizacao-veja-como-votou-cada-deputado-158.html>>(Last visited January 29, 2018)

¹⁵⁷ PL 4330/2004 status. Available: <<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=267841>>(Last visited January 29, 2018)

Michel Temer to be sanctioned.¹⁵⁸ Days later, on March 31, 2017, President Temer partially sanctioned the Outsourcing Law (no. 13,429/2017).¹⁵⁹

3. 3. 2. Outsourcing Law 13,429/17 and Labor Reform No.13,467/17 Legislation's Content

Law 13,429 of 2017, the so-called Outsourcing Law (some authors called this law as new temporary worker law), regulates two types of contracting labor. The first part, Article 1 regulates temporary work and amended the previous Temporary Worker Law n. 6,019 of 1974; the second part disciplines labor outsourcing, which is work in which a company provides services to third parties.

In terms of content, Law 13,429 amended Temporary Worker of Law 6,019/74 by extending the term of temporary contract work. It also introduced the rule of outsourcing, which authorized service outsourcing in any sector without characterizing an employment relationship.¹⁶⁰ It is important to emphasize that temporary work and outsourcing are two different instruments

¹⁵⁸ Globo. *Entenda o projeto de lei da terceirização para todas as atividades*. 23/03/2017. Available: <<https://g1.globo.com/economia/noticia/entenda-o-projeto-de-lei-da-terceirizacao-para-todas-as-atividades.ghtml>>(Last visited January 29, 2018)

¹⁵⁹ Planalto Presidência da Republica. *Presidente Temer sanciona parcialmente Lei da Terceirização*. 2017/03/31. Available: <<http://www2.planalto.gov.br/acompanhe-planalto/noticias/2017/03/presidente-temer-sanciona-parcialmente-lei-da-terceirizacao>>(Last visited January 29, 2018)

¹⁶⁰ Calcini, Ricardo Souza. *A nova lei da terceirização e a reforma trabalhista*. 2017/10/23. Available in: <<http://www.migalhas.com.br/dePeso/16,MI267633,21048-A+nova+lei+da+terceirizacao+e+a+reforma+trabalhista>> (Last visited January 29, 2018)

not to be confused with one another, although disciplined in the same legislation.

Months following the Outsourcing Law, the Reform of labor laws containing provisions on contracting services were approved in July 13, 2016.

i. Temporary work: First Part of Law 13,429/2017

As mentioned above, temporary work is regulated by Law 6,019/74, and the recent Law 13,429/17 that came to amend this regulation. The update brought about four main changes: the hypothesis for hiring temporary workers, the service taker's responsibility, the term of temporary work contracts, and the possibility of hiring temporary workers for core activities.

Article 2 establishes that “Temporary work is work provided by an individual hired by a temporary work company, which offers its employees to a service taker, in order to meet the temporary need for replacement of the service taker's permanent staff or to attend the complementary demand of services.” Here, ‘complementary demand for services’ was replaced by ‘extraordinary increase of services’.

According to the previous law, hiring temporary labor could only take place in cases of temporary need of replacement and extraordinary increase of services.¹⁶¹ Now, the new law maintains those situations, adding the situ-

¹⁶¹ Art. 2º Trabalho temporário é aquele prestado por pessoa física contratada por uma empresa de trabalho temporário que a coloca à disposição de uma empresa tomadora de serviços, para atender à necessidade de substituição transitória de pessoal permanente ou à demanda complementar de serviços.

ation of meeting complementary demand for services. Complementary demand Paragraph §2 defines demand arising from unforeseeable factors or, when due to predictable factors, is intermittent, periodic, or seasonal in nature.¹⁶²

The new law clearly prohibits the practice of hiring temporary workers to substitute workers on strike, by virtue of Article 2, Paragraph §1.¹⁶³

According to the Article 4, temporary work can only be provided by a company that was constituted exclusively with the purpose of providing temporary labor. In this sense, this company is a legal entity, registered with the Ministry of Labor, with the purpose of temporarily replacing workers at the disposal of other companies.¹⁶⁴

One of the main changes is that the term of the temporary work contract, which previously was up to three months, became up to 180 days; it also became subject to an extension of up to 90 days, proven that the necessity of temporary work persists.¹⁶⁵ In this case, after exceeding 180 days, the only

¹⁶² As alterações procedidas pela lei 13429

<<https://arthurmdiniz.jusbrasil.com.br/artigos/448813121/as-alteracoes-procedidas-pela-lei-13429-2017-da-regulamentacao-do-trabalho-terceirizado-e-das-alteracoes-do-trabalho-temporario>> (Last visited January 29, 2018)

¹⁶³ Article 2, § 1º É proibida a contratação de trabalho temporário para a substituição de trabalhadores em greve, salvo nos casos previstos em lei. § 2º Considera-se complementar a demanda de serviços que seja oriunda de fatores imprevisíveis ou, quando decorrente de fatores previsíveis, tenha natureza intermitente, periódica ou sazonal.

¹⁶⁴ Article 4. Empresa de trabalho temporário é a pessoa jurídica, devidamente registrada no Ministério do Trabalho, responsável pela colocação de trabalhadores à disposição de outras empresas temporariamente.

¹⁶⁵ Article 10: § 1º O contrato de trabalho temporário, com relação ao mesmo empregador, não poderá exceder ao prazo de cento e oitenta dias, consecutivos ou não. § 2º O contrato poderá ser prorrogado por até noventa dias, consecutivos ou não,

requirement to extend this contract, to more 90 days is the need to continue the contract for the same reasons for which it was contracted. There is no need for prior approval from the Ministry of Labor to extend the contract. Here, for the same worker to be hired again, the new law requires 90 days' time from the end of the contract.¹⁶⁶(Article 10, Paragraph 5).

Further, in regard to the service taker's responsibility, the new legislation established in Article 9, Paragraph §1, that the service taker is responsible for guaranteeing the conditions of safety, hygiene and health of the workers when the work is carried out in its premises or in a place indicated by service taker.¹⁶⁷ Also, the service taker has the obligation to extend to temporary workers the same medical, outpatient and meal services as provided to its own employees ¹⁶⁸ (Article 9, Paragraph § 2). Lastly, the new law maintains the

além do prazo estabelecido no § 1º deste artigo, quando comprovada a manutenção das condições que o ensejaram.

¹⁶⁶ Article 10, § 5º O trabalhador temporário que cumprir o período estipulado nos §§ 1º e 2º deste artigo somente poderá ser colocado à disposição da mesma tomadora de serviços em novo contrato temporário, após noventa dias do término do contrato anterior.

¹⁶⁷ Law 13,429/17, Article 9, § 1º É responsabilidade da empresa contratante garantir as condições de segurança, higiene e salubridade dos trabalhadores, quando o trabalho for realizado em suas dependências ou em local por ela designado.

¹⁶⁸ Article 9, § 2º A contratante estenderá ao trabalhador da empresa de trabalho temporário o mesmo atendimento médico, ambulatorial e de refeição destinado aos seus empregados, existente nas dependências da contratante, ou local por ela designado.

same line for the responsibility of labor charges default, established in Precedent 331, IV; hence it disposes of the subsidiary responsibility for labor obligations referring to the period of temporary work, Article 9 Paragraph §7.¹⁶⁹

The last change refers to the authorization of temporary work in activities considered core activities. Article 9, Paragraph §3, says that temporary work can take place in non-core and core activities of service taker company.¹⁷⁰

However, as said previously, the type of function is secondary question, as the previous law did not prohibit the practice of temporary work in core activities. In that sense, in order to replace regular staff, the requisite of whether this regular staff pertained to in core activity functions was not verified. This means that the fact that a regular or permanent employee was in a position related to core business activities did not disallow a service taker to hire temporary workers for the same function. For that reason, the law does not establish the nonexistence of subordination, for which, on the contrary, workers needed to be subject to the service taker in order to perform labor in the same line with the regular staff in the case of temporary work. These are the reasons why Carelli considers temporary work an exception to the intermediation of labor law, which unlike out is prohibited by labor laws.

¹⁶⁹ Article 9, § 7º A contratante é subsidiariamente responsável pelas obrigações trabalhistas referentes ao período em que ocorrer o trabalho temporário, e o recolhimento das contribuições previdenciárias observará o disposto no [art. 31 da Lei nº 8.212, de 24 de julho de 1991](#).

¹⁷⁰ Article 9, § 3º O contrato de trabalho temporário pode versar sobre o desenvolvimento de atividades-meio e atividades-fim a serem executadas na empresa tomadora de serviços.

ii. Outsourcing: Second Part of Law 13,429/2017

In Brazil, there are several definitions of outsourcing, not including the definitions provided by economists and others researchers. As the present study focuses on labor laws, the definition of outsourcing as pertains to this study is “the passing of activities and tasks to third parties. The company concentrates on its core-activities (end-activity), the one for which it was created and the one which justifies its presence in the market, and passes on to third parties (individuals or legal entities) activities-means” (Davis). “Outsourcing is an administration technology that consists of purchasing specialized goods and/or services, in a systemic and intensive way, allowing the purchasing company to concentrate its energy in its real business, enhancing gains in quality and competitiveness” (Fontanella, Tavares e Leiria). Further, outsourcing “is the tendency to transfer to third parties activities that are not part of the core business” or “it is a modern trend that consists of concentrating efforts on core activities, delegating to third parties the complementary ones,” or “it is a management process through which some activities are passed on to third parties letting the company to focus only on tasks essentially linked to the business in which it operates.”(Giosa).¹⁷¹

This revision was needed because the new legislation is not clear whether it authorizes the outsourcing of any services, thus making it helpful to review the concept of outsourcing to interpret the confusing provision set by Law no. 13,429.

¹⁷¹ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 98-99

That said, the second part of the law introduces new provisions. This new modality is regulated in Articles 4-A and 5-A of Law 6,019/74 and regulates outsourcing in general.

Article 4-A defines a company that provides service to third parties as “a legal entity, under private law, designed to provide determined and specific services to contractor.”¹⁷² The vague expression “determined and specific services” is what caused the confusion about its interpretation. According to Court judge Vólia Bomfim Cassar this law grants authorization to outsource core activities, as long as they are specified, defined, and fixed in the contract. Others argue that it refers to term contract, since the term *determined services* indicates certain and predictable services. Accordingly, Article 443, Paragraph 1 of the CLT says that a term contract is used to provide specified services or to perform a certain event during a prefixed term. In this case, the expression *certain event* equates to *determined service*. Finally, still others are interpreting that this provision did not authorize the outsourcing of core services simply because it was not expressed in this sense.¹⁷³

Judge Cassar’s interpretation is that the legislation authorizes outsourcing only of non-core activities, not of core activities. This is because that if

¹⁷² Article 4-A. Empresa prestadora de serviços a terceiros é a pessoa jurídica de direito privado destinada a prestar à contratante serviços determinados e específicos.

¹⁷³ CASSAR, Vólia Bomfim. *Breves comentários à nova redação da lei 6.019/74 — terceirização ampla e irrestrita?* April 3, 2017. Available in <<http://www.lfg.com.br/conteudos/artigos/geral/terceirizacao-ampla-e-irrestrita-entenda-a-lei-1342917-que-altera-a-redacao-da-lei-n-601974>> (Last visited January 29, 2018)

the legislator wanted to authorize core activities, then he or she would be expressly as it was in the instance of temporary work.¹⁷⁴

Following Paragraph 1, the legislation establishes autonomy for service providers, stating that a company that provides services is responsible for contracting, paying, and guiding the works performed by its employees, even being permitted to subcontract others companies to perform that services.¹⁷⁵ From this provision, it is understood that the law allows the phenomenon of *quarteirizacao*, which is when an outsourced company subcontracts another company to provide services, the outsourcing of outsourcing.

According to Paragraph 2, in this relation there is no configuration of an employment relationship between the workers or partners of service providers and the service takers.¹⁷⁶ This rule preserved the same lines as Precedent 331, but did not express the condition of the nonexistence of direct subordination and personality.

¹⁷⁴ CASSAR, Vólia Bomfim. *Breves comentários à nova redação da lei 6.019/74 — terceirização ampla e irrestrita?* April 3, 2017. Available in <<http://www.lfg.com.br/conteudos/artigos/geral/terceirizacao-ampla-e-irrestrita-entenda-a-lei-1342917-que-altera-a-redacao-da-lei-n-601974>> (Last visited January 29, 2018)

¹⁷⁵ Article 4-A, § 1º A empresa prestadora de serviços contrata, remunera e dirige o trabalho realizado por seus trabalhadores, ou subcontrata outras empresas para realização desses serviços.

¹⁷⁶ Article 4-A, § 2º Não se configura vínculo empregatício entre os trabalhadores, ou sócios das empresas prestadoras de serviços, qualquer que seja o seu ramo, e a empresa contratante.

Article 4-B establishes the requirements for operating company that provides services to third parties, such as the reasonable amount of capital in accordance with the number of employees and registering procedures.¹⁷⁷

In accordance with Article 5-A, a contractor can take the form of either an individual or a company, that aims to contract determined and specialized services from a service's company. This contract is specifically determining which services are being contracted, and by virtue of Paragraph 1, the use of these workers for any other activities that those covered by the contract is prohibited.¹⁷⁸

In regard to the contractor's responsibility, it maintained the same understanding as the regulation of temporary work. Here, according to Paragraph 3, the contractor is responsible for ensuring the conditions of safety, hygiene and health of the workers, when the work is carried out on the contractor's premises or a place previously agreed upon in the contract.¹⁷⁹ Hence,

¹⁷⁷ Article 4-B. São requisitos para o funcionamento da empresa de prestação de serviços a terceiros. I - prova de inscrição no Cadastro Nacional da Pessoa Jurídica (CNPJ); II - registro na Junta Comercial; III - capital social compatível com o número de empregados, observando-se os seguintes parâmetros:

¹⁷⁸ Article 5-A. Contratante é a pessoa física ou jurídica que celebra contrato com empresa de prestação de serviços determinados e específicos. § 1º É vedada à contratante a utilização dos trabalhadores em atividades distintas daquelas que foram objeto do contrato com a empresa prestadora de serviços.

