

SUPERIOR LABOR COURT AND OUTSOURCING IN BRAZIL: DYNAMICS OF ITS DECISIONS FOR PERIOD 2000-2013

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Abstract

Nevertheless current labour market rates in Brazil mark a substantial employment recovery and an important decrease in informal labour work, precarious employment is expanding, as it the case of outsourcing. This stirs up inequalities and fragments workers organization. Unlike other Latin American countries, in Brazil there is no specific law regulating outsourcing. In this legal vacuum, Superior Labor Court (TST) cancelled in 1993 Precedent 256, which in practice, refrained the outsourcing, and edited Precedent 331. This paper will analyze TST decisions of period 2000 - 2013, based on research carried out under axis of outsourcing environment of the thematic project "Current Brazilian Labour contradictions: formalization, precariousness, outsourcing and regulation".

Keywords

Outsourcing; Labor Justice; Superior Labor Court; Precedent 331

INTRODUCTION

The outsourcing phenomenon has advanced all over the world and also in Brazil, mainly based in deepening of neoliberal policies, becoming nowadays current practice in most economic segments, in both public and private spheres. This hiring model is developing new expressions in management techniques, getting into labour world through diverse clothes, with varied outlines and even sometimes, in a disguised from.

Growing use of outsourcing has been researched in many economic areas, but this expansion has not been reflected in a more detailed Labour Justice study of its decisions and dynamics. This shows how important it would be having in-depth studies on the issue, to stimulate analyzing Labour Justice acts

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in this scenario, and its liability in giving Labour Law opinions for this matter.

The present paper introduces some partial results obtained in ongoing investigations of the axis of outsourcing of the thematic project: *Current Brazilian Labour contradictions: formalization, precariousness, outsourcing and regulation*, which include outsourcing as one of contemporary capitalist dynamics expressions, discusses role of Labour Justice in face of this way of hiring, focusing the TST. Extending the scope of two previous investigations³, now we included following workers categories: pulp and paper, oil, electrical, IT, *call center*, and public bank servants. To perform this, the paper uses as prevailing source TST judgments regarding outsourcing during period 2000-2013. These two issues delimit the work, and explain meaning of some institutes. Then we will display methodological basis that guided TST judgments study, and show some obtained results and last, final considerations.

1. Specifying some concepts

Marx affirmed that capitalist system demands permanent development of productive forces⁴. On the other side, J. Schumpeter⁵ stated that capital is always in search of extraordinary profits, in a true “compulsion”. To achieve this, innovations are introduced in production and in the way of organizing companies and relate them to others. Boosted by a force keeping it in movement, capitalism ceaselessly procreates new forms of organization in a process that revolutionizes economic structure internally, destroying previous configuration and generating a new one: the “creative destruction” process⁶. And outsourcing is one of the expressions of this movement.

From 1990, a strong liberal wave overflowed the country with its adjustment policies and structural reforms, basically oriented to reduce public deficit and open to the private sector areas up till then exclusively managed by public sector. During this process, outsourcing gained importance as corporate cost-cutting and risk sharing strategies and increased organizational flexibility,⁷

3 These two previous researches, done at CESIT/IE/UNICAMP and financed by FAPESP - A Outsourcing and Labour Justice and Outsourcing and Labour Justice: regional diversities -, with approved scientific reports, used as primary prevailing source work lawsuits processed before ancient Conciliation and Judgment Board (JCJ), in Guaíba, Fourth Region/Rio Grande do Sul, in JCJ of the Fifteenth Region, Campinas, São Paulo, and JCJ of Telêmaco Borba, Paraná, Nineth Region, between 1985-2000, to respondents discussing outsourcing at RIOCELL S/A and KLABIN S/A, both paper and pulp companies, between 1985-2000, frame time Precedents 256 and 331 of TST. Main objective of both was, starting from sample lawsuits and interviews, understanding role of Labour Justice in front of outsourcing advance, and evaluate if this institution was locus of resistance or affirmation to phenomenon, questioning if sense juridical world gives to outsourcing influences or not in comprehension Labour Justice has of social actors. Current research is being done within the environment of a thematic project: Brazilian current labour contradictions: formalization, precariousness, outsourcing and regulation, analyzing judgments of TST discussing outsourcing and the process of building Brazilian regulation on this matter, in a dialogue with Brazilian social actors and people from other Latin American countries.

4 MARX, Karl. *El Capital - Crítica de la economía política*. México: Fondo de Cultura Económica, 1946.

5 SCHUMPETER, Joseph A. *Capitalismo, socialismo e democracia*. New York: Harper & Row, 1975.

6 SILVEIRA, Carlos E. F. *Desenvolvimento tecnológico no Brasil: autonomia e dependência num país periférico industrializado*. Thesis presented to the Instituto de Economia da Universidade Estadual de Campinas, to earn degree of Doctor in Applied Economics, Campinas 2001

7 Cf. KREIN, José Dari. *As tendências recentes na relação de emprego no Brasil: 1990-2005*. 2007. Thesis presented to the Instituto de Economia da Universidade Estadual de Campinas, to earn degree of Doctor in Applied Economics, Campinas, 2007.

causing an impact in workforce hiring policies.

Regarding the State, concept *adopting power relationship theory*⁸ is understood as a relation. This is a material and specific condensation of relation of forces among classes and fractions of classes. Since the place of each class or of the power it holds is delimited by other classes' places, this power is not a quality immanent to it; it depends and comes from a relational system of material places occupied by agents. Political power of a class and its capacity to make its interests becoming concrete will depend not only of its class place in relation to other classes, but also of its strategic position regarding the classes⁹.

Regarding Right, it is seen as a *cultural product*¹⁰. Since it is within the interior of social structure before being placed by the State, it cannot be understood as *just* a product of economic relations, as an ideology or even *just* as expression of will of dominant classes, or instrument of domination. Being a level of the complex social whole – the social structure – it is composed within it, resulting of its own interaction with other levels of this whole. Specifically talking about Labour Law, included in its historical movement, if taken as a relationship between employer and worker, we see that workers sell workforce to the employer, holder of means of production, getting wages in exchange, only asset of his estate¹¹. Therefore a relation is established, not only compulsory, but also of power.

