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Abstract

This article discusses the “judicial marxism”, which was characterized by the actuation of judges who have learned their ideology among student movements and labor unions. Brazilian Labor Justice was created in the 40s, but the true Labor Law charismatic founders were the hyper politicized generation of labor judges, stood out in the 80s and the 90s, when Marxist labor judges held their position, in the field, against the traditional view of a neutral and impartial judge in the Montesquieu style. It’s known that judges who are politically oriented to Marxism produce “garantist” discourses (in Ferrajoli’s sense) when they utter a speech in legal terms (in their opinions), referring to the fundamental labor rights doctrine – which is based on the concept of dignity of work. However, sometimes “labor garantism” and “Marxism” don’t coincide in attitudes of the same labor judges because it’s not necessary that garantist judges have both the humanistic education and the political initiation in their backgrounds. The truth is that Marxism and garantism can live together, once we recognize that the prior is a political and philosophical doctrine, effective only in the political field, but never into the legal field, while the later is a major philosophical theory especially applied to law issues. By the 2000s, elder Marxist judges were challenged by a younger generation of hyper technician magistrates formed at the benches of the career preparatory courses. By asserting the autonomy of the juridical discourse, rather than the political ideology, these legal positivist judges (in Kelsen’s sense), so called “professional jurists”, partially delegitimized the judicial activism, particularly relevant in Brazilian Labor Courts. Nowadays, Judicial Marxism faces a crisis, losing space to pure garantist and legal positivist judges, although it still holds a formidable aura of legitimacy because it’s the only labor law tradition that deeply justifies the “protective principle”, by assuming the class struggle theory as a main postulate.

Keyword: Legal Sociology; Labor Courts; Ideology; Marxism; Legal Field.

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Judicial Marxism: a sociological essay on ideology in Brazilian Courts¹

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Abstract

This article discusses the “judicial marxism”, which was characterized by the actuation of judges who have learned their ideology among student movements and labor unions. Brazilian Labor Justice was created in the 40s, but the true Labor Law charismatic founders were the hyper politicized generation of labor judges, stood out in the 80s and the 90s, when Marxist labor judges held their position, in the field, against the traditional view of a neutral and impartial judge in the Montesquieu style. It’s known that judges who are politically oriented to Marxism produce “garantist” discourses (in Ferrajoli’s sense) when they utter a speech in legal terms (in their opinions), referring to the fundamental labor rights doctrine – which is based on the concept of dignity of work. However, sometimes “labor garantism” and “Marxism” don’t coincide in attitudes of the same labor judges because it’s not necessary that garantist judges have both the humanistic education and the political initiation in their backgrounds. The truth is that Marxism and garantism can live together, once we recognize that the prior is a political and philosophical doctrine, effective only in the political field, but never into the legal field, while the later is a major philosophical theory especially applied to law issues. By the 2000s, elder Marxist judges were challenged by a younger generation of hyper technician magistrates formed at the benches of the career preparatory courses. By asserting the autonomy of the juridical discourse, rather than the political ideology, these legal positivist

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judges (in Kelsen's sense), so called "professional jurists", partially delegitimized the judicial activism, particularly relevant in Brazilian Labor Courts. Nowadays, Judicial Marxism faces a crisis, losing space to pure garantist and legal positivist judges, although it still holds a formidable aura of legitimacy because it's the only labor law tradition that deeply justifies the "protective principle", by assuming the class struggle theory as a main postulate.

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1. Introduction. The first generation and the myth of the robe.

This sociological essay discusses the "Judicial Marxism", the most important political ideology held by professional judges in Brazilian Labor Courts. (Due to ethical commitments, we are referring the names by pseudonyms). In this essay, we will analyze the ideological attitudes of Brazilian Marxist labor judges in sociological terms.

First, some brief considerations about Brazilian laboral courts... Labor Courts is part of the Brazilian judicial system. Initially, by the late 30s, it was an organ of the executive branch, but the Federal Constitution of 1946 changed Labor Courts officially into a Judicial organization.

In Brazil, these Federal Courts, specialized in trial and judgement of laboral cases, are hierarchically structured, from the district courts (the so called "varas"), in the trial level, to the appellate higher courts: the Regional Labor Courts (TRTs), with full competence to review the matters of law and of fact discussed in the trials; the Superior Labor Court (TST), competent to examine issues concerning federal labor law; and, finally, the Supreme Federal Court (STF), competent to examine constitutional issues.