¹⁷⁹ Article 5-A, § 3º É responsabilidade da contratante garantir as condições de segurança, higiene e salubridade dos trabalhadores, quando o trabalho for realizado em suas dependências ou local previamente convencionado em contrato.

if the outsourced worker provides a service in the establishment of the contractor, the contractor is responsible for the hygiene of the work environment, including in the cases of occupational accidents and diseases.¹⁸⁰

According to Paragraph 4, the contractor can extend the same medical care, outpatient services, and meal services provided to its employees to outsourced workers.¹⁸¹ Therefore, unlike the content determination regarding temporary work (Article 9, Paragraph 2), the provision is merely optional.

Paragraph 5 states that the contractor is subsidiarily responsible for labor obligations referring to the period in which the services are rendered. This is the understanding already prevailing in legal outsourcing, as observed in the Precedent 331, Item IV.¹⁸²

Lastly, Article 5-B enumerates requested elements of a contract of service-providing contract: qualification of the parties, specification of the service to be provided, deadline for performing the service, a price when applicable.¹⁸³

¹⁸⁰ Gustavo Filipe Barbosa Garcia. *Lei da terceirização não é clara quanto à permissão para atividade-fim*. April 2, 2017 Available in <https://www.conjur.com.br/2017-abr-02/gustavo-garcia-lei-nao-clara-quanto-permissao-atividade-fim>

¹⁸¹ Artigo 5-A, § 4º A contratante poderá estender ao trabalhador da empresa de prestação de serviços o mesmo atendimento médico, ambulatorial e de refeição destinado aos seus empregados, existente nas dependências da contratante, ou local por ela designado.

¹⁸² Artigo 5-A, § 5º A empresa contratante é subsidiariamente responsável pelas obrigações trabalhistas referentes ao período em que ocorrer a prestação de serviços, e o recolhimento das contribuições previdenciárias observará o disposto no [art. 31 da Lei nº 8.212, de 24 de julho de 1991](#).

¹⁸³ Art. 5o-B. O contrato de prestação de serviços conterá: I - qualificação das partes; II - especificação do serviço a ser prestado; III - prazo para realização do serviço, quando for o caso; IV - valor.

However, the question of whether this law allowed outsourcing in any type of service remained. This is because, as stated above, the expression “*determined and specialized services*” was too vague to conclude that core services could be outsourced. However, at that time, the general understanding was that the law did not authorize outsourcing of core business, because the legislation did not clearly mention expressly core activities and noncore activities as it did in the provision for temporary work. This showed that the intention of the legislator was to prevent confusion between *core activities* and *determined and specified services*. Moreover, with the mindset of protecting workers, this interpretation was the most favorable to workers, since it tried to protect the direct employment relationship.

Nevertheless, few months later, President Temer approved Labor Reform, which also brought about some modifications to outsourcing, thus broadening the meaning of outsourcing.

iii. Labor Reform: Law 13,467/2017

Labor Reform, approved by Law no. 13,467/17 on July 13, 2017, brought about another amendment to Law 6,019/74 (Temporary Work Law). Firstly, it defined ‘provision of services to third party’ in Article 4-A as “the transfer, by the contractor, the execution of any activities including its principal activity, to a legal entity of the private sector, which provides services and has the economic capacity to perform such services.”¹⁸⁴ Compared to the

¹⁸⁴ Art. 4^o-A. Considera-se prestação de serviços a terceiros a transferência feita pela contratante da execução de quaisquer de suas atividades, inclusive sua atividade

previous law of outsourcing that established ‘*determined and specialized services*’, this recent law has a much broader concept of outsourcing as it conceptualizes outsourcing in any activity, including principal activity. This indicates the end of the debate over core activities and non-core activities.

Interestingly, Article 4-A of the new regulation, which is considered an improvement as it benefits outsourced workers, mirrors in the principle of isonomy. It says that “whenever the outsourced worker provides services, which can be any activity, on the premises of a contractor, he or she is guaranteed the same conditions of meals, when provided in contractor’s cafeteria; use of transport services; medical or outpatient care; training when required; sanitary, health and safety measures at work; as well as adequate facilities to provide the service.¹⁸⁵ In addition, Paragraph § 1^a requires the faculty to establish an equal salary for outsourced workers, as it states that if they wish, the contractor and the outsourced company may establish an agreement such that outsourced employees shall be entitled to a salary equivalent to employees of the contractor, in addition to other rights.”¹⁸⁶

principal, à pessoa jurídica de direito privado prestadora de serviços que possua capacidade econômica compatível com a sua execução.

¹⁸⁵ Art. 4^o-C. São asseguradas aos empregados da empresa prestadora de serviços a que se refere o art. 4^o-A desta Lei, quando e enquanto os serviços, que podem ser de qualquer uma das atividades da contratante, forem executados nas dependências da tomadora, as mesmas condições: I - relativas a: a) alimentação garantida aos empregados da contratante, quando oferecida em refeitórios; b) direito de utilizar os serviços de transporte; c) atendimento médico ou ambulatorial existente nas dependências da contratante ou local por ela designado; d) treinamento adequado, fornecido pela contratada, quando a atividade o exigir. II - sanitárias, de medidas de proteção à saúde e de segurança no trabalho e de instalações adequadas à prestação do serviço.

¹⁸⁶ Artigo 4-C, § 1 Contratante e contratada poderão estabelecer, se assim entenderem, que os empregados da contratada farão jus a salário equivalente ao pago aos empregados da contratante, além de outros direitos não previstos neste artigo.

Lastly, Article 5-D regulates that “an employee who is dismissed will not be able to provide services for the same company as an outsourced worker before the expiration of 18 months from the dismissal of the employee”.¹⁸⁷ This prohibits the employer from indirectly (through outsourcing) re-contracting with the employer who had dismissed him or her, within 18 months. This prevents companies from dismissing their employees and hiring them again as outsourced workers for the same position, just because it reduces costs.

Therefore, the recent two laws in regarding outsourcing concluded that it authorizes the practice of outsourcing in any type of activity is authorized, even if related to an essential activity of the contractor, provided that the execution of the services is carried out by a specialized company with the economic capacity for that execution.

iv. Bill 4,330/04 (to be voted upon)

Bill 4,330 of 2004, also called Bill of Law 30, has already been approved in the Lower House and is still in the Federal Senate waiting for approval. This bill contains the same line as Outsourcing Law 13,429 and regulate the practice of outsourcing in more detail; however, the major difference is that this bill authorizes the outsourcing of core business functions.

¹⁸⁷ Art. 5^o-D. O empregado que for demitido não poderá prestar serviços para esta mesma empresa na qualidade de empregado de empresa prestadora de serviços antes do decurso de prazo de dezoito meses, contados a partir da demissão do empregado.

Article 4, Paragraph § 2 says that the services may be related to the development of activities that are inherent, incidental or complementary to contractor's business.¹⁸⁸ The word "inherent" clearly indicates that any activity can be contracted through the practice of outsourcing. Hence, once this provision is signed, every activity will be authorized to be outsourced. However, outsourcing in the public sector remains limited to non-core activities, by virtue of the constitutional rule requiring public examination.

It is apparent that outsourcing laws constantly and gradually tried to ease labor laws by broadening the scope of legally outsourceable services and by flexibilizing the limits on outsourcing. Bill 4,300 eliminates the restriction for outsourcing by redefining the legal framework, which clearly demonstrates that there is to be no division of illicit and licit outsourcing. In that case, upon approval, this type of exceptional trilateral labor relationship would become the general rule, eliminating the protection given by Labor Laws and increasing the number of workers in precarious working conditions.

¹⁸⁸ Artigo 4, § 2o O contrato de prestação de serviços pode versar sobre o desenvolvimento de atividades inerentes, acessórias ou complementares à atividade econômica da contratante.

CHAPTER IV – EFFECTS OF OUTSOURCING ON WORKERS’ RIGHTS

As widely known, as long a regulation allows for triangular labor relation, however restrictive it is, there is also an attempt to disguise the employment relationship, putting workers in a dangerous situation of being deprived of the protections they lawfully deserve. Until now, this study has shown the evolution of trilateral relations in labor contracts, along with globalization and its effect on the labor market, and how this practice of outsourcing has become a common practice recently. It has also caused a huge increase in the number of people working outside the traditional framework of employment relationship.

It is also known that whenever workers are configured outside the employment framework, they are excluded from the labor laws’ protection. Even in authorized indirect labor relationship, workers do not receive proper protection under CLT and the Constitution. This chapter aims to present the effects of outsourcing on workers’ rights, especially those rights that are considered as fundamental rights by the Constitution. First, it analyses the risk of an indirect employment, even the legitimate ones, turns into a disguised employment relationship, which is considered fraudulent to labor laws. By doing such, it demonstrates that outsourcing of core activities also represents fraud to labor laws. The second party lists the consequences and the results of outsourcing practices. Through reported data, it proves that this form of hiring is mitigating labor rights and causing precariousness of working conditions.

Hence, two effects can be inferred: First, fraudulent acts committed against labor laws, and the precariousness of labor.

4. 1. Unlawful Labor Intermediation

4. 1. 1. Lawful Outsourcing and Unlawful Labor Intermediation

The practice of subcontracting services through the mechanism of outsourcing is an exception provided by Precedent 331, which clearly states that the hiring of workers by an interposed company is illegal in its first item. This ruling provides a list of activities that can be legally outsourced, considering them as legal or licit outsourcing. Yet it can be concluded from Precedent 331 that outsourcing is illicit when the hiring of workers is for activities related to core business dynamics.

As mentioned earlier, for professor Carelli, most people support Precedent 331's content, declaring the legality of outsourcing. Therefore, most of the articles and decisions try to unfold the difference of core and non-core activities without understanding why an outsourcing can be considered lawful or illicit. The understanding is that the problem of unlawful outsourcing does not depend on the type of services, but on the difference between real outsourcing and labor intermediation.¹⁸⁹

¹⁸⁹ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 82

In the same line Professor Sergio Pinto Martins argues that the question about distinguishing core and non-core activity is not the problem, the real problem is to verify whether there is an existence of pure labor supply by an interposed company. Thus, unlawful or illegal outsourcing is referring to permanent lease of labor, which can give rise to fraud of labor relations and damages to the workers. Still, for him to verify the lawfulness of outsourcing some requirements should be explored: the economic suitability of the outsourced company; assumption of risks by the outsourced company; specialization in the services provided; the services must be managed by the outsourced company; the services shall not be related to core activities; and the necessity of extraordinary and temporary services.¹⁹⁰

Professor Souto Maior considers valid outsourcing when the service provider company has a specific business activity. The supplying of services needs to be for a certain period of time and it cannot be continuously carried out in service user company regardless whether core or non-core activities. Out of these boundaries, outsourcing shall generate the formation of employment relationship directly between workers and the service taker company.¹⁹¹

To understand why it is important to discriminate outsourcing and labor force intermediation rather than distinguishing core and non-core activity, is the necessity to indicate what comes to be labor intermediation. To be characterized as labor force intermediation, the contracting of services should contain some elements or indicators such as; work management by service taker, lack of expertise or know-how by service provider, the service taker

¹⁹⁰ MARTINS, Sergio Pinto. *A terceirização e o Direito do Trabalho*, 1997, p. 136

¹⁹¹ SOUTO MAIOR, *O direito do trabalho como instrumento de justiça social*. 2000 in CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 78

holds the materials to perform the services, services provided permanently within service taker's establishment, supervision of the work performance by service taker, orders and procedural guidelines provided by service taker; element of human work in the contract, payment based on the number of workers, and provision of services to a single service taker. These elements can be reduced or summarized in three, which are work management by the service taker, specialization of the service provider and the prevalence of the human element in the service contract.¹⁹²

The work management, which is the determination of the mode, time, and ways on how the work should be performed, is the most perfect indicator of legal subordination. For existing legal subordination, it is clear that the intention of an intermediary is to avoid direct labor relationship and consequently its obligations. This management can be noticed in many situations. The most common is when the service taker indicates the number of workers needed which the outsourced company has to provide. In this case, the service provider has no autonomy to manage how the services would be carried out as long as they have provided required number of labor supply. Here, it is clear that to provide or to supply the required number of workers was given more emphasis than to supply workers of specialized services. Still, the determination of working hours also characterizes work management. Besides the exception of regulating business hours, requiring the outsourced worker to do overtime demonstrates the direct subordination with the service taker.¹⁹³

¹⁹² CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 94-95

¹⁹³ CARELLI, Id. at p. 95-97

With regard to personality (*intuitu personae*), if the outsourcing contract contains a provision of workers replacement when required by contractor, this outsourcing carries the element of personality. The personality element not only contains in the provision of workers' replacement but also when the contractor imposes requisites to workers hiring. In this case, contractor chooses who would be hired and also who would be dismissed, without any obligation or responsibility.¹⁹⁴

Another indicator of labor intermediation is the supervision of service operation. If the services are the object of the contract, what needs to be supervised is the final product, the service itself, and not the ways and forms that this service is being operated. The service taker cannot act as hierarchical superior by giving orders and tasks to be complied.¹⁹⁵

In relation to specialization of the service provider, in which relies the concept of outsourcing, the company must hold the specialization in the specific area. The concept of outsourcing is the shifting services to a specialized company that can better perform such services so that the company can concentrate on its core activity. In case the company provides services in general such as cleaning, concierge services, telemarketing etc., it is not considered specialized company but a company that places staff in other companies, obtaining profit by this practice of leasing workers.¹⁹⁶

¹⁹⁴ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 98

¹⁹⁵ CARELLI, Id. at p. 99

¹⁹⁶ CARELLI, Id. at p. 102-103

In this element, the company that provides specialized services must have the know-how and technique to perform the services. It means that the materials and equipment needed to perform the services and also the training of its staff must be arranged by the service provider.¹⁹⁷

Lastly, the indicator of human element in the contract of services characterizes the existence of labor force intermediation. Each concrete case needs to be verified whether the contractor needs the service or the worker himself. This difference can be seen, for instance, in the outsourcing of transportation services. If the contractor holds the means of providing the service, which include cars, buses, or motorcycles, this outsourcing is illegal as the object of contract is the workers, prevailing the human element in this contract.¹⁹⁸

Also the human element is verified if the services are paid according to the number of workers. The price of the contract should reflect the value of the services, based on the market rules. However, when the calculation is based on the number of workers, this practice does not indicate real outsourcing but the supplying of workers or the leasing of workers.¹⁹⁹

Those indicators show how easy it is to disguise labor relationships behind the formula of outsourcing. For that reason, it is important to verify primarily whether the relation of the service provision is outsourcing or a mere intermediation of labor force. This is because, a service provided in non-core

¹⁹⁷ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 104

¹⁹⁸ CARELLI, Id. at p. 105

¹⁹⁹ CARELLI, Id. at p. 106

activities, such as the example of transport services, can be used to disguise an employment relationship, however protected by law.