Regarding outsourcing, one of hindrances in classifying it is related to different ways world of work may appear, and also multiplicity of concepts that are attributed to it in several areas of knowledge. With different outlines, and sometimes disguised, it can be recognized, according to Krein¹², among others, in hiring of supplier networks with independent production; companies specialized in provision of support services; in corporations or autonomous individuals for essential activities; in allocation of temporary jobs through employment agencies; home working; through work cooperatives; or, even, by displacement of part of production or sectors of production to former employees. In this dynamic, we may even see another phenomenon: outsourcing of outsourcing – when an outsourced company subcontracts others –; *fourthization* (a neologism based on a play of words with thirdization) a specific corporate hiring to manage contracts with third parties; and increasing of “tolling agreements” and “partnerships”, mechanisms hampering definition of poles in working relation.

Legally, this form of contracting causes rupture in the relation employee-employer¹³ because a middleman stays between worker and company hiring

8 POULANTZAS, Nicos. Estado, o poder, o socialismo. Terceira edição, Rio de Janeiro: Graal, 1990.

9 Ibidem.

10 GRAU, Eros. Ensaio e discurso sobre a interpretação /aplicação do direito. São Paulo: Malheiros, 2002.

11 NEUMANN, Franz L. Il diritto do lavoro fra democrazia e dittatura. Bologna: Il Mulino, 1983.

12 KREIN, José Dari. Tese de doutoramento citada.

13 VIANA, M.T. Terceirização e Sindicato: um enfoque para além do direito. Belo Horizonte, 2006, mimeografado.

workforce¹⁴ and this can be interpreted in a broad or restricted, internal or external way. In the broad sense, it is identified with corporate trend to develop part of its activities through other facilities, more or less independent, including whole operation – organizational or economic corporate activities - of outsourcing or decentralization, independently of contractual options used. In the restricted sense, as a decentralizing mechanism, involving a trilateral relationship established between the company hiring services from another third company, which at its turn, hires workers whose services are addressed to the borrower of services.

In the internal sense, expresses the situation in which somebody stays between employee and contracting party; in the external, for example, when somebody stays between entrepreneur and consumer.¹⁵ This paper will address on outsourcing in the broad way, in internal and external conceptions, to explain in details complexity of this issue.

2. Lack of specific regulations in Brazil and TST precedents

Unlike other Latin American countries, in Brazil there is no specific law regulating outsourcing. We have some laws introducing trilateral legitimate relationship; jurisprudence agreements incorporated through TST; draft bills at National Congress, and proposals prepared by a Commission of Jurists of the Secretariat of Reform of the Judiciary of the Ministry of Justice; two other laws, result of discussions in the Ministry of Labour, and also another prepared by the Secretariat of Strategic Affairs¹⁶

In September 12, 1986, the TST hindered outsourcing through Precedent 256, down here:

256 – SERVICES CONTRACT – LEGALITY.

Except in cases of temporary work and monitoring services, established by Laws # 6019, of January 3, 1974 and # 7.102, of June 20, 1983, it is illegal hiring through intermediaries. Therefore employment relation must be directly negotiated with the contracting party.

This understanding expressed a jurisprudence decision line, and also established limits in almost all following decisions to define existence of direct employment relationship with workforce beneficiary, or to recognize joint liability between it and third parties by labour obligations.

Precedent 256 was cancelled during decade of 1990, in a time of high pressure for flexibilizing labor protection norms. In December 1993, Precedent

14 VIANA, M.T. et al. O novo contrato de trabalho: teoria, prática e crítica da lei n. 9601/98. São Paulo: LTR, 1998.

15 VIANA, M.T. Terceirização e Sindicato: um enfoque para além do direito. Belo Horizonte, 2006, mimeografado.

16 BIAVASCHI, M. B.; DROPPA, A. A história da súmula 331 do tribunal superior do trabalho: a alteração na forma de compreender a terceirização. Revista Mediações [UEL], v. 16, p. 124-141, 2011.

331 banned outsourcing in main activities, legitimating them for support activities, and defined as subsidiary contracting party's liability; in 2000, new wording for item IV¹⁷ extended subsidiary liability to public body hiring outsourcing.

Later, this was revised after a Federal Supreme Court (STF) decision in Direct Action of Constitutionality (ADCON) # 16, which upheld the action by majority of votes. The object was declaration of constitutionality of article 71, § 1º of Bidding law, proposed by Governor of the Federal District of Brasilia, in the face of text of Precedent 331 item IV, ruled at that time and subsidiary making liable the public body hiring outsourcing. From that decision and countless complaints arising from STF, the whole TST, with votes against of four Ministers, modified Precedent 331 regarding public bodies' liabilities, and delivered following final wording:

Precedent 331 of the TST

SERVICES CONTRACT – LEGALITY (new wording of item IV, and added items V and VI to the wording) – Resolution 174/2011, Electronic Journal of Labour Justice (DEJT) released in May 27, 30 and 31, 2011.

I – Hiring workers through an interposed company is illegal. The relation must be directly established with the contracting party, except in cases of temporary work (Law 6.019, of January 3, 1974).

II - Irregular hiring of workers, through an interposed company, does not create employment relationship with Public direct, indirect or foundational Administration bodies (article 37, II, of Federal Constitution, 1988).

III – It does not create employment relationship with surveillance services contracting party (Law 7.102, of June 20, 1983) repair and cleanliness, and specialized services related to support activities of the contracting party, if it does not exist direct subordinate specificity.

IV – Breach of contract of labor obligations by the employer, implies in subsidiary liability of services contracting party regarding these obligations, provided he participated of procedural relationship and be listed in judgment debt.

V - Public administration bodies respond alternatively, in the same conditions of item IV, in its culpable conduct is evidenced in unfulfillment of obligations of Law # 8.666 of June 21, 1993, especially in monitoring compliance of contractual and legal obligations of services contracting party acting as employer. This liability does not arise from mere unfulfillment of labour obligations assumed by legally contracted company.

VI – Contracting party's subsidiary liability includes any dues arising from sentences regarding the work period.

Within the scope of the action, and in the midst of a strong movement to cancel this Precedent, TST held in Brasilia during October 4 and 5, 2011 a public hearing named "Work force outsourcing". Among the audience, guests and individuals registered per terms of a public notice defining participation

17 BIAVASCHI, M. B; DROPPA, A. A história da súmula 331 do Tribunal Superior do Trabalho: a alteração na forma de compreender a terceirização. Revista Mediações (UEL), v. 16, p. 124-141, 2011.

rules. They represented companies and workers, researchers and scholars, which presented their visions on the subject. The initiative showed will of TST to have a dialogue with agents involved in this matter affecting both workers and Brazilian society.