Until 1999, the laboral trial courts have had a paritary composition, with a main professional State judge and two "classist" lay judges, respectively representatives of the workers and the employers. Nowadays, local courts have only one professional judge.

The *enjeu*, in the field of the labor judicature, is the problem of defining and imposing, to the pairs within the profession, the definition of "being a good labor judge". According to spirit of times, the attitudes of judges, in the 40s, made them to think that a "good judge", a really fair one, was the one identified with the values of neutrality and impartiality. The power of this conception was so strong that even the Labor Justice assumed it for itself in the first decades. Then, the members of the first generation of labor judges believed that they should not be engaged in the class struggle arguments, thus being favorable to workers or employers. Rather, they believed that they would behave better, as judges, being fully impartial and applying the labor law itself (maybe literally) to the concrete cases brought before them. This attitude is known in literature as the "myth of the robe": the belief that neutrality is possible for a well trained and professional judge.

Therefore, this type of judge is considered similar to that ones described by Montesquieu as the "mouth of the Law" (*la bouche de la loi*). In this sense, when interviewed, the retired judge J.R. Ludke answered: "I don't believe that I was a judge of employees or of employers. I guess that a judge must be a judge". He also said: "A judge must be a judge and apply the labor law and its principles. It's not the judge that protector [of the worker]. It's the [labor] Law, isn't it? It's the Law!" Basically, this kind of attitude

before the Law is representative of the collective *habitus* of judges in the first generation of Brazilian Labor Courts.

2. The second generation: the Marxist founders.

Although Brazilian Labor Courts were created in the 40s, the true labor law charismatic founders were the judges of the hyper-politicized and ideological generation that stood out in the 80s and the 90s. We call “Marxist labor judges” those who held their ideological worldviews against the traditional idea that a judge should be neutral and impartial, before political issues, as in Montesquieu’s rhetoric.

It’s important make it clear that the term “Judicial Marxism” is a concept built in context of “our” research, in order to make theoretically meaningful our empirical intuition. In sum, Marxist judges are those labor magistrates ideologically identified with Marxism, and related beliefs and values, which means, militants in the left and the far left part in the political ideological spectrum.

The career of a Marxist judge in Brazil - the path in which he learns and absorbs a “Marxist set of values and attitudes” - typically encompasses the experience of being and living among judges, but also (and more important) the early political initiation: normally, a political leftist militant experience, such as, being part of student movements, labor unions and left-wing parties, particularly at a young age. Such a perspective, concerned about the trajectories (paths) of the judges in and out (after and before they join) the magistrate career (SILVEIRA, 2011), intends to be critical to approaches that intent to explain the judicial ideologies only by the internal socialization in the bench, such as Junqueira (1997) and Bonelli (2002).

3. A qualitative path analysis: two ways of being a Marxist judge

Two great examples of Marxist judges are M.Castilhos and B.Cavallieri, which are our case study:

Castilhos, the first case, daughter of a humble railroad worker, had a poor childhood. She studied in a public high school and took “classical studies” courses, because she preferred it better than the sciences. She joined the student movement in an early age, in late 50s; and so she soon had problems with the Military rule. The military regime arrested her for the first time, in 1968, during the Congress of the National Union of Students (UNE) in Ibiúna.

She was also militant of the Catholic Action movement (*ação católica* in Portuguese); and, most important yet, she joined the reorganized Communist Party of Brazil (PCdoB). Throughout her militant career, she was arrested again twice again by the Military. As a communist, she was probably seen by the regime as a revolutionary.

She was already a lawyer when she was finally approved in the exams for judgeship. Castilhos considers herself to be a Marxist and stated, in our interview, that she follows the Historical Materialism “as a religion”. Now retired, she very often tells this joke: “*I was a labor judge, not a capitalist judge*” - Coherently!

Differently, our second case, B.Cavallieri, was the child of an elite family, and she was grown in relatively privileged circumstances. Granddaughter of aristocratic landowners, politically and economically influent, and daughter of the town doctor. Her family had close relationships with important

politicians, among them the State President Júlio de Castilhos's grandnephew, the National President Getúlio Vargas's son, and the National João Goulart himself.