Therefore, applying those indicators to classify unlawful outsourcing would be more efficient than deciphering which activities are subject to a licit outsourcing. Then, if these indicators are present, the referring subcontracting shall be considered unlawful or illegal outsourcing and be, consequently, penalized with the formation of direct labor relationship between the outsourced workers and the beneficiary of its labor.

4. 1. 2. Outsourcing of core activities: Fraud to Labor Laws

The illegality of such subcontracting in core activities, prescribed in Precedent 331, item I, was due to protect the principles of the Labor Law. The judgment that decided the illegality of intermediation on labor in 1986, which originated with the prior Precedent 256, that offered ground to Precedent 331. In this judgment, Judge Marco Aurelio de Mello motivated the unlawfulness based on the following arguments: service provider does not appropriate of labor's result and much less assumes the risk of economic activity; the constitutional principles of valuation of work as a condition of human dignity; principle of the primacy of reality; abuses of the intermediary company, subject to the law of supply and demand; and constitutional principle of freedom to choose work.²⁰⁰ These arguments are also grounds for labor law violations.

²⁰⁰ TST, Pleno, Proc. TST-IUJ-RR-3442/84, Relator Ministro Marco Aurelio de Mello, DJ 10.10.1986

All the protection given by labor laws is based on the employee-employer relationship. Labor contract is characterized by limiting the freedom of worker, by subordinating to the orders of employer and also by limiting employers to use selfishly the right of property. In this sense, labor law pursues an imperative nature because of the preservation of its objective; that is, to ease the unending struggle of capital and labor. This objective exceeds the circle of individual interests of the worker and the company.²⁰¹

In turn, fraud means the betrayal of the spirit of the law. The legal norm is used to arrive at a desired result that is prohibited by another law.²⁰² In labor law, fraud is linked to the idea of frustration of the purpose which is the protection of workers, failure of its humanizing mission of the employment relation, and the emptying of its potential demercantilization of human work.²⁰³ Thus, fraud to labor laws corresponds when a party, knowing the imperative character of labor laws, intends, by indirect means, to achieve the purpose prohibited by law. For instance, a company, abusing its rights, utilizes the practice of outsourcing to hide the real purpose of avoiding employment relations, which is penalized by labor laws.

In core activities, there is no way that these services be provided without the direct subordination of the worker to the service taker. This is because the latter is not only the beneficiary of the result but because of its profit, its ability to gain depends on the worker's activity, which is directly related to the dynamics of the business. Thus, when core activities are outsourced, it

²⁰¹ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 60

²⁰² VIANA, Márcio Túlio. *Fraude à Lei em Tempos de Crise*, 1996, p. 62

²⁰³ DELGADO, op. cit., p. 60

gives a perfect scenario for a disguised employment relationship, which is considered fraudulent against the application of labor laws' protection.

In addition, transferring the labor responsibility to a third party, by externalizing essential activities, outsourcing becomes an instrument of weakening the safety of employment and of the distortion of a company's social function.²⁰⁴ In this sense, outsourcing of non-core activities is the exception to bilateral relations provided by law, the misuse of this permission by admitting outsourcing in essential and core activities corresponds to fraud to labor laws as this practice consists of a process of disarticulation, precarization and dismantling of labor laws.²⁰⁵

Mere labor intermediation of labor by an interposed company implies the formation of an employment relationship between the worker and the user, as stated in Item I of Precedent 331. When the court recognizes the illegal outsourcing, the decision also establishes the employment relationship with the service taker by the force of item I. In this, the service taker is directly responsible for the integrity of the amounts, which were originated from labor obligations, to the worker. Thus, in illicit outsourcing, when the service provider fails to comply with labor obligations, not paying salary and others benefits to its workers, the service taker is responsible to comply with those obligations, by the virtue of Article 9 of Consolidation of Labor Law.

In illicit outsourcing, fraud against labor law is revealed and, consequently, the third party, which is the beneficiary of the services, occupies the

²⁰⁴ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 64

²⁰⁵ VIANA, Márcio Túlio. *Fraude à Lei em Tempos de Crise*, 1996, p. 70

status of true employer, being directly responsible for the employee.²⁰⁶ In labor law, fraud is penalized by article 9, which says “The acts performed with the purpose of distorting, preventing or defrauding the application of the precepts contained in this Consolidation shall be null and void.” With the illicit outsourcing null, the labor relationship is formed with the contractor, being this contractor directly responsible for all labor charges originated from the period of the service performance.²⁰⁷

Joint liability stands out when each holder (debtor or creditor), has the right or the duty to respond for the totality of the installment, that is, in joint liability the responsibilities for the credits place on the same plane, being equal horizontally without the benefit of order.²⁰⁸

According to Brazilian Civil Code, in article 265, joint liability cannot be presumed, it needs to be resulted from the law or the will of the parties. It is clear now that the intermediation of labor law and outsourcing of core activities configure fraud against labor laws and, hence, an unlawful act. The Civil Code in article 927 states that the party responsible for the unlawful act must repair the damages — “whoever, by unlawful act, causes harm to another, is obliged to repair it.”²⁰⁹

Furthermore, from article 942 - “the assets of the person responsible for the offense or violation of the right of another are subject to compensation for

²⁰⁶ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 102.

²⁰⁷ LACERDA, Luísa. *Terceirização e intermediação de mão de obra: em busca de novos parâmetros de responsabilização*, 2015, p. 215

²⁰⁸ ENGELKE, Rozi; BELMONTE, Ligia. *Responsabilidade solidaria e subsidiaria na justiça do trabalho*, 2010, p 96

²⁰⁹ Brazilian Civil Code, Article 927.

the damage caused; and if the offense has more than one author, all shall be jointly liable for the reparation”²¹⁰ — is extracted that if the offense is done by more than one person, all of them must be equally and jointly responsible for reparation. Accordingly, since the offense against labor rights is generated by more than one author, the service provider and the service taker are jointly responsible for the payment of the labor credits.²¹¹

Fraud to the labor laws by the practice of illicit outsourcing not only forms the bond of employment relationship with the contractor, being the latter directly responsible for labor obligation, but also establishes equal and joint liability for the intermediary company, that with the appearance of ‘employer’ participation to cause damages to workers.²¹²

4. 2. Precariousness of working conditions

CUT and DIEESE published an important dossier entitled Outsourcing and Development: a Non-Closing Account showing the data of increased outsourcing in the 2000s in Brazil. According to this, “the reality imposed by outsourcing is not modernity, but a country with archaic working relations, which violates the precepts of equality.” Brazilian companies weren’t motivated to outsource due to technical specialization, productivity growth, and the development in quality, instead, they’re looking for more avenues for

²¹⁰ Brazilian Civil Code, Article 942.

²¹¹ ENGELKE, Rozi; BELMONTE, Ligia. *Responsabilidade solidaria e subsidiaria na justiça do trabalho*, 2010, p. 101

²¹² LACERDA, Luísa. *Terceirização e intermediação de mão de obra: em busca de novos parâmetros de responsabilização*, 2015, p. 216

profits, especially through very low wages, intense working hours and little or no investment to better the working conditions.

It is also called ‘terceirização à brasileira’, which means outsourcing in a ‘Brazilian way’. This practice is close to the practice of intermediation of labor because, contrary to industrialized countries and Japan, outsourcing in Brazil was a technique of management to only reduce costs. Different from the Toyotism pattern of production in Japan, this was flexible specialization of organizing in order to focus on their business activities by improving the quality of the goods, in Brazil outsourcing is directly linked to precariousness of working conditions.

In this sense, the phenomena of outsourcing in Brazil caused a huge damage in society, especially with the working class, which now, as demonstrated above, is the minority as the number of lumpenproletariat increases. The precariousness of working conditions usually occurs in cases that labor intermediaries are disguised as outsourcing, this is because the interposed companies need to guarantee their profit, which is done by reducing workers’ salary, and subtracting workers’ rights and benefits.²¹³

The second part of chapter IV gives a scenario of the consequences of the outsourcing practices happening in Brazil. Obviously, these consequences are evidences that outsourcing is a synonym of precariousness of labor. Outsourcing management causes damages to a worker as an individual, workers as a working class and collective group, as well as in the environment.

²¹³ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 128

The consequences of outsourcing are demonstrated by the four different faces of precariousness by providing data that shows the reality of outsourcing in Brazil. The first face is related to outsourcing as violator of labor rights, especially on reduction of wages and subtraction of rights guaranteed by the CLT and the Constitution. The second refers to the fragmentation of the working class, which naturally leads to the emptying of collective rights and the weakening of trade union entities. The third face is outsourcing as environmental degradation, especially degradation of working places that, in the majority, damage the health and safety of workers. Fourth and finally, outsourcing as a symbol of social exclusion. This is due to discrimination that occurred in both the workplace and outside of it. Here, outsourcing will also be reported as a driver of social dumping.

4. 2. 1. Derogation of Labor Laws

Brazil is one of the most expensive developing nations for doing business, according to a study by consulting firm KPMG of 2012.²¹⁴ This report, called “Competitive Alternatives”, is a regular KPMG report that compares the structure of costs for companies in different countries and localities, taking into account taxes, labor, rent, cost of capital and other factors. The element that most contributes is the costs related to employment in Brazil. As Brazil has a detailed and specific employment laws, it is a potential source of

²¹⁴ Competitive Alternative Report, Edition of 2012 covers the BRICS - Brazil, Russia, India, China and South countries. Available < https://www.competitivealternatives.com/reports/2012_compalt_execsum_en.pdf> (Last visited January 29, 2018)

difficulty for both local and foreign companies to establish their business, mainly because of the rigidity of the rights.

According to the CLT, employers are responsible for labor and social security charges for its regular employees. For social security charges companies have to be responsible for 28,80% of each employee's monthly salary, which corresponds to Employer's Contribution (20% + 2.5% if financial institution); Working Accident Contribution RAT (1% to 3%), Severance Fund FGTS (8%) and others contributions (5.8%).²¹⁵ And there are mandatory additional costs for regular employment, which is for employee's benefit, that are 30 days of paid vacation, bonus equivalent to 1/3 of the monthly salary, thirteenth month salary, prior notice pay, mandatory maternity leave, transport subsidy, compensation for unjustified dismissal and other benefits as medical services, child care services food vouchers.²¹⁶

In short, according to some consultants, these additional costs correspond approximately 23% of employee's salary, for instance, if the gross salary (monthly) is R\$ 1,000.00 the real cost of each employee would be about R\$ 1,240.00. However, most of the companies provide additional benefits, that became common practice and also an achievement of bargaining, such as transport, lunch voucher and health plan. In that case, if the salary is

²¹⁵ Trading Economics. Brazil Social Security Rate for Companies 2004-2017. <<https://tradingeconomics.com/country-list/social-security-rate-for-companies>> (Last visited January 29, 2018)

²¹⁶ Delloite. Labor legislation for Brazilians: The legal and Tax System. <<https://www2.deloitte.com/br/en/pages/doing-business-brazil/articles/labor-legislation-for-brazilians.html>> (Last visited January 29, 2018)

R\$ 1,000.00, employers shall pay in total for each employee an amount of R\$ 2.238,89.²¹⁷

Now it is clear why the Brazilian way of outsourcing is only aimed at reduction of labor costs, and deteriorating workers' rights and benefits. It is estimated that, counting only the mandatory pension and obligation, 27,80% of the payroll is the amount that companies take as an advantage from the process of outsourcing.²¹⁸

Outsourcing has allowed contractors to get rid of social and legal obligations, as well as not passing on the achievements of collective bargaining to the outsourced workers. Professor Graca Druck observes that outsourced workers are, in general, deprived of a series of rights: not covered by labor protection laws, lower wages, lower qualification, unstable employment, and many of them without the formal contract.²¹⁹

Moreover, the process of outsourcing brings more profit or cost reduction to companies, the only way possible is degrading worker's right through salary reduction with little or no benefits, the same is true for their labor rights.²²⁰ This is the tendency of Brazilian companies: providing little or no labor benefits and reducing workers' salary behind the figure of outsourcing, only aiming to reduce costs, increase profit and *have the competitive advantage*. As we've seen, this practice, that is close to intermediation of labor,

²¹⁷ According to an automatic calculator provided online. This calculation could not be accurate but in terms to have a view on how much cost to employ under CLT conditions, this exemplary number would be helpful to clearly see the difference.