Results of this hearing were seen in interview that – at that time - President of TST, Minister João Oreste Dalazen gave at the end of the event. According to an article published in TST Internet Page, he said he was in favor of contracting party adopting joint liability in case of unfulfillment of labour obligations, stating that this would be a social advance and would induce companies hiring services to increase participation in supervision processes. And he added that this would be an essential item to improve legislation on this subject. Another thing would be limiting cases where outsourcing is admitted, as stated in Precedent 331 of TST¹⁸. This public hearing allowed organizations of workers, researchers and scholars meeting together in the same year than was constituted the National Forum for the Defense of working rights against threat of outsourcing, in short The FORUM - which became an important forum for discussion about resistance to approval of Draft Bill 4330.

After new wording approval of Precedent 331, a great pressure was put to cancel it. Recently, on May 16, 2014, Luiz Fux, a STF Minister, proposed analyzing Extraordinary Remedy 713.211 to the light of a general repercussion rule, welcomed by majority voting. It is the Public Civil Action proposed by the Public Ministry of Labour of the third region in which Celulose Nipo Brasileira S/A – CENIBRA presented an Extraordinary Remedy with Appeal at the STF. However, core issue has not yet been analyzed. The focus now is in own Precedent 331 of TST, because it may be discussed possibility of TST, through an understanding, impose limits to free initiative. In sum, what will be defined is if TST, by banning outsourcing in main activities, would be violating yes or no freedom to hire as it is stated in Federal Constitution of 1988. Soon after, Minister Teori Zavascki, in judgment of Extraordinary Remedy with Appeal 791.932, proposed by Contax S/A, regarding outsourcing in telecom *Call Centers*, also proposed to be recognized a general repercussion on this subject, once its unanimity by STF had been welcome in its Virtual Plenary Session. It is a remedy opposed against a decision of TST based in Precedent 331 that ruled the illicitness of outsourcing in these services, because it is a main activity. If matters of substance of remedies were welcomed, in practice the STF will be able to delegitimize the stance TST is adopting through Precedent 331.¹⁹ This stance, according to research in which is based this paper, shows that in spite of in 1993 being a backward movement regarding Precedent 256 of 1986, currently it has partially stopped this way of hiring and contributed to the development of a more inclusive

18 Available at: http://ext02.tst.jus.br/pls/no01/NO_NOTICIASNOVO.Exibe_Noticia?p_cod_noticia=12975&p_cod_area_noticia=ASCS

19 For deepening in regulation issues, see: BIAVASCHI, Magda Barros; TEIXEIRA, Marilane; DROPPA, Alisson. A Terceirização e desigualdade: abordagem crítica sobre os projetos de lei 4330/04 e 87/2010. São Paulo, 2014, digitado. Sobre a Repercussão Geral, consultar: <http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4304602>; <http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4517937>; http://www.aasp.org.br/aasp/imprensa/clipping/cli_noticia.asp?idnot=17205

labour market.

To discuss such relevant issue, the FORUM, together with the Group of Research of the Universidade de Brasilia, organized an Academic – Political Seminar, held during 14 and 15 of August in Brasilia.

3. Research in TST judgments: methodology

In both researches Outsourcing and Labour Justice and Thirdization and Labour Justice: regional diversities we analyzed role of Labour Justice in front of outsourcing during years 1985 to 2000, having as temporal references TST Precedents 256 of 1986 and 331 of 1993, that cancelled previous one, and was revised in 2000 to extend subsidiary liability to public bodies hiring third companies, mainly focused in paper and pulp sectors. To do this, we studied processes being handled at the ancient Board of conciliation and Judgment (JCJ) of Guaíba, 4th Region, in the state of Rio Grande do Sul, at the JCJ of the 15th Region, of Campinas, state of São Paulo and at the JCJ of Telêmaco Borba, state of Paraná, 9th Region, filed within research time period. Results showed that even against liberal atmosphere of the time in Brazil during decade of 1990, judicial decisions were limited, resisting total releasing.

Due to the fact that these researches were limited to the year 2000 and focused analysis in paper and pulp sector, stimulated bringing these researches to a more current period of our history, and also include other categories. Therefore we proposed within environment of outsourcing thematic axis, enlarging it with project Current Brazilian Contradictions at work: formalization, precariousness, outsourcing and regulation, where we analyze role of Labour Justice in last years, and focus in judgments discussing outsourcing in following working sectors: pulp and paper, electrical, oil and public banks with an emphasis in IT and Call Center for period 2000-2013. This research is based in TST Internet Page, as we will see furthermore.

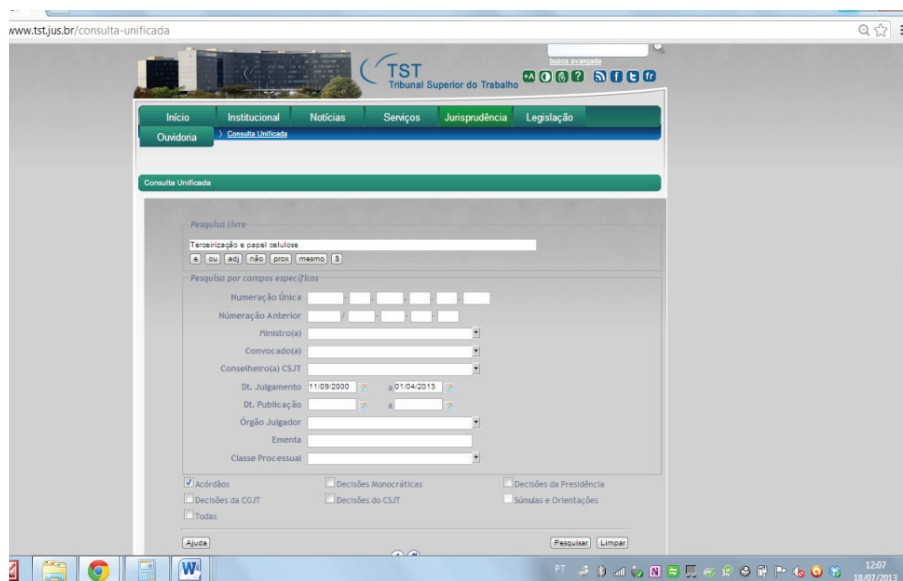
Regarding timeframe, we will use judgments published between April 1st, 2000 and April 1st, 2013, finishing at the beginning of the thematic project. Starting point in 2000 is justified for several reasons, among them the fact of two previous researches covering period of 1985 to 2000,²⁰ therefore the proposal of research go beyond. Another reason is that by enlarging study beyond year 2000 we may see how TST, in charge of unifying Brazilian labour jurisprudence, currently interprets legal claims related to outsourcing, placing obstacles or expanding its possibilities.