Because João Goulart got little B.Cavallieri's father started in the cooperative movement, which was considered subversive at that time, the family had to exile to Europe during the 1964 Military Coup d'État. Cavallieri's mother was also an unconventional woman: she ran away from traditional familial standards, which expected her to be a housewife; she used to smoke cigarettes and ride horses ("male attitudes"); and she also got a position in the Red Cross, in order to work, and finally became an Arts teacher.

When Cavallieri was 15 years old, her father decided that she was supposed to study abroad, sending her to a high school in the United States. So, she had to skip sciences courses because of the difficulties with a foreign language. That's why - she explained - she took only Humanities courses, such as: History, English, Arts and Sociology. As a young adult, back in Brazil, she realized she wasn't able to attend the Architecture Faculty, as she wanted. Then, almost by chance, she ended up studying Law and becoming a judge: with such a background it's not a surprise that she would become a leftist judge – *a fortiori*, a Marxist judge.

Differently from Castilhos, born in a proletarian environment, who came to be a typical left-wing political militant, Cavallieri naturally turned out to be a leftist intellectual. Not only she was a labor judge, but also she became a Law School professor, but teaching especially the most "philosophical" subjects (such as "Labor Law Principles") and even got a postdoctoral degree in Economics. She says: *"In contrast to what people suppose, they [the Marxist historians] – Marx included – don't believe in inexorable laws. No! They contextualize and put reasoning, inside History; and time, which I think it's fundamental. Therefore, if this is being a Marxist, you may consider myself one"*.

4. The rise of the Social Law: Why only in late 80s?

From the 80s to the 90s, Marxist judges made a true symbolic revolution in the field of the laboral judicature, breaking the current tradition of neutral and impartial judges. Their motto was the "protective principle," which establishes that it's the role of the Labor Law to rebalance the social injustices originated from the malfunctioning of the capitalist society. We realize that this principle of Law is grounded in the Marxist theory postulate of class struggle, and the social inequalities it produces, as a given and incontestable truth.

But such a level of ideological engagement was not the mainstream among labor judges in decades. Notice that, although Brazilian Labor Law is dated to the 30s, it was only in the late 80s that its *raison d'être* could be enough legitimized in the legal field. As well stated by Professor Angela Castro Gomes: the new democratic Brazilian Constitution (1988) gave to social rights a "special consideration". The constitutional framers put Social and Labor Rights in a bold position, within the legal system, thus legitimizing Labor Courts as guardians of these new fundamental labor rights.

5. Magistrates and revolutionaries: an apparent paradox

By coining the term "Judicial Marxism" maybe we are creating a contradiction in terms; which is an important theoretical problem to be faced: Isn't it contradictory to say the one is simultaneously a State

officer (a magistrate) and a revolutionary (a Marxist)?

Marx (2008) affirmed that the function of the State and of the Law, in a capitalist society, is to maintain the *status quo*, which means, the regime of property in which social exploitation is based, the bourgeois property. In this sense, Marx held that the State is the “committee of the bourgeois class”. Marx’s “theory of revolution” still proposes that the internal contradictions of the capitalist economic system will create the social conditions for its collapse.

This way, most kinds of Marxist ideologues and activists have considered that the “historical mission” of the proletariat is to take control over the State (dictatorship of the proletariat), in order to destroy it later. So, logically, since judges are State officers, they could never be Marxists. As it was said, a “Marxist judge” is apparently a contradiction in terms. So, how to solve this apparent paradox?

It’s important to define how a “Marxist legal professional” works in practice. To do so, we need to distinguish the dynamics of “Marxism” in two different realms: the *political field* and the *legal field*.

In the one hand, Marxism is (said to be) a critical theory, which means, among other things, that - different from philosophical positivism (COMTE, 1978) - it does not detach the objective scientific analyses and the down-to-earth engaged action. This is exactly what the Marxist thinkers call “*práxis*”. So, it’s completely coherent that anyone who is a self-declared Marxist person should be (logically) also considered an engaged player, politically or ideologically - say, some kind of “revolutionary”.

Thus, Marxism works out efficiently *in the political field*, explaining the relative position of some of its players, and the “possible discourses” (besides attitudes, values and worldviews) to be held by a left-wing engaged player. However, it is logically complicated, to one who has a legal profession, and “represents” the State, to hold such a discourse while interacting *in the legal world*, “in the name of the State”. That’s why understanding “Marxist judgeship” may seem so complicated...