²¹⁸ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 127

²¹⁹ CARELLI, Id. at p. 128-129

²²⁰ CARELLI, Id. at p. 128

is affirming that labor is a commodity. Service providers are attempted to put its workers into the market at the lowest price, so they are more likely to win the competition and be chosen by companies that, in turn, are willing to hire a service at lower cost.

According to the CUT/DIEESE research of 2013, it was verified that: the salary of outsourced workers was 24,7% lower when compared to regular workers; they worked 3 three hours more per week; the duration of employment was lower as they stayed at their work for about 2,7 years while regular workers stayed with average of 5,8 years, this reveals a higher turnover of outsourced workers with no job security compared to regular workers.²²¹

To explain the results, arguments said that the low salaries is due to the fact that outsourcers are allocated in small companies, which makes it less possible for them to have better salaries. However, according to the CUT/DIEESE survey of 2011, 53.4% of outsourced workers work in companies with more than 100 employees. Another common argument is that outsourced workers received lesser salary because they have lower levels of schooling and skills. Even though they have lower level of schooling it did not make much of a difference since 61.1% of the workers in typically outsourced sectors have high school education or higher education, whereas among the regular workers in the typically contracting sectors, the percentage is 75.7%.²²²

The intense working hours indicated the violation of labor laws which establish limits for working hours and also for extra payment when it is exceeded.

²²¹ CUT. DIEESE. *Terceirização e desenvolvimento: uma conta que não fecha*, 2014, p. 15

²²² CUT.DIEESE. Id. at p. 11-12

The data related to the period of employment reveals a high turnover of outsourced workers. This fact has a series of consequences for a worker, which include irregular periods of work and periods of unemployment, resulting in the lack of conditions to organize and plan for their personal development such as professional training. Moreover, there are workers that cannot complete at least one year of service in the same company, hence, are not entitled to a paid vacation, which affects their physical and mental health. Not only wage losses, but also, they have reduced benefits. In general, outsourced workers do not have benefits such as meal vouchers, medical care, profit sharing and results, among others.²²³

The report of 2013 also points out that outsourced companies defraud the labor rights of their workers and that work-related accidents in outsourcing companies are high. There are strong indications that outsourcing and slave-like work do not simply go hand in hand, but are intimately related.²²⁴ According to a study mentioned in this report, out of 10 largest rescues of workers in slave-like conditions in Brazil between 2010 and 2013, 90% of them were outsourced workers, this is according to the data obtained from the Department of Eradication of Slave Labor (Detrae) of the Ministry of Labor and Employment.²²⁵

²²³ LACERDA, Luísa. *Terceirização e intermediação de mão de obr : em busca de novos parâmetros de responsabilização*. 2015. p. 200

²²⁴ CUT. DIEESE. *Terceirização e desenvolvimento: uma conta que não fecha*. 2014. p. 28

²²⁵ The study is available in <<http://reporterbrasil.org.br/2014/06/terceirizacao-e-trabalho-analogo-ao-escravo-coincidencia/>> (Last visited January 29, 2018)

It is clear that, although they have a formal employment contract, this employment is considered a rarefied employment, which is, according to Delgado, a labor relation that suffers from a normative effectiveness deficit, by an intensity and by a protective quality that is much lower than the assured standards.²²⁶

This labor turnover and job insecurity, entailed by outsourcing, insinuate the feelings of individualization in labor relations and the fragmentation of a productive body. This creates an ideal scenario for companies to hinder as much as possible trade union and bargaining activities. Thus, outsourced workers are losing their voice in the labor market, having less opportunity to have their social rights defended and working conditions improved.

4. 2. 2. Fragmentation of Working Class

Prior to the practice of outsourcing, according to the framework of Taylor-fordism, it was necessary to gather and standardize the workers in the workplace; this gathering intensified their union since they shared the same suffering, pain and dreams. Each worker saw himself in the other, as in a mirror. Therefore, an individual worker who can identify with a coworker and with another has gradually created a coalition that has turned into a labor union.²²⁷

²²⁶ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 106

²²⁷ VIANA, Márcio Túlio. *As Varias Faces da Terceirizacao* 2009, p. 143

However, flexible accumulation system ruptured the traditional working class as it created a diverse, heterogeneous and a complex working class. Many authors tried to name this new working class, as shown in Chapter II of this study, as precariat, subproletariat, neo-proletariat, class-that-lives-from-labour, lumpenproletariat. All of them recognize that the traditional working class is disappearing and that the rising of a new working class is in a more precarious condition.

In outsourcing, there are many people and entities involved. As analyzed by David Weil in his book “The Fissured Workplace”, “we walk into a Marriott and assume that the people who greet us at the front desk or who clean our rooms are employees of that brand, as their uniforms imply.” However, in reality of contracts, those workers are employees from multiple and different service supplier companies. According to him, the modern workplace has transformed profoundly, the basic terms of employment, which hiring, evaluation, pay, supervision, training, coordination, are result of multiple organizations. The workplace has fissured.²²⁸

The fissured workplace fragments, divides, separates, dismantles collective identities, individualizes and creates competition among those who work in the same place, in the same functions, but are classified or divided in first and second category, an apartheid that has a direct implication on collective and union action.²²⁹

The multiplicity of service takers, components of different economic categories, as well as the successive of labor contracts signed by outsourced

²²⁸ WEIL, David. *Fissured Workplace*, Stanford University Press, 2014, p. 3-7.

²²⁹ ANTUNES, Ricardo; DRUCK, Graca. *A terceirizacao como Regra?*, 2013, p. 220-221

workers, makes it impossible for workers to be organized, even though they have the same economic interest and common working conditions.

In Brazil, workers are organized according to the professional category of its employer. The CLT maintained the Constitutional principle of unitary *union* system, which means that limited number labor unions are state-recognized in a given trade or occupation, in a geographic area (usually a city or municipality).²³⁰ With that, in a certain municipality, only one union can represent a certain specific professional category. It is the prohibition by law of the existence of more than one union on the same basis of action.

The CLT made the professional category to correspond to the economic category, which leads to the conclusion that people who work in the same branch of business activity are united by bonds of solidarity.²³¹ In other words, employee's union category is related to the economic activity developed by his employer, so outsourced worker belongs to the union category relative to the business of service provider company, and not to economic activity of contractor.²³²

This is a contradiction because what happens in reality is: outsourced workers are working within the contractor's enterprise and for the benefit of

²³⁰ Art. 8º. É livre a associação profissional ou sindical, observado o seguinte: [...] II - é vedada a criação de mais de uma organização sindical, em qualquer grau, representativa de categoria profissional ou econômica, na mesma base territorial, que será definida pelos trabalhadores ou empregadores interessados, não podendo ser inferior à área de um Município.”

²³¹ VIANA, Márcio Túlio. *Terceirização e Sindicato: Um enfoque para além do direito*, 2003

²³² MANFIO, Fernanda. *O enquadramento sindical dos empregados terceirizados*, 2014, p. 47-48

contractor's economy activity. The beneficiary of the result of the labor is the service taker, that is, his economic activity is being benefited. In addition, the union category of service supplier is always weaker than the lead company's labor union. Hence, outsourced workers have less bargaining power to improve their working conditions.²³³

In a company called Petrobras, for example, in which the majority of workers are outsourced, their direct employees are represented by a powerful union association while outsourced are represented by different unions depending on their companies' economic activity. With this, collective bargaining turned to be more difficult as labor association lose the power to bargain. An example of this is the strike that occurred on 2001 when employees paralyzed their work but the production kept on going, it was possible because outsourced workers were normally working and doing the work of Petrobras's employees.²³⁴ This case clearly demonstrates not only the fragmentation of working class but the emptiness of the collective right of bargaining and the right to strike.

Another example is the case of company Barcas SA, a ferry crossing operator, which explicitly testified that they used subcontractors to cover striking workers, in order to not have their activities paralyzed. Here, the reason for subcontracting was to replace worker on strike and prevent possible damages on its production due to the paralyzation.²³⁵

²³³ MANFIO, Fernanda. *O enquadramento sindical dos empregados terceirizados*, 2014, p. 47-48

²³⁴ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*. 2014. p. 131 -132

²³⁵ CARELLI, Id. at p. 132

Without the right of bargaining, provoked by pulverization of the working class, workers are inhibited from fighting for better working conditions.²³⁶ It is the same as going to war without a gun. The pulverization and the multiplication of labor unions make it increasingly difficult to defend the labor environment and working conditions, notwithstanding the workplace is the same for both the outsourced and for the regular employees. With weakened union and little representativeness, companies have no strong pressure to improve workplace conditions through complying with terms of safety and health of workers.²³⁷

With regard to regular workers, they also have been negatively affected by this fragmentation. Although they are represented by a strong union, with power to bargain better working conditions, when outsourced is there to cover their strike activities, their right to strike would remain empty. This is because, companies are not pressured to improve or attend their solicitation as they are not affected in production results. Companies are less likely to accept what the union is proposing, causing a stagnation of regular workers' salary, for example. However, outsourced workers are still more affected and the consequences are even worse in terms of degradation of their rights, and sometimes the damages are irreversible.

Therefore, outsourced workers are inhibited from fighting for better working conditions, better safety and hygiene in working places, leading to intense journeys and the health and safety conditions more precarious.²³⁸ The

²³⁶ SOUTO MAIOR, Jorge Luiz. O direito do Trabalho como instrument de Justicia Social, p. 320, *apud* CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*. 2014. p. 132

²³⁷ CARELLI, Id. at p. 134

²³⁸ VIANA, Márcio Túlio. *As Varias Faces da Terceirizacao*, 2009, p. 147

fragmentation of the workers does not only imply and weaken the collective rights but propels the creation of employees by category. In this scenario, workers within a single enterprise are being classified as workers or sub-workers, resulting to discrimination within the workplace.

4. 2. 3. Precariousness of Safety and Occupational Health

With regard to safety and health condition in workplace, DIEESE's report of 2011 proves its precariousness of outsourcing in numbers of work-related accidents and deaths.²³⁹ The precariousness, in relation to the work environment, is partly due to the collapse of the labor collectivity. With the pulverization of the working class and the multiplication of trade union entities, it is increasingly difficult to defend the conditions for work environment, which is the same for regular contractor's employees and outsourced workers.²⁴⁰

According to this report, it is observed that outsourced workers suffer the greatest number of occupational accidents as they are more exposed to risks. This is the result of outsourcing practice, which is aiming to reduce cost; it does not provide essential training, information about the risks, preventive measures and etc., which are costly.²⁴¹

²³⁹ CUT. DIEESE. *Terceirização e desenvolvimento: uma conta que não fecha*, 2014, p. 23

²⁴⁰ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 134

²⁴¹ ANTUNES, Ricardo; DRUCK, Graca. *A terceirização sem limites: a precarização do trabalho como regra*, 2015, p. 28

In the petroleum sector, data from the Federation of Oil Tankers of CUT indicates that in the period of 1995 to 2010, 283 deaths were recorded due to work accidents in the Petrobras Company. From the total of 283 cases, 228 occurred with outsourced workers. In 2011, this number already exceeds 300, without counting the number of occupational diseases.²⁴² From 2005 to 2012, the number of outsourced workers grew 2.3 times in Petrobras and the number of accidents at work exploded: it grew by 12.9 times. During this period, 14 Petrobras's regular workers died during their work activities, while 85 outsourced workers died in the same period.²⁴³

The reasons for this greater accident among outsourcers are linked to the precariousness of their working conditions. The outsourced workers lacked preventive measures and personal equipment, were given excessive working hours and were in greater exposure to risks by constantly carrying out hazardous operations.²⁴⁴

Outsourcing in the Brazilian electricity sector has been classified as one of the most hazardous in the sense of endangering the lives of workers; both by the technical nature of the work process, which is highly dangerous, and also by the restructuring suffered by the sector through privatizations.²⁴⁵ In this hazardous sector of electricity, high rates of accidents and deaths at work indicates outsourced workers. According to Brazilian Electric Sector Accident Statistics Report, elaborated by the Business Management Committee

²⁴² CUT. DIEESE. *Terceirização e desenvolvimento: uma conta que não fecha*, 2011, p. 14

²⁴³ CUT. DIEESE, Id. at p. 25

²⁴⁴ ANTUNES, Ricardo; DRUCK, Graca. *A terceirização sem limites: a precarização do trabalho como regra*, 2015, p. 28

²⁴⁵ ANTUNES; DRUCK, Id. at, p. 28

Foundation (COGE), outsourced workers, in the sector of distribution and transmission of electric energy, deaths are 3.4 times more than regular workers. In 2011, out of 79 cases of death caused by work-related accidents, 61 of them were outsourced. The report shows that the very reason of those tragedies is mainly related to precarious work conditions to perform the service, such as lack of protective equipment and training. The prove that best reveals it is the number of 62% of the accidents (38 out of 61) were caused by electrical origin, which reveals the lack of use of personal protective equipment.²⁴⁶

The causes are the precarious working conditions, particularly on non-compliance with Regulatory Norms (in relation to health and safety prevention), lack of training, insufficient qualification and professional training, lack of experience and knowledge about the work process, especially in the electrical networks, absence of recycling, non-provision of PPE (Personal Protective Equipment) and EPC (Collective Protection Equipment), and non-existent CIPA (Internal Commission of Accident Prevention).²⁴⁷

The lack of providing protective equipment also exists in hospitals sector, some of the outsourced workers in a hospital cleaning service were reported to be suffering from diseases such as tendinitis and dermatitis, and many occupational risks associated with the use of cleaners, repetitive work, and involvement in sharps injuries and biological fluids.