Once defined methodology, we used TST Internet page, Consulta Unificada (Unified Enquiry) <http://www.tst.jus.br/consulta-unificada>, using key-words, since labour processes are not classified by object. We started using this tool with key-word Outsourcing, adding following terms: paper and pulp; electrical workers; Banco do Brasil, Caixa Econômica Federal, BNDES, Nossa Cai-

20 Begun one year before Precedent 256 of TST, in 1986, and ended in 2000, when TST revised Precedent 331 to include, in paragraph IV, subsidiary liability of public bodies using outsourcing.

xa, IT and Call Centers; and oil workers. Then we mentioned type of proceeding by selecting the option: Point of Law²¹.

So we got a list of judgments in each term added to Outsourcing. Later, we opened each judgment from the list, and saved as a “doc” file to be read and registered. Down here is layout of tool Consulta Unificada used for the research:



The tool allowed incorporating key-words, delimiting timeframe and type of proceeding to be searched. We selected the option Point of Law to obtain TST judgments by Regions, and saved them mentioning date when they were collected.

Then we made data sheets to be applied to each judgment being part of the sample, adapting those from previous researches for specificities of news investigations, with following questions:

1. **What liability bears to Contracting party in the Regional?**

- 1.1. Assumes its condition as employer of the contracting party;
- 1.2. Assumes joint liability of the contracting party;
- 1.3. Assumes subsidiary liability of the contracting party;
- 1.4. Excludes contracting party from dispute or exempts it from liability regarding outsourcing ;
- 1.5. Excludes contracting party from dispute, by request of claiming party;
- 1.6. Outsourcing is not questioned by the plaintiff;
- 1.7. Others

21 Verdicts in first degree may present Ordinary appeal, and matter will be seen at Regional Courts. Judgments from Regional, when matter does not involve fact, Point of Law may be presented at TST.

How did TST rule? Did it fully or partially provide the appeal, or dismissed the appeal.

Provided appeal

Provided it partially

Dismissed the appeal

Did not know about the appeal; maintained original decision.

Regarding outsourcing and liability of the contracting party, the TST:

Assumes its condition of employer of the contracting party

Assumes joint liability of the contracting party;

Assumes subsidiary liability of the contracting party;

Excludes contracting party or exempts it from liability regarding outsourcing;

Excludes contracting party from dispute, by request of claiming party;

Outsourcing is not questioned by the plaintiff;

Others

4. Regarding Outsourcing, TST was locus of:

4.1. Resistance;

4.2. Affirmation ;

4.3. None;

4.4. Others [in case outsourcing is no longer been discussed at TST and its consequences, and for cases where was declaration of invalidity of decision or other procedural issues that determined return to the Regional Court without having yet decided the outsourcing question itself].

5. Regarding Outsourcing, labour Justice was *locus* of:

5.1. Resistance;

5.2. Affirmation ;

5.3. Both;

5.4. None;

- 5.5. Others [in case outsourcing is no longer been discussed at TST and its consequences, and for cases where was declaration of invalidity of decision or other procedural issues that determined return to the Regional Court without having yet decided the outsourcing question itself].

Above item 3 focuses specifically in what TST decided, when sometimes recognizes as employer the contracting party, or as solidary or subsidiary liable. Or when excludes it from dispute or from any liability. To conclude option Others regards processes that specifically in TST do not discuss the issue. The objective of this question is to provide elements to item 4.

Item 4 seeks to assess if TST decision was of Affirmation or Resistance to the phenomenon. Option None respects cases where outsourcing was not discussed in the process. And option Others involves situations where it is not anymore discussed in TST outsourcing and its consequences, even if it has been object of argumentation in the first and/or second degrees, and also in cases with declaration of invalidity of decision or other procedural questions that made o return of cases to the Regional, without having decided outsourcing itself. In these cases, study of outsourcing was halted.

In item 5, we tried to clarify role of Labour Justice as a whole in front of outsourcing by evaluating total of decisions in all degrees. We started with results obtained with items 1, 2, 3, and 4. First measure adopted regarding interpretation of these data is to take into consideration conjectured thesis that when more judiciary liable is the contracting party, the higher obstacles are to the phenomenon. So, when recognizing direct employment relation with the contracting party, or when it was solidary or even subsidiary liable, result was considered as Resistance to Outsourcing. Judgments excluding from the dispute the contracting party or avoiding from liability were considered as Affirmation to the phenomenon. Specifically in item 5, option Both attends cases in what degree of jurisdiction to the position was of Resistance and in other of Affirmation. This is possible when analyzing Labour Justice as a whole, making clear own contradictions happening in niches of the Power under consideration.

Still in this question, we have included two differentiated options: None, when process does not address outsourcing; Other for cases where no longer is discussed at TST outsourcing and its consequences, even if the original process studied this matter. In this case, Point of Law was sent to TST for other questions, such as for example in the case of processes of Telêmaco Borba, analyzed in research Outsourcing and Labour Justice: regional diversities, where the Court of the 9th Region, in state of Paraná, upheld decision, considering Outsourcing illegal, recognized condition of employer to Klabin, the contracting party. However Klabin, when appealing Point of Law, accepted this decision, and discussed substantive issue itself: legal environment of workers as rural or urban. Option was maintained, due to fair treatment. Nevertheless, item 5 establishes a dialogue between degrees of jurisdiction and TST when

analyzing Labour Justice position as a whole, it considers what was discussed in the Region where no judgments were included in this answer. Besides all these elements in individual file-cards of each judgment, Ana Bianchi - the researcher – made an interesting note, highlighting data with the objective of keeping a more detailed analysis of the content.