Our fieldwork unveiled the *practical ambivalence* of such players, called Marxist State magistrates, according to the field (legal or political) where they are acting and speaking. None of the judges – being Marxists or not – produce “Marxist speeches” while acting, as legal players, within the legal field, say, when dealing with strictly legal and technical issues; for example, while proffering judicial sentences or other legal opinions and documents.

However, the empirical evidence of the “Marxist ideology” of our judges can be only found, empirically, in their public discourses and non-technical publications or (like in this research) in their personal interviews. That is to say: ideology only appears in the political field; although it seems to hide behind legal forms, in official documents. Thus, you’ll never find it if you only analyze official documents and written judicial opinions. That’s why we teach to our students that it is a methodological error to consider data, in a research on judicial attitudes, only from official documents (judicial opinions).

If it’s true that judges politically oriented towards Marxism do not produce Marxist discourses when dealing with *strict Law* (juridical forms), we could formulate a further and necessary question: *what is the specificity of Marxist judges’ legal discourses?* We found that these justices produce sentences in which they widely adopt the *fundamental labor rights doctrine*, which is based on the concept of *dignity of work* (a laboral variation of Kant’s concept of the dignity of the human being). Hereafter, We propose that we should brand the ideology of these legal discourses, concerned about the fundamental labor guarantees, by the term “laboral garantism” (in reference and by analogy to the Ferrajoli’s theory of “criminal

garantism”⁷) (FERRAJOLI, 2010).

6. Laboral Garantism

In the 80s and the 90s, garantist legal decisions were produced by the overwhelming majority of labor judges - not only by those with a political initiation in their sociological backgrounds. At that time, many judges didn't have a background with an important political socialization, neither in the left nor in the right, but, on the contrary, they often had backgrounds of Humanistic learning from college. The humanistic worldviews included the philosophy of Kant, the theories of Ronald Dworkin and Robert Alexy, human rights theories, new constitutionalism, humanistic criminal theories and etcetera. This was a remarkable feature in the education of an important generation of Brazilian Law professionals, especially in the very south of the country.

In this context we had, for example, the Alternative Law movement. This trend began in the Court of Justice of the State of Rio Grande do Sul (*Tribunal de Justiça do Estado do Rio Grande do Sul* in Portuguese), the Appellate Court for common civil and criminal cases. The fact is that the garantist legal ideology in Brazil was contemporary to the consolidation of the democratic Constitution. It fed the content (the rationale) of the non-positivist legal speeches for every kind of judge: alternative judges, criminal and laboral garantists and even, strange as it may seem, to Marxist judges.

Both laboral garantist judges and Marxist judges have lived together, sharing a convergent legal rationale, in Brazilian Labor Courts in a relatively peaceful atmosphere for almost two decades. Notice that, many times, “laboral garantism” and “Marxism” are professional and political ideologies not shared necessarily, at the same time, by every labor judge, because it's not necessary that garantist judges have both the humanistic education and the political initiation. The truth is that Marxism and garantism can live together, once the prior is a political and philosophical doctrine, which responds only in the political world, but makes little sense in the legal field; while the later is a major philosophical theory especially applied to legal issues. Let us give you some examples...

The already mentioned appellate judge Cavallieri used to hold philosophical and political opinions easily classifiable as “Marxist” – and that's why we called her a “Marxist judge” in the context of this research. However, she used to face very technical legal issues, in the trials, expressing a true “garantist” rationale, in order to undermine the strict *ipsis litteris* interpretation of the law, this way creating a new and “alternative law”.

In 2004, the 45th Constitutional Amendment determined, among other things, that the Labor Justice had legal trial and judgement competence for cases about civil compensation for moral and patrimonial damages derived from the labor relations². After several discussions, it was found the consensus that the new competence of the Laboral Courts included the trials of civil compensations derived from occupational accidents. Thus, emerged the controversy about the statute of limitation (*prescrição* in Portuguese) fixing the time limit in which the worker must take file a lawsuit to enforce the intended compensation. The literal reading of the Civil Law suggests clearly that the deadline was 03 years or 20 years from the damage date,

² See Article 114, item VI, of the Brazilian current Constitution.