²⁴⁶ CUT. DIEESE. *Terceirização e desenvolvimento: uma conta que não fecha*. 2014. p 24

²⁴⁷ ANTUNES, Ricardo; DRUCK, Graca. *A terceirização sem limites: a precarização do trabalho como regra*, 2015, p. 28

Hence, outsourcers work harder, have more risky jobs, are more pressured, less skilled, less organized, and have less medical care. It is not surprising that they are the biggest victims of accidents.²⁴⁸ However, still in regard to workplace, there is a degradation on outsourced workers' mental health as they have intense working hours and high turnover. The situation deprives them from having the right for a rest day or maybe a vacation at the same time the uncertainty of job security.

Work is interesting to an individual where there is a possibility of freedom of expression and creativity, but when this aspect is threatened, the process of psychic illness begins. This is seen in outsourcing; where there are weak ties with employers, feelings of inferiority, lack of opportunity for professional growth, and job security cause a significant emotional load for outsourcers. In the cleaning sector, especially, workers are reported to have perceived inequality and humiliation in the work environment. The consequence of this is the corrosion of character of these workers. Since character focuses upon the long-term aspect of people's emotional experience, expressed by mutual commitment and the pursuit of long-term goals. But how can workers build their character in the environment of immediate and impatient, short term, companies being constantly breaking apart?²⁴⁹

The problem referred to work environment leads to another problem that is social exclusion. Classifying, dividing and fragmenting the workers into different categories of workers not only break the solidarity and union

²⁴⁸ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014. p. 137

²⁴⁹ SENNET, Richard. *A Corrosão do Caráter, consequências pessoais do trabalho no novo capitalismo*, Editora Record, 2009

among workers, but also creates competition between workers and increases discrimination in the workplace.

4. 2. 4. Social Exclusion

The precariousness of work brought by modernization of labor laws is verified by the increase of inequality between workers in the same workplace, as they do not receive equal treatment as regular workers do. When analyzing the subjectivity of outsourced workers, there is a sense of isolation, lack of bond and insertion, and where the perspective of collective identity is weakened, the results are disposability, devaluation and discrimination.²⁵⁰

Perhaps the greatest damage to workers is the state of exclusion in which outsourcers remain, discriminated within the work environment, segregated from a group of workers with 'status' of employees, who receive better benefits from a single employer.²⁵¹

It is understood that social exclusion exists in a contemporary society, that is horizontally organized, it concerns whether a person or a worker is in the center or in the periphery. The question is not about being 'up' or 'down', but 'in' and 'out'. Those belonging to the 'in' benefit from labor protections and have the opportunity to increase their standard of living, by occupying a job, enjoying an identity at work, as well as participating in a social life. The

²⁵⁰ ANTUNES, Ricardo; DRUCK, Graca. *A terceirização sem limites: a precarização do trabalho como regra*, 2015, p 30

²⁵¹ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 141

excluded ones, who belongs to the ‘out’, are victims of the mutations of the economic system, and consequently deprived of all effective participation.²⁵²

Andre Gorz describes that there’s a dualist division in workers: on the one side, an elite of protected and stable workers, employed full time; on the other side, a mass of unemployed and unskilled workers, employed in precarious and intermittent work conditions.²⁵³

Social exclusion differs from precariousness. The latter is a stage prior to exclusion. It points the destruction of social bonds as a decisive cause for social exclusion. Alain Lipiets demonstrates this characteristic by analyzing the present society as an hour-glass society, that is, every citizen is a grain of sand toward the bottom, and whoever is in bottom part of the upper part would most likely to pass to the bottom.²⁵⁴ This analogy illustrates exactly the modern outsourcing practice. It shows that regular workers, who is in the upper part is imminent to fall to the bottom, as the tendency of modern companies is to outsource all activities.

Segregation and discrimination are the most visible aspect of social exclusion and they are characterized by delimiting spaces, differentiating groups from particular attributes, and unequal access to social resources. The first characteristic is seen when companies segregate regular workers and out-

²⁵² CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 143

²⁵³ GORZ, Andre. *Farewell to the Working Class: An essay on Post-Industrial Socialism*, Pluto Press London and Sydney, 1987, p. 74

²⁵⁴ LIPIETZ, Alain. *La Société en sablier: La partage du travail contre la déchirure sociale*. 1998. in CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 147

sourced workers by different uniforms, name tags. It creates a status of ‘*outsourced*’ that, in majority of times, is mentioned with contempt and demotion. Another characteristic that segregates outsourced workers refers to distinction of authority and competence in their functions. It is verified that management and ‘strategic positions’ are occupied by the contractor’s employees, and all the residuals by outsourcers. The last characteristic of unequal access to social resources is verified when companies do not extend the use of its facilities to outsourced workers. For example, the company Petrobras has separated toilets for regular and outsourced.²⁵⁵

Outsourced workers constitute lower and periphery category, they are treated as second class, not only by the bosses and supervisors, but also, in many cases, by regular workers, who are the ‘elite’ of the factory. Even though they work side by side and often perform the same function, they are considered second class and are deprived of basic rights. This scenario is not only seen in private entities, but outsourced workers in public sector are also classified as second-class, holding lesser rights than public servants and carrying out less important activity.²⁵⁶

Furthermore, the regulation itself entails discrimination as it states the determination of direct employment relationship when the element of subordination is present. Under this penalty, companies intentionally treat differently outsourcers and regular employees. In other words, outsourcers are left

²⁵⁵ CARELLI, Rodrigo Lacerda. *Terceirização como intermediação de mão de obra*, 2014, p. 151-156

²⁵⁶ CARELLI, Id. at p. 154-156

aside so that it is not said that there was subordination or any other element that would characterize direct employment with the service taker.²⁵⁷

The affirmation of the value of labor in the major developed western capitalist economies was one of the most remarkable frameworks of social democracy in the contemporary world. Through this assertion, the capitalist system was able to incorporate the large population of workers into its operative dynamics, according to a pattern of economic development and distribution of wealth.²⁵⁸ In this sense, labor is the principal vehicle to social inclusion, but what we have seen is that the new atypical forms of hiring are not promoting social inclusion, instead it is excluding workers, rights and social policies.

4. 3. Outsourcing as Social Dumping

The term dumping was initially used in Commercial Law to define the practice of selling large quantities of products at a price much lower than that practiced by the market. In labor law, similarly, business owners seek to eliminate competition at the expense of basic employee rights. Social dumping is therefore characterized by the conduct of certain employers who consciously and repeatedly violate workers' rights to achieve financial advantages,

²⁵⁷ SOUTO MAIOR, Jorge Luiz. *A terceirização sob uma perspectiva humanista*, 2004, p. 122

²⁵⁸ LACERDA, Luísa. *Terceirização e intermediação de mão de obra: em busca de novos parâmetros de responsabilização*, 2015, p. 202

through lowering the cost of the production, which increases the unfair market competitiveness.²⁵⁹

According to Souto Maior, social dumping is identified as a repetitive practice of non-compliance with labor legislation, as a way of maximizing profit and of taking advantage of competition, even if this objective is not achieved, it causes serious maladjustment in the whole production process, with serious damage to workers and to society in general.²⁶⁰

In a globalized economy that is marked by strong competition this practice becomes more commonplace. Some actors defend that globalization is not beneficial to workers as capitalism always imposes measure to preserve and accumulate capital, what necessarily implies in reduction of cost with labor forces.²⁶¹ There are several practices that may constitute social dumping, such as intense working hours, illegal outsourcing, non-observance of safety standards and occupational medicine, among others. Companies that practice social dumping is considered fraudulent not only causing damages to their employees but also to employers who fulfill with their labor duties as they end up suffering losses from unfair competition.²⁶²

²⁵⁹ SÁ, Arquimedes Vieira de. *Dumping social e terceirização: uma análise Projeto de lei da Câmara n. 30/2015*, 2016, p. 18-19

²⁶⁰ SOUTO MAIOR, Jorge Luiz; MENDES, Ranúlio; SEVERO, Valdete Souto. *Dumping Social nas Relações de Trabalho*. in SILVA, Leda Maria Messias da; NOVAES, Milaine Akahoshi. *Dumping social e dignidade do trabalhador no meio ambiente de trabalho: propostas para a redução da precarização*, 2015, p. 27

²⁶¹ SILVA, Leda Maria Messias da; NOVAES, Milaine Akahoshi. *Dumping social e dignidade do trabalhador no meio ambiente de trabalho: propostas para a redução da precarização*, 2015, p. 27

²⁶² SÁ, *op. cit.*, p. 18-19

Flexibility of labor rights is unanimously seen as decline of social rights. Competitiveness, another factor of neoliberal capitalism, had and has been the core factor that destroys workers citizens who are daily seeking for his and family's survival. These two elements, which characterize social dumping, are pushing the main multinational companies to install their companies in countries where they can obtain profit to the detriment of labor rights. Because of this, they can put on the market a product with prices much lower than that practiced. This obviously is due to the use of slave or child labor, whimsy wages, denial of essential labor rights, or the submission of workers to precarious work situations.²⁶³

Social dumping is not a phenomenon originally internal to a country. Its applicability almost always requires a relation of more than one country. Two or more countries consciously agree to practice social dumping, one party agrees to invest in a country that, in turn, agrees to ease labor standards, and the economy of a country can be revitalized with social dumping.

Accordingly, legal systems of the states have been demoted to the condition of 'costs' that must be considered by the entrepreneurs in the account of the production, in order to have decisive weight in the choices around the entrance or exit of a certain market, this is a true system of law shopping. According to Alain Supiot, in this global market, the law is considered as a product that competes on a global scale, where there is a natural selection of legal systems that best adapt to the demand for financial performance. In this sense, the labor law, which aims to give legal bases that are indispensable for

²⁶³ SILVA, Leda Maria Messias da; NOVAES, Milaine Akahoshi. *Dumping social e dignidade do trabalhador no meio ambiente de trabalho: propostas para a redução da precarização*, 2015, p. 27-28

the functioning of the labor markets and for protecting workers, is progressively being dismantled in the context of globalization.²⁶⁴

In this process of seeking for the best labor laws, this situation only harms the workers of the countries receiving the predatory investment. Bringing this context to Brazil, the recent deregulation and flexibility of labor laws is being positively viewed by great investors, as the huge territory and large population were always a characteristic of investment.

One of the principal example of social dumping is the practice of outsourcing, which has the purpose of cutting cost, increase productivity at the expenses of labor standards reduction. In this sense, the authorization of outsourcing of all activities is creating an environment where social dumping can be lawfully played.

In the international context, the fight against social dumping can be faced, for example, by implementing of the so-called 'social clauses' or 'labor standards' in the treaties signed by the member countries of the World Trade Organization (WTO), as well as in bilateral and multilateral agreements, precisely because of the obligation of the signatory states to strict and effective observe those precepts stated in ILO Declaration on Fundamental Principles. In this sense, the free access of products by consumer markets would be conditional to the fulfillment of the right to freedom of association, recognition of collective bargaining, elimination of all forced and compulsory labor, abolition of child labor and elimination of discrimination in respect of employment and occupation.

²⁶⁴ SUPIOT, Alain. *El Espíritu de Filadelfia*, p. 61-68 apud EBERT, Paulo Roberto Lemgruber. *O direito do trabalho no século XXI: em busca de uma nova estruturação*, 2012, p. 230

The implementation of such clauses is due because the experience accumulated over the last seventeen years shows that between 1995 and 2012 there was indeed a growth of free trade accompanied by the enrichment of several so-called ‘emerging’ countries, without, however, the mitigation of the social problems that persist in them, much less the strengthening and consolidation of labor rights. On the contrary, the current scenario is the persistence of the concentration of income in the upper strata of the population and the increasing declining of labor guarantees due to social dumping.²⁶⁵

Besides that, the social clauses would reinforce the determination given by ILO on fundamental principle and rights at work and decent work by promoting sustainable development, respect for the environment, respect for those rights inherent to the individual dignity of workers, such as limited working hours, salary appropriate to attend the worker and his family need, safety and health at work, leisure, among others.²⁶⁶

The protection of human rights, through affirming the value of labor, remains an important normative principle in global affairs, and democratic countries cannot merely ignore their human rights obligations and must balance their international commitments with their desire to remain economically competitive and attractive to investors.

With that said, all countries who participate in the world economy shall held solidarity responsible for observing the international labor standards given by ILO, and use it as an instrument of combating social dumping. Not

²⁶⁵ LEARY, Virginia. *The WTO and the Social Clause: Post Singapore*. p. 118-122. in EBERT, Paulo Roberto Lemgruber. “*O direito do trabalho no século XXI: em busca de uma nova estruturação*”, 2012, p 230

²⁶⁶ EBERT, Paulo Roberto Lemgruber. *O direito do trabalho no século XXI: em busca de uma nova estruturação*, 2012, p. 230-231

only social dumping, but also the consequences of poverty and social inequality that it brings, ensuring that globalization in all its forms goes hand in hand with social progress.