Collected information from file-cards was included in an Excel data base allowing organization, classification and quantification of decisions found from each questions. This information was analyzed and allowed watching jurisprudence of TST involving outsourcing, contributing with relevant elements to current debate of Brazilian Labour Justice role in this matter.

4. TST judgments: regulation and limits to workforce outsourcing

Based in explained methodology and timeframe adopted by the research, 1,176 judgments were found involving already mentioned categories of workers: electricity, oil, paper and pulp, Call Centers and IT public bank servers. All judgments related in the Internet page were saved in “doc” format. However, when studied one by one, we saw that many of them, found through adopted key-words, did not refer to any of the categories object of research. Therefore they were disconsidered from analysis and saved in other files for later studies.

This is one of the problems faced since first research, Outsourcing and Labour Justice; limitation imposed by use of key-words. When using these words, a page opens in judgments that once analyzed, sometimes refer to other issues, and however may have a reference to adopted word. This makes necessary a careful reading of judgments to check if they really talk about what we are searching.

After doing this first judicious analysis, we verified that regarding electricity workers, of 324 available judgments, only 72 really corresponded to this category. It is them which compose the sample. Nevertheless, the remaining discuss outsourcing; refer to other categories of workers, as for example surveillance personnel, while others are not related to the researched subject.

Regarding oil workers, by using key-word we got into 244 judgments, but only 70 of them referred to the category. Remaining are from other categories, and therefore were excluded from the sample, put into an own file for a later re-study, if it would be the case.

Regarding paper and pulp workers, we found 65 judgments, of which we took 54. Remaining correspond to other categories, however related with outsourcing.

To finish, Call Center and IT workers in Brazilian public banks were 541 judgments. When analyzing them, we verified that only 213 were about outsourcing in public banks, Call Centers and IT, most of them against Caixa Econômica Federal. Others are related to other categories or include discus-

sions of Call Centers and IT in private banks. Therefore were disconsidered from the study and put into an own file.

Finally, sample included a total of 409 judgments. Differently from previous researches, where to compose sample and groups, reference were Cochran²² and Campbell²³ studies, in current one the sample was delimited by own criteria of TST Internet page, coming from its information feeding system. So from a universe of judgments obtained through the key-word and due to necessary selections imposed by limits of researched data bank, we arrived to the quantity of judgments composing sample of present, quite significant and allowing fulfillment of proposed objectives.

All judgments were catalogued. Through the questions adopted by the research to its analysis, we observed from the beginning that in a general manner, TST was a space of Resistance to deepening of outsourcing, as we had already seen in two previous researches. It was also verified that in most of Labour Regional Courts' decisions, they were not reformed by TST regarding substantive issues, sometimes in the face of procedural questions hindering examination of heart of controversy, prevailing in these cases, what Regional had decided. Even considering nature of Point of Law, delivering a certain type of subject to TST – particularly regarding law violations and agreements judged by TST – majority of Points of Law was not known due to unfulfillment of requirements. Therefore, decision of Regional's was maintained.

Anyway, from file-cards done up to here we may observe that, generally, TST and Labour Justice has been a space of Resistance to deepening of outsourcing, strong in the understanding consolidated by Precedent 331, breaking this hiring way by assuming for example, as employer of a third party contractor for activities permanently necessary to them, as it is the case of a paradigmatic judgment in electricity, or even making subsidiary liable the contracting in face of evaded labour rights. In fraud cases, Labour Justice has intensely worked and in a way predominantly inhibiting to outsourcing, recognizing direct employment relation with the contracting party of services. We also have seen that in most of decisions of Regional's, they have not been reformed by TST, regarding procedural questions. And that most of Points of Law were not known due to unfulfillment of requirements, maintained in these cases by judgments of the Regional.

It is important to remind that decisions of TST and Labour Justice tend to resist outsourcing, and that these positions have been taken based in a dialectic process within the environment of Judiciary, reflecting tensions occurring in the society from its specificities.

To conclude, content of studied judgments reveals subtleties of a dynamics established to compose judiciary decisions, such as quantitative and

22 COCHRAN, 1953, W. G.: Sampling techniques. New York: John Wiley, 1953, p. 442. Processes were grouped in their respective periods - 1985-1990; 1991-1995; 1996-2000 – and then a simple random selection was done, based in some minimum criteria, such equality proportions among universe of selected processes, period by period.

23 CAMPBELL, Donald T.; STANLEY, Julian C.: Experimental and Quasi-Experimental Designs for Research. Houghton Mifflin Company Boston, London, 1966.

qualitative analysis done in research environment.

5. Quantitative and qualitative analysis: a dialogue with interviewees

Results have been evaluated considering order of questions inserted in data sheets. Due to space limits in present paper, we have only applied first four questions.

Question 1 - *What responsibility bears to contracting party in the Regional?*

The objective of this question is to verify within Regions environment from where come Judgments, and which is the answer to respective Regional Courts regarding responsibility of contracting party towards workers rights. Following table shows that decisions make responsible the contracting party in a largely subsidiary: 51.59 pct or 211 processes, ratifying consolidation of TST understanding, expressed in Precedent 331 of 1993 regarding strength of understandings established in Precedents, regarding first and second degrees of jurisdiction. This is same conclusion of previous researches, with the exception that as we already saw, Regional Courts of 4th and 9th Regions, even after Precedent 331, had processes involving ampliative theses regarding understanding that a Precedent contemplates, be it ordering the contracting party as being real employer, or by defining its joint liability.