depending on the case³. Nevertheless, Cavallieri decided audaciously - say, alternatively, against the judicial common sense -, that the claims to repair moral damages derived from work accidents don't have any statute of limitation. She wrote antithetical opinions, holding a thesis based on a "garantist rationale", according to which, whatever the subject matter of the legal issue may be, there are no statutes of limitation when the dignity of human being is at stake. In this sense she said to us:

"Well, now, what is the right statute of limitation to be applied? I think that this is another order of comprehension. I think that, if we are dealing with demands for compensation of moral damages derived from a work accident, it touches the right to live (...). These are fundamental rights... I believe that the discussion we should start now is about knowing if are there (or not) statutes of limitations, but not about what's the statute of limitation to be applied. I wonder if the right to live has any statutes of limitation... I wonder if there is any statute of limitation to the right to have a dignified life. This is the doctrine of the inexistence of statutes of limitations to any rights derived from the fundamental rights: fundamental rights don't have such statutes, especially the right to live. Don't you agree?"

This is a typical example of a laboral garantist thought, shared by both kinds of laboral judges, the "pure garantist" and the "Marxist": both of them write judicial sentences this way.

7. Conclusion: New (technocrat) kids on the block

By the 2000s, Marxist veteran judges were challenged by a younger generation of hyper-technicist magistrates, with an important background of years of education in the benches of "preparatory courses". In contrast to the last strong judicial generation, whose main feature is the belief that laboral judges' role is to protect the workers, counterbalancing social and economic injustices, the new technocrats believe that the Labor Law is protective enough and it's not their job to be active in favor of the employees.

As "pure professionals" and technicians, the new technocrats hold a position openly against all kinds of judicial activism. In this sense, a young judge of a district trial court, J. Hoff, said to us: *"(...) I'm against the idea of applying the protective principle to any hypothesis. I guess the principle of equality has to drive the trial. (...) He [the judge] doesn't need, I believe, to conduct the trial by holding a point of view in support of the employee party"*.

Another young substitute judge, R.E.Müller, stated something similar:

"I think that the Law already protects the employee. The Law does it already! If the judge intends to protect him even more than the Law does, he will create an inequality to the other party [to the employer party]. Here is what I think: there is the protective principle, isn't there? There is the economic inequality. Here comes the legal protection to balance the poles. So, I'd say: the Law already balances the relationship. I believe that it's not the judge's task to protect them even more! By applying the Law the way it is, searching for its fairest sense, he [the judge] will be assuring that it's not going to occur a legal inequality between the parties in the trial".

Now it's clear that the current relations of forces in the field put the *old veterans, politically devoted,*

³ Please, read Article 205, paragraph 3, item V, and Article 2.028, in the Brazilian Civil Code of 2002.

in direct struggle against the *new technocrats*, oriented only by their ideals of *professionalism*. The eloquent theory of the opposition between grand old man and new technocrats was created by Dezalay and Garth (1994), although in a quite different context.

Another remarkable difference between the old Marxists and the current legal positivist judges is built by analogy to the Max Weber's political theory of the "two types of political life": Weber (2002) used to say that one can live *for* the politics or *off* politics. The first one takes politics as a mission or a cause in the name of which it's worth to live and to die. The second one considers politics as a job, a source of income. In the same sense, we can say that the veteran Marxists have "lived for the judgeship", while the new technocrats are "living off the judgeship". That's the difference of considering judgeship as a vocation, in its religious sense, or as a profession, in a strict economic sense.

By asserting the autonomy of the juridical discourse, rather than the political ideology, these new legal positivist judges - in Kelsen's sense (KELSEN, 1998) -, so called "professional jurists", partially delegitimized the judicial activism of the charismatic founders of the social justice ideals in Brazilian judicial tradition. Today, some young technocrats call their veterans "dinosaurs" or "jurassic". Judicial Marxism faces a crisis, nowadays, losing space to "pure garantist" and "legal positivist" judges; even though it still carries a little aura of legitimacy (because it's the only labor law tradition that deeply justifies the "protective principle", dear to many legal professionals, by assuming the class struggle theory as a main postulate). The protective principle (social justice) is still (although its everyday less true) the very heart of Labor Law in Brazil.

Finally, our contribution was to give a name and to discern the specificity and the main relations involved in this social phenomenon, now called "Judicial Marxism".

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