CHAPTER V - LIMITS TO UNRESTRAINED OUTSOURCING

It was proven that outsourcing is the legitimate main driver of precariousness of work in Brazil. It is also synonymous with health and life risks, and the one responsible for the fragmentation of collective identities of workers, the intensification of alienation and human devaluation, as well as an instrument of spraying the union organization, which hampers bargaining for better work conditions. In addition, outsourcing puts a “mantle of invisibility” on workers, so they appear invisible for application of labor laws, building an ideal scenario for entrepreneurs to not have limits in the use of labor force, exploring it as a commodity.²⁶⁷

The previous chapter tried to prove that the consequences of precarious working conditions occurs only when workers are outside the scope of the traditional employment relationship. Although labor laws try to regulate every true employment relationship, based on facts and reality, it fails to extend its protection to workers that are not regular employees.

The period of the research shown in Chapter IV refers to the outsourcing regulated by Precedent 331, which was somehow restricted as it allowed outsourcing only in noncore activities. However, even under this limitation the results of precariousness and social exclusion have shown to be alarming,

²⁶⁷ ANTUNES, Ricardo; DRUCK, Graca. *A terceirização sem limites: a precarização do trabalho como regra*, 2015, p. 31

much more now with the new law of outsourcing that extended outsourcing to core business activities. Important to mention that there is an unrestrained outsourcing Bill waiting to be approved, which will further aggravate the alarming situation of outsourced workers.

Any guidance of human existence should be understood within an evolutionary perspective, such as the principles of non-retrogression, in Human Rights, and the progressive improvement of social and economic condition of workers, in Labor Laws. Labor laws exists to confer opportunities for the working human being to be rescued from the logic of objectification or commodification.²⁶⁸

Non-social retrogression and the progress of social rights are two sides of the same coin. If the former guarantees the maintenance of a qualitative and quantitative minimum level of rights, the latter guarantees the extension and improvement of these rights. With that said, the interpretation and the application of law have as a corollary the perpetuation of the improvement of working conditions and the promotion of social welfare of the working class. It has to act as a civilizing instrument that preserves social standards already assured by whole labor laws.²⁶⁹

In this sense, the interpretation and the application of the new outsourcing law shall be performed in accordance to the principles and standards given by ILO, as fundamental principles and Conventions for decent work, respecting the fundamental social rights ensured by Brazilian Constitution. This

²⁶⁸ SOUTO MAIOR, Jorge Luiz. *Capitalismo, Crise, e Direito do trabalho*, 2013, p. 4

²⁶⁹ GIZZI, Jane Salvador de Bueno; MENDONÇA, Ricardo Nunes de. *Terceirização: instrumento de exclusão social e precarização do trabalho*, 2014, p. 81

chapter aims to analyze that, although the outsourcing regulations seem to be unlimited, especially the one that is about to come, the brake for this unrestrained practice is mainly found in the principle of human dignity and the social function of property. Therefore, the first part further discusses the labor international principles, and second part centralizes in the value of work as an affirmation of the principle of human dignity and the social function of enterprise. By providing limits to this practice, this chapter tries to prevent the instrument of outsourcing from annihilating the whole history of working-class achievements.²⁷⁰

5. 1. Limitation by ILO

5. 1. 1. Philadelphia Declaration (1944) and Declaration on Fundamental Principles and Rights at Work (1998)

ILO emerged in the midst of the world economic and political environment, where countries were united in trade and political agreements to facilitate the transaction of goods and services. In this context, there was an international pressure for protective labor standards to be included in the national legislation of each country.²⁷¹ Further, the conditions to which the workers were subjected in the industrial revolution period were unjust and intolerable

²⁷⁰ SOUTO MAIOR, Jorge Luiz. *A terceirização sob uma perspectiva humanista*, 2004. p. 124

²⁷¹ SOUTOMAIOR in SILVA, Leda Maria Messias da; NOVAES, Milaine Akahoshi. *Dumping social e dignidade do trabalhador no meio ambiente de trabalho: propostas para a redução da precarização*, 2015, p. 29

conditions, where workers were exploited without any consideration for their health, family life and personal development. This condition implied misery, unemployment, long working hours and low salaries.²⁷²

This scenario provoked the creation of ILO in 1919, during the Peace Conferences in April 1919. The ILO Constitution, which was part of the Treaty of Versailles, declared that universal and lasting peace can be accomplished only if it is based on social justice. For that, ILO has the purpose to adopt social policy of cooperation and promote social developments for the improvement of working conditions, through the implementation of universal social protection standards for workers.²⁷³

Its motivation, as expressed in its preamble, is based on the defense of social justice with a view to promoting lasting peace, avoiding the exploitation of workers and restoring social harmony. ILO Constitution emphasizes the necessary regulation of social and labor rights, unions, social security, protection of the integrity and dignity of workers, as well as the technical and educational improvement necessary for an economic and political order. Therefore, the Constitution motivates ILO to specialize in the labor field that is driven by the values of justice and humanity.²⁷⁴

In 1944, ILO adopted the Philadelphia Declaration, which brought four fundamental principles of International Labor Law, as an attachment of ILO Constitution. The first principle and one of the most important principle is

²⁷² ALVARENGA, Rubia. *A organização internacional do trabalho e a proteção aos direitos humanos do trabalhador*, 2007, p. 56-57

²⁷³ ALVARENGA, Id. at p. 56-57

²⁷⁴ DELGADO, Gabriela Neves; RIBEIRO, Ana Carolina Paranhos de Campos. *Os direitos sociotrabalhistas como dimensão dos direitos humanos*, 2013, p. 213

“labor is not a commodity”. With this core principle ILO reveals that the human dignity is an indispensable presupposition for normative construction and also it is the reference value for legal and modern political thinking.²⁷⁵

Where the right to work is not minimally assured, through the guarantee of fundamental rights, there will be no human dignity to survive. It is therefore by decent work that a person finds meaning for life. In this context, labor law is the main instrument of decommodification of human labor in the capitalist economy, favoring human labor with rules that are superior to the rules of the market.²⁷⁶

The second principle expresses “the freedoms of expression and of association are essential to sustained progress”. ILO encourages the free expression of thought and the right of freedom to associate trade union. It signifies the participation of all society in the Democratic State of Law, guaranteeing the manifestation of thought and the wide associative possibility.²⁷⁷

Third principle states that “poverty anywhere constitutes a danger to prosperity everywhere”. Through this principle, the ILO repeats the need for regulation and protection of labor relations, with a view to affirming the conditions of citizenship and dignity of the worker.²⁷⁸ Extreme poverty and social exclusion violate the dignity of the human person. One of the alternatives to reduce social inequalities is the effectiveness and universalization of Labor

²⁷⁵ DELGADO, Gabriela Neves. *Direitos humanos dos trabalhadores: perspectiva de análise a partir dos princípios internacionais do direito do trabalho e do direito previdenciário*, 2011. p. 67

²⁷⁶ DELGADO, Id. at p. 70

²⁷⁷ DELGADO, Gabriela Neves; RIBEIRO, Ana Carolina Paranhos de Campos. “Os direitos sociotrabalhistas como dimensão dos direitos humanos”. 2013. p. 213

²⁷⁸ DELGADO; RIBEIRO, Id. at p. 213

Law, since it secures the effectiveness of citizenship at the socioeconomic level and the effectiveness of dignity at the individual level.²⁷⁹

Finally, fourth fundamental principle of International Labor Law expresses that “the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.”²⁸⁰ This fourth principle adds the strategy of social dialogue or tripartism. Through its tripartite structure, ILO involves representatives of the Member States, workers and employers in deliberations related to labor market, adding the the dimension of individual protection to the field of collective rights.²⁸¹ With this, the fight against poverty should be promoted through the participation of the three parties: employees, employers and government.

The permanent concern to protect the worker, ensuring better conditions of work and social security led ILO to adopt the Declaration on Fundamental Principles and Rights at Work in 1998. This Declaration elects the Human Rights of Workers with emphasis on the following rights: freedom of association and collective bargaining; the elimination of all forms of forced

²⁷⁹ DELGADO, Gabriela Neves. *Direitos humanos dos trabalhadores: perspectiva de análise a partir dos princípios internacionais do direito do trabalho e do direito previdenciário*, 2011, p. 71

²⁸⁰ ILO Declaration of Philadelphia, 1944, Part I.

²⁸¹ DELGADO, Gabriela Neves; RIBEIRO, Ana Carolina Paranhos de Campos. *Os direitos sociotrabalhistas como dimensão dos direitos humanos*, 2013, p. 214

or compulsory labor; the abolition of child labor and the elimination of discrimination in respect of employment and occupation.²⁸²

Declaration on Fundamental Principles and Rights at Work makes it clear that these rights are universal, applicable to all people of all member states, regardless of the level of economic development. It recognizes that economic growth alone is not enough to ensure equity, social progress and to eradicate poverty. Because of that, the Declaration commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions.

These fundamental workers' rights are echoed in the eight core main ILO Conventions, and ILO highly advises its members to ratify it. However, the non-ratification of those conventions does not free members from providing these fundamental social rights to its citizens. Therefore, the eight core Conventions apply to all workers in the broadest sense of the term: that is, they apply regardless the kind of contractual arrangement under which individuals are engaged and independently of the sector of the economy in which they work.²⁸³

Brazil is one of the founding members, having participated even in the first International Labor Conference in 1919, and it is the first Latin American

²⁸² ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010)

²⁸³ CREIGHTON, Breen and McCrystal, Shae. *Who is a "worker" in international law?*, 2016, p. 706

country to host an ILO field office in 1950.²⁸⁴ Among the core ILO conventions, Brazil has ratified seven of them, not ratifying the Convention of Freedom of Association n. 87 for reasons that Brazilian Constitution states the principle of single union or union unity in article 8, II, that says that the creation of a union is not allowed if there is already another one on the same base and category.²⁸⁵

According to the new outsourcing provisions, it seems to be legitimate to exclude workers, who genuinely work on their own account, from protections that regular workers receive. However, ILO, by recognizing this possibility of some categories of workers not receive due protection, guided member states to adopt policies to combat the manipulation of contractual arrangements. In this sense, the regulation of a business activity cannot inhibit workers to receive the proper protection of labor law, because, according to ILO principles, the protection shall be universal. Thus, the limitation for this legitimate unrestrained practice of outsourcing is contained in the fundamental principles of the ILO.

5. 1. 2. Decent Work

Another determination of the ILO that imposes limits on the practice of outsourcing is the task that all members' states have to promote decent work in each nation. The promotion of decent work is one of the most powerful

²⁸⁴ ILO in Brazil, June 2016

²⁸⁵ Article 8, II – it is forbidden to create more than one union, at any level, representing a professional or economic category, in the same territorial base, which shall be defined by the workers or employers concerned, which base may not cover less than the area of one municipality.

ways to achieve social inclusion, dignity and to distribute the fruits of economic growth.

Decent work is a concept formalized by the ILO in 1999 and it summarizes ILO's historical mission of promoting opportunities for men and women to have productive and quality work in conditions of freedom, equity, security and human dignity. It is considered a fundamental condition for overcoming poverty, reducing social inequalities, and for the effective exercise of citizenship for ensuring democratic governance and sustainable development. Through this conception, the crucial purpose of decent work is to promote well-being and guarantee a decent life for workers. According to Alves, the definition of decent work is essentially related to the affirmation of the dignity of the human person of the worker.²⁸⁶

According to ILO, decent work is related to the aspirations of people in their working lives. This involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.²⁸⁷

It can be said that decent work is the key element to achieve a fair globalization as it combats poverty and social inequalities. The ILO Declaration on Social Justice for a Fair Globalization recommends the establishment of

²⁸⁶ SILVA, Leda Maria Messias da; NOVAES, Milaine Akahoshi. *Dumping social e dignidade do trabalhador no meio ambiente de trabalho: propostas para a redução da precarização*, 2015, p. 29

²⁸⁷ SILVA, Id. at p. 29

appropriate indicators to monitor the progress made in the implementation of the ILO Decent Work Agenda.

On September 2008, the ILO convened an international Tripartite Meeting of Experts (TME) on the Measurement of Decent Work, and consequently, adopted a framework of Decent Work Indicators that was presented to the 18th International Conference of Labour Statisticians in December 2008.²⁸⁸

The Framework on the Measurement of Decent Work covers ten substantive elements which are closely linked to the four strategic pillars of the Decent Work Agenda, that is, international labor standards and fundamental principles and rights at work, employment creation, social protection and social dialogue and tripartism. The ten substantive elements of decent work consist of: employment opportunities; adequate earnings and productive work; decent working time; combining work, family and personal life; work that should be abolished; stability and security of work; equal opportunity and treatment in employment; safe work environment; social security; and social dialogue, employers' and workers' representation.²⁸⁹

All the aspects of the ten measures of decent work have legal dimensions, which mean that national labor laws should be edited in the line to affirm and clarify the meaning of decent work by providing an authoritative legislation. However, we've seen that Brazilian recent flexibility on labor laws is focusing more to attend the need of the market without balancing this latter with the promotion of decent work. The proof of this is seen in chapter

²⁸⁸ International Labor Organization. Decent Work Indicators. December 2013

²⁸⁹ ILO, Ibid.

III, which has shown that outsourcing in Brazil is intimately linked to precariousness of work.

In Brazil a National Decent Work Agenda was launched in 2006 with the purpose to combat poverty and social inequalities. The three priorities established in this agenda of 2006 are: generating more and better jobs with equal opportunities and treatment, eradicating forced labor and child labor, and strengthening tripartite actors and social dialogue as an instrument of democratic governance.²⁹⁰

Within the framework of decent work agenda, all workers, regardless of employment status, should work in conditions of decency and dignity.²⁹¹ This means that outsourced workers are entitled to receive the treatment of decent work, which is provided by labor laws, even if they are outside of the scope of employment relationship with the user. When the practice of outsourcing surpasses the limits by ignoring equal treatment and the promotion of social dialogue, it cannot be considered lawful in the eyes of labor laws. In this sense, the practice of outsourcing can only be acceptable and legitimate to labor law when it is used within the limits of promoting decent work.