In current thematic project, sample reveals that while joint liability decision regarding contracting party preponderates and in practice this legitimates outsourcing in main activities, there will be a significant percentage of Regional Courts recognizing contracting party's condition of employer in a case of direct subordination, or then establishing joint liability. Sentence it as direct employer does not mean deciding beyond Precedent 331, because contemplated understanding is quite clear regarding its condition of workforce employer in direct subordinate specificity issues in case of labor work and fraud. The interesting fact goes beyond the borders of Precedent is the joint sanction. Quantitative and qualitative refined analysis, cross-referencing data, allow explaining origin of these decisions and identify respective Courts, and through the quantitative analysis verify foundation of decisions. This refinement will be done during research, and it will take time and displacement of research team. To follow, data obtained with question:

Table 1 - What responsibility bears to contracting party in the Regional?

| Decision | Judgment | Percentage |
|--|----------|------------|
| Assumes its condition as employer of the contracting party | 46 | 11.25 |
| Assumes joint liability of the contracting party | 55 | 13.45 |
| Assumes subsidiary liability of the contracting party | 211 | 51.59 |
| Excludes contracting party from dispute or exempts it from liability regarding outsourcing | 20 | 4.89 |
| Outsourcing is not questioned by the plaintiff | 0 | 0 |
| Others | 77 | 18.83 |
| Total | 409 | 100 |

Source: <http://www.tst.jus.br/web/guest/consulta-unificada>

Elaboration: Thematic project "Current Brazilian Labour contradictions: formalization, precariousness, outsourcing and regulation"; Outsourcing axis

Regional Courts' percentage excluding contracting party from any liability regarding Outsourcing is too little, showing that Precedent 331 of 1993, revised in 2000 and 2011 to check public bodies liabilities on Outsourcing, has effectively slowed down expansion of outsourcing, therefore justifying attacks and pressure from economic sectors fighting for its cancelling, even if in 1993 it meant a setback regarding relation with understanding of Precedent 256 of 1986. Coincidentally, this is one of results pointed by three researches.

As we can note in previous researches, there are important differences in the way how Regional Courts understand outsourcing, what strengthens argumentation of *material condensation of existing forces* in society, expressed in State bodies and other in *Law understood as a relation*²⁴.

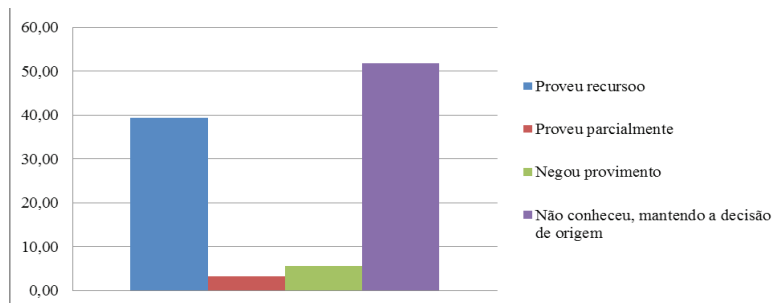
This is a fact consolidated in current research, nevertheless still being in the initial phase.

Question 2 - How did TST rule? Did it fully or partially provide

the appeal, or dismissed the appeal? This is an important issue to analyze TST position. Options offered are: *provided the appeal; provided it partially or dismissed the appeal* or even, *did not know about the appeal*. These are relevant information to verify if requests deducted from appeals were totally or partially upheld.

Following chart expresses this reality:

Chart 1 - How did TST rule?



Proveu recurso / provided the appeal. Proveu parcialmente / partially provided the appeal. Negou provimento / dismissed the appeal. Não conheceu, mantendo a decisão de origem / did not know about the appeal, maintaining original decision

Source: <http://www.tst.jus.br/web/guest/consulta-unificada>

Elaboration: Thematic Project "Current Brazilian Labour contradictions: formalization, precariousness, outsourcing and regulation"; Outsourcing axis.

Data show that most of Points of Law, being 51.83 pct, were not known by TST, it is to say that TST *did not know about the appeal*. A simple reading of information shown in Table 1 does not allow verifying Regional court content, maintained by the fact of not knowing the Point of Law. To solve this question, data obtained with question 2 must be cross-referenced with data from questions 3 and 4. Then, considered all judgments, we see that only 3.3 pct maintained exclusion of dispute of the contracting party, or exempted it from labour liability. Most, 46.21 pct defined or maintained subsidiary liability; 4.4% joint liability, while contracting party as employer was in 9.05 pct. The understanding expressed in TST Precedent 331 allows this decision content.

The fact that major decision was *Did not know the appeal* and the circumstance that most of these judgments defined as subsidiary liability of the contracting party, as we will see more detailed in question 3, this strengthens hypothesis of TST Precedent 331 uniformed labour jurisprudence of this matter. This shows hypothesis introduced in two previous researches is correct, regarding the sense that legal meaning of the phenomenon reverberates in decisions of first and second degrees of jurisdiction and in the way social actors understand the phenomenon itself, in a dynamic and dialectic interaction.

Yet, these results show strength of understandings where TST presented judgments, and regarding Precedent 331, make fallacious the argument that it is needed a regulatory legislation of outsourcing in Brazil to have legal certainty. Wording of Precedent 331 clearly defines limits and levels. Discuss its improvement in face of reality of social demands is another aspect. But we are talking of an understanding defining levels, and that Judiciary constructed it in a legislative vacuum. And a scenery permeated with values in conflict, even if Precedent has a clear wording, resistances to maintain it are important and may be seen in procedural environment, in concrete cases taken to Labour Justice and through an Extraordinary Resource to STF.

The process TST-RR-105000-58.2007.5.17.0191 – Applicant Petróleo Bra-

sileiro S.A. - PETROBRAS and defendant Civil Construction, earthmoving, public roads, bridges, paving, construction and assembly and furniture Union Workers of the North of the State, SINTINORTE and MONTRIL MONTAGENS INDUSTRIAIS LTDA – is an example of these differences. TRT17 dismissed Ordinary Appeal of PETROBRÁS where the company spoke out against recognized subsidiary liability and granted to the complainant to reflect *in itinere* hours. Down here follow grounds of the Regional Court judgment transcribed into grounds of TST judgment:

[...]

For these reasons, judging unacceptable application of Jurisprudential Orientation (OJ) 191 of the respectable TST, representing in this case, application of Precedent 331, item IV, of the respectable TST. Jurisprudence consolidated by the Superior Court confirms labour judicial role of protecting the insufficient, respecting the principles guiding Labour Law.

[...]

What cannot be admitted is transferring workers the burden of risk due to wrong choice of services provider or an unsuccessful option of administrative policy. The obligations under the contract celebrated with first complaining party, only generates obligations to contractors, and eventual unfulfillment must be discussed at its own will. Workers are out of this question.

[...]

Considering that the developer was the workforce recipient of employees of the contracting party, he is subsidiary liable for payment of employer's unpaid labour credits, and it matters little if hiring of contracting party was licit or illicit, because workers credits must be protected, and they cannot suffer effects arising from businesses done by employers with his clients.