²⁹⁰ Organização International do Trabalho. Agenda Nacional de Trabalho Decente, Brasília 2006 Available in <http://www.ilo.org/wcmsp5/groups/public/---americas/--ro-lima/---ilo-brasilvia/documents/publication/wcms_226229.pdf> (Last visited January 29, 2018)

²⁹¹ CREIGHTON, Breen and McCrystal, Shae. *Who is a “worker” in international law?*, 2016, p. 706

5. 2. Limitation by Brazilian Constitution

In Constitution of 1988, the very first article defines Brazil as a Democratic State of Law, that is, a state model that guarantees the rights and freedom of individuals and also guarantees the rights of well-being.²⁹²

The Constitution of 1988 privileges the construction of a free, just and solidary society founded on the dignity of the human being and the primacy of work and employment, subordinating free enterprise to its social function. It clearly defined, through its regulations, the need to realize a sophisticated and successful modality of socioeconomic organization.²⁹³

The Brazilian Constitution of 1988 places a person as the centre of State's protection, founding its regulations on dignity of human person, article 1, III, social valorization of work in which the principle of free enterprise is subordinated (Article 1, IV).²⁹⁴ Accordingly, by describing Economic and Financial Order, in Title VII, article 170 not only emphasizes the value of work but dictates that all private property shall be subjected to its social function

²⁹² BARACHO, Hertha Urquiza, MAIA, Mario S. F. *A efetividade dos Direitos Sociais no Brasil: comentários sobre o papel do judiciário*, 2007, p. 55

²⁹³ GIZZI, Jane Salvador de Bueno; MENDONÇA, Ricardo Nunes de. *Terceirização: instrumento de exclusão social e precarização do trabalho*, 2014, p. 79

²⁹⁴ Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: III – the dignity of the human person; IV – the social values of labour and of the free enterprise.

5. 2. 1. Human Dignity and Value of Work

In order to comply with the Principle of the Dignity of the Human Person, the Constitution sets forth the guidelines, programs and purposes to be carried out by the State and by society, expressed in articles 1, 3 and 170.

According to Ingo Wolfgang Sarlet, each human being deserves respect and consideration on the State and society, implying, in this sense, a complex of fundamental rights and duties that protect a person against any and all acts of degrading and inhumanity as well as guarantee the minimum existential conditions for a healthy life.²⁹⁵ For Immanuel Kant, the human being, in general, and every rational being, exists as an end in itself, not simply as a means by which this or that can serve its purpose. Because it is an end in itself, the natural purpose of every human is the realization of his own happiness.²⁹⁶

To explain the human dignity Kant differentiates price and dignity by saying that “In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is above all price and therefore admits of no equivalent has a dignity”. He concludes that dignity is above all price, with which it cannot be brought into comparison or competition at all without, as it were, assaulting its holiness.²⁹⁷

²⁹⁵ SARLET, Ingo Wolfgang. *Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988*, 2010, p. 59-60.

²⁹⁶ WAMBIER, Luciane. *A função social da empresa e o princípio da solidariedade: instrumentos de cristalização dos valores sociais na estrutura jurídico-trabalhista*, 2013, p. 162

²⁹⁷ KANT, Immanuel. *Fundamentação da metafísica dos costumes*, 1960, p. 77

In the same understanding the Constitution came to recognize the human being as a center of the protection and represented a profound advance in the recognition of social rights of work, not only by elevating these rights to the meaning of fundamental rights, but also by democratization and revision of their institutes and principles, precisely because they present the concreteness of the value of dignity.²⁹⁸

Fundamental social rights, in turn, have a dual dimension, the first is the subjective dimension that refers to the worker as the titular subject of social rights, and the second dimension is objective that imposes on the State the duty to conform these rights into the infraconstitutional order, with obedience to the fundamental values related to work.²⁹⁹

To accomplish that, fundamental rights have superior hierarchy in relation to other law and have immediate applicability and bind all public powers. The social values to guarantee the principle of human dignity contained in the Constitution are the social value of labor (article 1, IV), primacy of work in the economic order (article 170), labor as the vehicle of social justice (article 193), and the social function of the owner of the means of production (article 173, III).

The value of work is a fundamental instrument to concretely apply the value of human dignity. The social value of work concerns the cardinal principle of the Brazilian Constitution as it is crucial for affirmation of the human

²⁹⁸ MELLO FILHO, Luiz Philippe Vieira de; DUTRA, Renata Queiroz. *A terceirização de atividade-fim: caminhos e descaminhos para a cidadania no trabalho*, 2014

²⁹⁹ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 118

being, both in the sphere of his own individuality and in the sphere of his family and social insertion. The work shows itself as the founding moment of social being satisfaction, which is the starting point for the humanization of the social being. As states by Marx, “is the work, therefore, a condition of the existence of man”.³⁰⁰

When the meaning of social value of labor is transmuted the work itself no longer is the end of human achievement and become a means of something. It means that workers cannot recognize the result of his labor, the product produces presents itself as a alien and unfamiliar to the producer, that is the worker. This estrangement of worker as a social being, as a producer and as a creator can be better expressed in that: the more the worker produces, less he has to consume; the more value he creates, the more worthless and unworthy he becomes; the more well-formed is his product, the more deformed he become; the more civilized is his object, the more barbarous he is.³⁰¹

In order to avoid the consequences of this estrangement, the social value of labor shall enforce the legal order, especially as being a criterion and filter from which the interpretation of each branch of law shall be passed through. Thus, any practice that involves human beings must respect the value of human dignity as well as interpret and apply the law based on this principle.³⁰²

³⁰⁰ CARMO, Patricia Santos de Sousa. *Trabalho: valor ou mercadoria?*, 2014, p. 166-168

³⁰¹ CARMO, Id. at p. 170

³⁰² MELLO FILHO, Luiz Philippe Vieira de; DUTRA, Renata Queiroz. *A terceirização de atividade-fim: caminhos e descaminhos para a cidadania no trabalho*, 2014

The principal instrument that enables this protection is the labor laws as it put in the world of labor the generous list of fundamental social rights that are listed from article 7, with 34 items, to article 11 of Constitution. This study already defined the purpose for the existence of labor law, which is not only to rule labor relationship but to balance the constant fight between labor and capital, though its mandatory and imperative regulations. In the present days, however, this battle seems to be more inclined to capital as capitalism is turning to be more globalized, causing labor laws to lose strength as it cannot achieve its purpose, which is to protect workers.

In this sense, it is necessary that labor law not only stop of retroacting, but it needs to go forward to develop and become 'bigger that it has already been'. It means that in order to not reverse or reduce the social rights, labor laws shall recognize the condition of worker under the constitutional interpretation, even if their contracting is supported by different civil, commercial or autonomous contracts. It has to attract to its protection the workers who have similarities with the employee but because of the different legal framework it receives different treatment.³⁰³

In the world of outsourcing, where workers are continuously being deprived from these fundamental social rights that guarantee their dignity, human work is increasingly approaching to the unacceptable idea that understands work as a commodity. Especially in Brazil, when outsourcing is the practice where companies are submitting human forces to market rules, giving them a monetary value that is priced accordingly to market rules.³⁰⁴ This

³⁰³ CARMO, Patricia Santos de Sousa. *Trabalho: valor ou mercadoria?*, 2014, p. 171-172

³⁰⁴ CARELLI, Rodrigo de Lacerda. *A terceirização no século XXI*, 2013

reality reveals that infraconstitucional laws aren't being applied and interpreted within the limits of the principle of human dignity.

As the market is being ruled by the principle of flexibility, mutating the form of producing and work organizing, labor laws also shall flexibilize towards more protection. It means that it shall adapt and evolve with the market and globalization changes keeping the very reason of its creation, that is to enable the consolidation of the human essence by decent work, making the worker to understand the sense of being a part and having rights in the society in which they live.³⁰⁵

The Constitution imposes a hermeneutic equation that is based on the competition between the freedom of contracting of entrepreneurs, a fundamental right of freedom, and the constitutional order of protection the employment relationship, a fundamental social right of the worker. The freedom of contracting is considered to be restricted as the Constitution consecrates the employment relationship as a source of fundamental social rights in article 7, I. In this point of view, the freedom of contracting must be used in a way that ensures the valorization of work, the dignity of the human person, and social justice.³⁰⁶

Therefore, as long as the practice of outsourcing - the masterpiece of neoliberal market and globalization - is providing and guaranteeing the outsourced worker his dignified existence, it can be considered legitimate in the eyes of the Constitution. Otherwise, whenever necessary, the Constitution

³⁰⁵ CARMO, Patricia Santos de Sousa. *Trabalho: valor ou mercadoria?*, 2014, p. 171-172

³⁰⁶ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 119-122

would intervene in these relations to affirm these values derived from fundamental rights.

5. 2. 2. Social Function of Property and the value of social Free-enterprise

The first time that the Brazilian laws dealt with the term of social function was in the Constitution of 1934, which was strongly inspired by Constitution of Weimar in 1919. From that time, the use of private property is being conditioned to observe its social function. The meaning of social function is that the entity or companies should make the correct use of its structure according to its nature, giving to that good a just destination, without violating the existence of it. In other words, it means that, whether property or other legal institutes have the condition to be performed in conformance with the greater interests of society. Social function of the enterprise derives from the social function of the property considering that enterprise owns the production means and the property of the assets.³⁰⁷

In Constitution of 1988, social function of property is listed in Article 5, XXIII, “property shall observe its social function”, along with others fundamental rights. It is mentioned again in the section of economic order in article 170, III, “the economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard

³⁰⁷ CARMO, Patricia Santos de Sousa. *Trabalho: valor ou mercadoria?*, 2014, p. 173

for the following principles: III – the social function of property”. Again it appears in article 186, which establishes the social function of rural property, says that “the social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements: I – rational and adequate use; II – adequate use of available natural resources and preservation of the environment; III – compliance with the provisions that regulate labour relations; IV – exploitation that favors the well-being of the owners and labourers.”³⁰⁸

In view of this, social function is a duty of the entrepreneur and the administrators of the business to harmonize their economic activity to the interests of the society, even though it is against their will. Hence, owner has the right to use, enjoy and dispose of his property, however the right is limited to the fulfillment of its social purposes (duty).³⁰⁹ This principle applies in economic, social and legal plans, especially in the application of labor standards.³¹⁰

In this sense, Brazilian Constitution reserves to company the social function of promoting direct employment, which is observed in the social rights contained in Article 7 and 8. Which are based on the principle of continuity of employment relationship and the maximum integration of the worker into the company’s life.

³⁰⁸ Chamber of Deputies. Constitution of the Federative Republic of Brazil. 3rd Edition. 2010

³⁰⁹ CARMO, Patricia Santos de Sousa. *Trabalho: valor ou mercadoria?*, 2014, p. 173

³¹⁰ WAMBIER, Luciane. *A função social da empresa e o princípio da solidariedade: instrumentos de cristalização dos valores sociais na estrutura jurídico-trabalhista*, 2013, p. 165

Moreover the social function is seen as a means to promote justice. Especially by creating decent work as a vehicle of affirmation of social work and free enterprise, and, as a result, the condition of the man who lives from work would also be socially promoted, affirming his citizenship.³¹¹ Thus, justice understood as a virtue that constantly preoccupies with another, is against with any concept of selfishness.³¹² In this sense, free enterprise is subordinated and conditioned to its social function and constitutional principles. It only fulfills its function whenever it prioritizes the protection of employment by applying policies of decent work, rather than selfishly seeking for profits.

In the same line STF affirms that the freedom of private initiative, in the context of Constitution, has to be limited to the social justice interest, being unlawful when it is used with the unique purpose of obtaining profit and self-satisfaction. The purpose of “the social values of labour” be firstly stated and then the “free enterprise”, in article 1st, is exactly to observe firstly the values of labor first and then free enterprise. It signifies that the individualist and unilateral free enterprise has no legitimacy under Constitution, and hence the value of free enterprise shall be observed after observed the value of work.³¹³

The Constitution repeated the same understanding in article 170, III, VII and VIII, that says “the economic order, founded on the appreciation of

³¹¹ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 135-140

³¹² WAMBIER, Id. at p. 166

³¹³ DELGADO, Gabriela Neves; AMORIM, Helder Santos. *A inconstitucionalidade da terceirização na atividade-fim das empresas*, 2014, p. 140

the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: III – the social function of property; VII – reduction of regional and social differences; VIII – pursuit of full employment.”³¹⁴

In regard to rural property, as seen in article 186, there are several requirements for rural property to fulfill with social function, such as, specifically what matters to workers, the compliance with the provisions that regulate labor relations and the exploitation that favors the well-being of the owners and workers. Although it expressly says rural property, the interpretation given shall be in accordance to article 7, which indistinctly addresses urban and rural workers and others that aim to improve their social conditions.³¹⁵ It means that this social requirement is applicable to any economic enterprise, inclusive to urban enterprise. Thus, the urban companies have to observe the protective labor norms and explore workforce that favors workers’ well-being.³¹⁶

Given the social function of the company, outsourcing in final activity removes the legitimacy of outsourcing in itself, this is because when companies outsource all activities, the constitutional vocation is left empty. In extreme situations, there would exist companies that externalized all activities configuring the figure of company without employees, in which companies

³¹⁴ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 140-141

³¹⁵ DELGADO, Gabriela Neves; AMORIM, Helder Santos. *A inconstitucionalidade da terceirização na atividade-fim das empresas*, 2014, p. 140 DELGADO & AMORIM, ob. cit.

³¹⁶ DELGADO & AMORIM, ob. cit., p. 136

is exempting, by absolute liberality, from labor charges, social security and tax liabilities.³¹⁷

The justification given above is clearer that only by limiting the practice of outsourcing, companies is fulfilling its social role of promoting not only the well-being of workers but also contributing to the improvement of workers' quality of life.³¹⁸

5.3. Humanizing the Practice of Outsourcing

There is no doubt that labor rights are understood as human rights to all those who make a living by their labor. In this sense, the fight must be towards the humanization of outsourcing: by extending to all subcontractors the principle of the equality of working conditions and salary. It shall incorporate the joint responsibility of the companies, service taker and the service provider towards the worker. It means to replace the criterion of subsidiary liability with that of joint liability, and in the case of a chain of user companies, it shall include all in the criterion of solidarity or joint liability.³¹⁹

By applying the joint liability between the companies, the user company will be more careful when selecting a company to provide services to.

³¹⁷ DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Os Limites Constitucionais da Terceirização*, 2014, p. 137

³¹⁸ WAMBIER, Luciane. *A função social da empresa e o princípio da solidariedade: instrumentos de cristalização dos valores sociais na estrutura jurídico-trabalhista*, 2013, p. 169

³¹⁹ VIANA, Márcio Túlio. *A terceirização revisitada: algumas críticas e sugestões para um novo tratamento da matéria*, 2012, p. 224

This will prevent the proliferation of ghost companies or even constitute themselves for easy and immediate profit at the expense of workers' rights. Those companies appear to sign the contract but disappear when it shall be responsible for labor obligations, leaving the employee without the salary payment and others due rights. Further, as the joint liability burdens the user company, the latter will be more considerate and mindful to inspect and supervise whether the provision of the services the company provide is in compliance with its social and labor charges.

Equal benefits and labor rights between workers from the service taker and the outsourced worker shall be observed. It is time to expressively guarantee all outsourced workers the same salaries with the other regular workers since they are working in the same workplace and for the same company. But isonomy must not stop at the question of wages. In a context in which salaries are increasingly desalinated, it will be necessary to extend to the outsourced the benefits granted to the employees of the user company. Of course, and not only for the isonomic reason, the outsourced workers shall have conditions of health and safety in the workplace.³²⁰

When companies outsource cleaning services, it does completely, it means that there is no direct worker who perform the cleaning service to compare the salaries. In those cases, the principles of ILO's Convention No. 100 shall be applied. That is, salary should be equated to those, although do not have same identity, the work has equal value. It means that the labor of the workers shall have equal remuneration for the works of equal value, not

³²⁰ VIANA, Márcio Túlio. DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Terceirizacao- aspectos gerais. A ultima decisão do STF e a Sumula 331 do TST. Novos enfoques*, 2011, p. 62

simply for the same work or for the similar work.³²¹ The wage isonomy no longer accommodates the classic barriers of assimilation, the equitable wage is the equitable and fair wage. It indicates a salary in its true social dimension, the one that meets the valuation of human labor.³²²

The question of salary leads us to collective bargaining. In order for the equal pay rule to be fully applied, it is necessary for a single union to cover ordinary and outsourced workers, which today, judging by what has been happening in other sectors, would demand more from the labor courts than effective changing in law.³²³

It is known that Brazilian labor law limits the freedom of association. The ILO's Convention No. 87, which guarantees it, cannot serve as a parameter because it present frontal collision with Brazilian Constitution, which defend the unicity of union. However, as one of the core and fundamental Conventions, it must be applied at least in an interpretative way, even if it is not ratified, in order to humanize the practice of outsourcing. If it is not possible to guarantee the freedom of association, an attempt should be made to construct an interpretation that places outsourced workers in labor unions in service-producing companies. Further, not considering any of these hypotheses as feasible, outsourced workers shall be guaranteed, even if they are covered by a different agreement or collective agreement, the same conditions of work and salary as that of regular employees, if these prove more beneficial

³²¹ VIANA, M. T. DELGADO, Gabriela Neves. AMORIM, Helder Santos. *Terceirizacao - aspectos gerais. A ultima decisao do STE e a Sumula 331 do TST novos enfoques*, 2011, p. 63

³²² ROs nos. 162, 391 e 993/2006, TRT da 3ª. Região, 4ª Turma

³²³ VIANA, Márcio Túlio. *As Varias Faces da Terceirizacao*, 2009, p. 153

to them.³²⁴ With that, whenever the collective agreement of user's employees contains better working conditions, it shall be extended to outsourced workers, who perform the services in the user's company' establishment.

The entire process of outsourcing expansion should be questioned under the application of humanizing interpretation. To discourage the increase of outsourcing, the solution is to burden this practice so then companies would be careful when deciding to outsourcing. It will also prevent the practice of outsourcing that only aims to reduce costs at the expense of labor rights reduction. For that, joint responsibility, freedom of association and rights isonomy shall be considered when using outsourcing of labor.

³²⁴ VIANA, Márcio Túlio. *A terceirização revisitada: algumas críticas e sugestões para um novo tratamento da matéria*, 2012, p. 219

CHAPTER VI – CONCLUSION

This study tries to demonstrate how the phenomenon of flexibility, with the emergence of variety forms of employment, such as informality, part time, and specifically outsourcing, is damaging the whole labor system, its structure and its normative, in order to maintain the market and the accumulation of capital. This movement turned into a recurrent mechanism of the entrepreneurs to amplify the profits generating and also increasing informality and precariousness. For that reason, outsourcing has been consolidating, in many parts of the world, as a tool to manage the business to focus on the main and core activities but also as a way to avoid labor standards.

Brazilian legislators gradually amplified the scope of activities to be outsourced. Since the Precedent 331 of TST, in which the practice of outsourcing was restricted to specialized services related to non-core activities. In which cases, workers were not receiving proper protection as they were hidden behind the instrument of outsourcing. The new legislation on outsourcing brings the permission to outsource any kind of business activities, including those related to essential activities.

Before the new regulation, judges used the distinction of core and non-core activities to define the legality of outsourcing. When the company sub-contracts labor in order to use it in its essential activities, the practice would be declared unlawful by virtue of Precedent 331, item I, and the employment relationship would be formed directly with the principal company. However,

with the new regulation, the parameter to define whether the outsourcing is licit or illicit turns to the question of the existence insubordination.

With the Precedent 331, it was adopted as the standard for judging the legality of outsourcing. In other words, each case submitted to labor courts was judged based on the material nature of the service outsourced. This is because, when the outsourcing was related to core business activities, it was almost impossible to not have direct command and order from the user company. Further, even when the outsourcing was referred to noncore activities, the judge determined employment relationship if insubordination was present.

This form of approach has shown a strong commitment to regulate the status of indirect labor relationship and, especially, the intention to allow outsourcing of labor only in exceptional cases. Unlike Korea, which distinguishes dispatching workers, supplying workers, and subcontracting of workers, Brazilian's regulation did not discriminate the various aspects of indirect employment in specific regulations, instead, it uniformly disciplined this practice through the TST Precedent 331. Through that, individual specific case was analyzed and judged according to the market situation. In other words, it can be said that Precedent 331 responded flexibly to the modern market's need, while maintaining the strict regulations as a whole.

The material standards of core and non-core activities represented a meaningful approach to countries, including Korea, to judge the legitimacy of subcontracting of labor under the existence of command and order by the user. However, this influential meaning disappeared as recent legislation allows outsourcing of any activity including core business activities. Without the material scheme to define the outsourcing legitimacy, the attention is now

focused on how the labor courts, who were against the Bill 30 of outsourcing of core activities, will deal with the future cases.³²⁵

Abolishing the practice of outsourcing means going against the nature of Brazilian capitalism and against the spirit of the regime of flexible accumulation imposed by the globalization of capital. Then, if to prohibit outsourcing is impossible, the solution is to burden more heavily the outsourcing practices. In this way, the quantity of outsourcing might be reduced or the quality of the outsourcing's working conditions needs to be improved, minimizing its perverse effects. In this sense, joint responsibility, freedom of association and rights isonomy shall be considered when using outsourcing for labor supply.

In a globalized economy, the flexibility of labor laws in one country impacts the economy of the whole world. Because of that, not only locals are responsible for providing policies that fight against labor exploitation and social exclusion, but there has to be a solidarity of international movement to combat poverty and social inequality seen in unlawful labor practices. Industrialized countries, that are in the position of dictating rules in the world market as well as dictate the means of production, should promote corporate responsibility for social justice.

In this sense, companies and/or service providers should have both social and corporate responsibilities globally. To fight all kinds of work that violates human dignity in these modern times where economies are 'unified' and globalized, social and corporate responsibility is necessary. The battle of

³²⁵ 노호창. 브라질에서의 간접고용 규제에 관한 동향과 전망, 강원법학 제 51 권, 2017, p. 409

price and *dignity* of human labor is constant and continuous. If this battle is not eliminated, human labor will always be treated as something that can be traded with a price and something that can be replaced at any time. It is a continuous task of companies, investors, industrialized countries, and all of those who own the means of production, to observe and to promote dignity of human labor in a world that tends to neglect or empty it. Therefore, although outsourcing is something that is inevitable brought by modern economic changes, the owners of production, wherever they are established, have the social responsibility to guarantee the value of human beings which is, in the words of Kant, “*above all price*” and “*therefore admits of no equivalent.*”³²⁶

³²⁶ KANT, Immanuel. *Fundamentacao da Metafisica do Costume*, Portugal: Edicoes 70 Ltda, 1960.

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국문초록

브라질의 간접고용에 있어서 근로자 권리에 관한 연구

- 소의 아웃소싱법을 중심으로 -

홍지나

법학과 노동법 전공

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신자유주의적 자본주의는 유연한 축적 사조 아래, 테일러모델과 포드생산방식 시스템을 혼란에 빠뜨리고, 유연성에 기반을 둔 일하는 방식을 만들어냈다. 신자유주의의 흐름이 노동법에 들어오면서 임시 근로, 파견근로, 아웃소싱, 외부화 등 간접고용의 다양한 비정규 형태의 고용을 창출하였다. 세계화된 신자본주의의 치열한 경쟁 속에서 살아남기 위해, 간접고용 또는 아웃소싱은 기업의 전략적 계획 또는 해결책이었다. 노동력을 외주화하면서 비용을 절감하고 생산성을 향상시키며, 경쟁 업체에 비해 경쟁력 있는 제품을 제공 할 수 있었기 때문이다.

‘Terceirização’라는 용어는 라틴어 ‘terciariu’에서 비롯된 신조어이다. 많은 국가들(프랑스, 이탈리아, 스페인, 포르투갈 등)은 기업이 제 3 자에게 업무를 제공하는 행위를 ‘도급’ (subcontract)이란 용어로

정의하고 있는데, 브라질은 유일하게 *terceirização* 이란 용어로 표현하고 있다. 브라질의 ‘Terceirizacao’ (인적 아웃소싱)은 기업이 제 3자와 파트너 관계를 맺는 것이며, 이는 기업이 비즈니스 운영과 관련된 업무에 집중하도록 일부 활동을 제 3자에게 전달하는 전략이다. 또한, 서비스를 운영하기 위해 기술력을 보유한 전문 공급 업체에 일부 활동을 이전하고, 기업은 핵심 비즈니스 활동에 집중하는 전략으로 정의된다.

지난 40년간 인적 아웃소싱 경향은 심화되었다. 생산 비용을 줄이고 경제성장만 바라보는 브라질의 아웃소싱 경험은 노동자들의 기본 권리와 인간의 존엄성을 침해하는 문제들을 겪고 있다. 이들을 보호하기 위해 국가의 개입이 절대적으로 필요해 보였지만, 브라질 정부는 그와 반대로 최근 모든 업무 활동의 인적 아웃소싱을 허락하는 법률을 개정했다.

그동안 브라질의 인적 아웃소싱은 최고노동법원의 판례법리 331 호에 의해 간접고용을 예외적으로 기업의 수단활동에 관련된 노무 제공에 허용하고 있었지만, 2017년 개정된 법률은 이를 모든 업무에 허용하였으나, 수단활동 및 목적활동의 구분없이, 제한 없는 인적 아웃소싱을 합법화하였다.

본 연구는 신자유주의적 자본주의가 브라질 노동시장과 간접고용에 관한 규정을 어떻게 변화시켜 왔는지 분석하고, 브라질의 아웃소싱에 관한 입법 변화, 최근 개정된 인적 아웃소싱 법률 내용 및 노동법개혁과 관련된 내용도 함께 소개한다. 또한 아웃소싱의 삼각 관계가 고용 관계를 손상시키고, 불안정한 노동 조건을 초래하며, 근로자를 사회에 배제시키는 결과와 직접적 관계성 있다는 것을 증명한다. 아울러 개정된 아웃소싱 법률들은 모든 업무에 아웃소싱을 허용하고 있는데, 이는 인간의 존엄성과 노동의 사회적 가치를 보장하는 브라질 헌법에 위배되는 것임을 논의한다. 이와 같은 브라질 헌법상 권리와 원칙을 보장하기 위해, 인적 아웃소싱

노동자들에게 정규근로자들과 동일한 임금 및 혜택을 누릴 수 있게 하고, 원청업체의 노동조합에 가입할 수 있는 필요성을 제시한다.

주요어: 브라질, 인적 아웃소싱, 간접 고용, 노동 관계, 브라질 헌법, 판례 331, 핵심 활동, 수단활동, 브라질 노동법

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