[...]

Sensitive to this alteration of facts, jurisprudence is taking position to consider developers as subsidiary liable of labour debts from contractors and sub-contractors, in cases where performed civil works are related to the economic activity of civil work owner. This is the understanding consecrated in OJ 191 of Individual Bargain Sector (SDI-1) of the venerable TST. IF civil work owner is a construction company or incorporated, they are subsidiary liable for labour debts payments of the contractor.

Economic profit going to civil work owner comes from his activities as constructor or incorporator, and also from related activities such as construction of technical installations or extending existing site, to increase productivity and/or general capacity of the company, or to protect existing site.

It is not possible leveling position of a nonprofit civil work owner, with a company trying to maintain or increase production capacity for higher profits, as it is the case of third claimed party, demonstrated in the construction of a gas treatment unit, when it is public and visible that one of third claimed party is gas exploration.

Petrobras interposed a Point of Law, ratifying being “owner of the civil work” and due to this the company could not be subsidiary liable, alleging violation to understanding signed by the TST, and article 71, § 1º of Law # 8.666/91, object of Direct Constitutionality Action (Adcon) 16. The rapporteur, Minister Luiz Phillipe Vieira de Melo Filho, also was rapporteur of the case that inspired this research, involving electricity sector of state of Goiás. In the grounds of Court Decision of his own, he stated:

[...]

Regarding alleging of violation of article 71, § 1º of Law # 8.666/93, it is worth stressing that in observance of principles of impersonality and morality [head of article 37 of Federal Constitution] the constitutional legislator chose three forms of becoming Public Administration servants: through a public position, a public employment or through a temporary contract to fulfill an exceptional public interest [items II and IX of article 37]. By doing this he did not leave space for infraconstitutional legislator expanding above mentioned role, since it is matter of question closely bound to public business management, that due to decision of the originating constituent power [therefore not subject to be appealed, due to absence of restriction inherent to prerogatives awarded to those that formulate main political decisions of a certain Nation] was restricted to the constitutional environment.

We must not mistake Public Administration hiring of services and civil works through tenders [as stipulated in item XXI of article 37 of the Constitution, ratified by Law # 8.666/93] with hiring manpower to perform support activities within public environment, because in these circumstances the objective is not civil work or the profit with services,] provided by tender bid winner, but only profiting the work of others to satisfy needs that could be supplied by hiring, as described in previous paragraph, of people to work at State bodies.

[...]

The judgment concludes stating that however STF has to judge ADCON 16, considered constitutional by article 71 of Law #8.666/93 in cases of unfulfillment of obligations by tender bid winner, it was obviously referring to civil works and services hired through Public Administration tender. However in support activities outsourcing hired by Public Administration, it remained clear that when demonstrated fault in surveillance by an Administration body, be it direct or indirect, it is viable that this body be liable for workers rights. Down here we quote it partially:

[...]

So, what do we understand by duty imposed on Public Administration of controlling taxes, in its condition of contracting party?

To demarcate this question, it must be faced that articles 58, III, and 67, head and § 1º of Law # 8.666/93 impose to Public Administration burden of verifying fulfillment of all obligations assumed by tender winner [among them obviou-

sly, those arising from labour laws] as it detaches from texts of mentioned law dispositives:

Art. 58. Legal regime of administrative contracts established by this Law granted to the Administration, following prerogative:

[...]

III – monitoring its performance;

[...]

Art. 67. Performance of the contract will be monitored and supervised by a specially designed representative of the Administration. It will be allowed hiring third parties to assist him and provide relevant information regarding this attribution.

§ 1º the representative of the Administration will take notes in an own register of any incident related to contract performance, deciding what would be needed to regularize observed shortages or errors.

[...] therefore, it is not admitted a passive stance from Public Administration regarding non supervising fulfillment of social benefits relating the contracting party. It is its liability – to perfectly fulfill the administrative contract – ensure right compliance of all obligations inherent to labour contracts of employees of the contracting party [and not only these of money characteristics – salaries in an strict sense, deposits of FGTS (Government Severance Indemnity Fund for Employees) payment of social contributions to National Institute of Social Security (INSS) as mentioned by above transcript author]. Carry out this duty by requesting monthly wage receipt of payment, verify full respect of safety norms and labour medicine and respect working hours as foreseen in article 7º, XIII, of Federal Constitution, among other measures.

[...]

Question 3 - Regarding outsourcing and liability of contracting party in TST

Objective here was verifying position adopted by TST regarding liability of the contracting party and third companies. Of 409 judgments, in 46.21pct conclusion was by the subsidiary conviction of contracting party. In 24.21pct option was *Others*, because it was not anymore discussed in TST outsourcing and its consequences; in other words, the original process examined the issue but the Point of Law discussed other matters, or also nullities making process go back to Regional Court.

Excludes contracting party from dispute or avoids it from liability was option in 15.89 pct, in 9.05 pct, judgments opt by *considering contracting party as employer*, and in 4.40 pct by *joint liability*. In one process, outsourcing was not questioned by Point of Law. Down here is data:

Table 2 - Regarding outsourcing and liability of contracting party in TST:

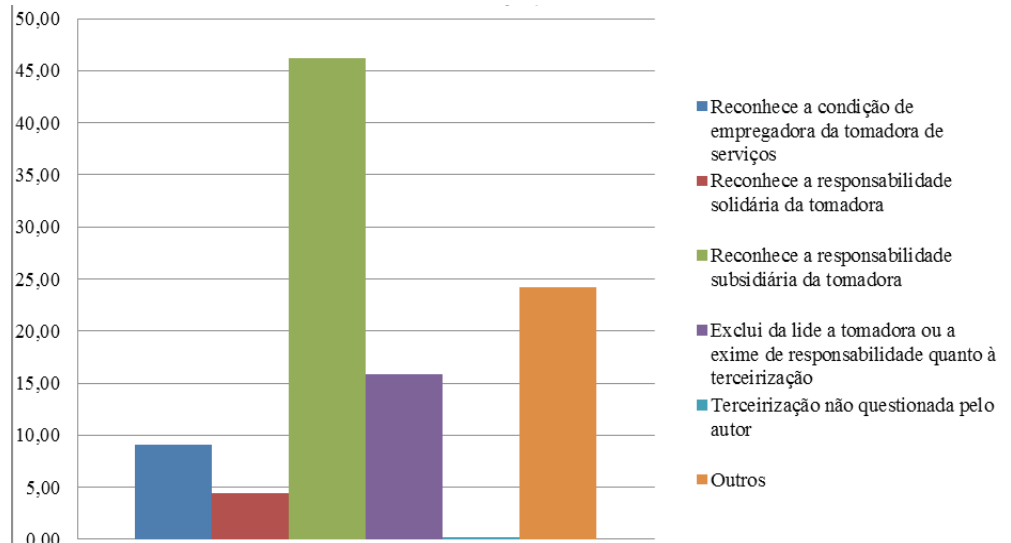
| Decision | Number of Judgments | Percentage |
|--|---------------------|------------|
| Assumes condition of employer of the contracting party | 37 | 9.05 |
| Assumes joint liability of contracting party | 18 | 4.40 |
| Assumes subsidiary liability of contracting party | 189 | 46.21 |
| Excludes contracting party from dispute or exempts it from liability regarding outsourcing | 65 | 15.89 |
| Outsourcing is not questioned by plaintiff | 1 | 0.24 |
| Others | 99 | 24.21 |
| Total | 409 | 100 |

Source: <http://www.tst.jus.br/web/guest/consulta-unificada>

Elaboration: Thematic Project “Current Brazilian Labour contradictions: formalization, precariousness, outsourcing and regulation”; Outsourcing axis.

Considering the three variables: assuming bond with contracting party, joint and subsidiary liabilities, percentage goes to 59.66, quite significant, since shows TST trend to curb outsourcing. This trend of subsidiary liabilizing contracting party strengthens research results from Outsourcing and Justice Labour: regional diversities, because Labour Justice is - now in other sectors and another period - resistance or limit locus to outsourcing. This is why substantive economic forces represented at Public Hearing called by TST in October 2011 pressured to cancel Precedent 331 and continue acting, now in the STF, with referred General Repercussion. Following chart illustrates this reality:

Chart - 2



| | |
|---|--|
| Reconhece a condição de empregadora da tomadora de serviços | Assumes its condition of employer of the contracting party |
| Reconhece a responsabilidade solidária da tomadora | Assumes joint liability of contracting party |
| Reconhece a responsabilidade subsidiária da tomadora | Assumes subsidiary liability of contracting party |
| Exclui da lide a tomadora ou a exime da responsabilidade quanto à terceirização | Excludes contracting party from dispute or exempts it from liability regarding outsourcing |
| Terceirização não questionada pelo autor | Outsourcing not questioned by author |
| Outros | Others |

Source: <http://www.tst.jus.br/web/guest/consulta-unificada>

Elaboration: Thematic Project "Current Brazilian Labour contradictions: formalization, precariousness, outsourcing and regulation"; Outsourcing axis.

Regarding liability for labor credits and Public body's liability with outsourced worker's credits, this was one of most discussed issues. Points of law traded argument that when STF performed constitutional Law 8666/93 denied joint liability or recognizing employment link with Public Administration. The Point of Law TST-RR-836-38.2010.5.03.0058, Applicant CAIXA ECONÔMICA FEDERAL - CEF and defendants Mayara Enia da Silva and BSI do Brasil LTDA, is an important example of this type of dissent.

This judgment reveals that TRT of Third Region, in state of Minas Gerais uphold complainant's ordinary appeal to subsidiary sentence CEF in labour funds, after verifying outsourcing fraud. CEF lodged appeal against subsidiary liability and equation of author to banking category. Following are Regional Court grounds of judgment:

[...]

It is incontrovertible, that during whole contractual period, from December 2, 2008 to June 1, 2009 – the claimant exclusively provided services to Caixa, by means of a contract signed with BSI do Brasil Ltda.

Legal side of hypothesis is to analyze lawfulness of outsourcing. We must verify if exercised functions by the claimant were inherent or not to banking category,

within support or main activities of this banking institution.

As established in service agreement Caixa and BSI, object of the contract would be related to *'services of document handling coming from Caixa's ATM envelopes and/or pouches, and typing of documents through Unix data system, within the bank agencies and/or in other facilities at CAIXA and/or in other locations determined by CAIXA.'* [first clause, f. 138].

Also, BSI's agent admitted that the author *'worked with the pouches, and also could do the work with envelopes, consisting in checking money and documents [...] besides eventually authenticate documents* [f. 198/199].

The Caixa's agent, said that there was a similarity among services rendered by the claimant and other employees, by confirming that *'this service began to be done by cashiers'*, not being anymore outsourced [f. 323].

Therefore we can see that activities performed by the claimant were directly inserted within main activity of Caixa, and performing same services than permanent bank employees.

It must be stressed that typical bank employees' activities are much more than contact or relationship with clients at the agencies, and handling money, even because, as it well known [art. 334, item I of Code of Civil Procedure] main activity of banks mainly includes among other and more complex activities, verifying check signatures and authentication of titles and documents.

We must say that item III of Precedent 331 of TST states that it is licit outsourcing in activities of *'upkeep and cleaning, and also specialized services related to support activities of the contracting party'*.

From above text we conclude that specialized services related to support activities of the contracting party are not subject to licit outsourcing. When analyzing the body of the process, we see that claimant was successful in demonstrating the constituent element of his right [articles 818 of CLT and 333, I of Code of Civil Procedure], since it was clearly proved existence of illicit outsourcing.

It is also worth stating that outsourcing in debate is not framed within described hypothesis of resolution 3.110/2003 of The Central Bank. Then Caixa's attempt of transferring main activities performance to third parties, breaking up bank services cannot be accepted in Labour justice, since it is from there where surges objective of precarizing corporate activity, banned by article 9º of CLT and by item I of TST Precedent 331. Therefore and with all due respect, mentioned Central Bank resolution based in principle of hierarchy of norms, does not prevail over the law, and comes up against principle of primacy of reality, fully applicable in such cases.

Thus in such outsourcing illicitness situations of main activity of contracting party, it would be the case of recognizing direct bond with Caixa [Precedent 331, item I, of TST], with joint liability of related rights, as if it were not constitutional obstacles, conditioning recognizing of direct and indirect employment relations with Public Administration, to worker's public tender submission [art. 37, II, CR/88].

Previous situation is in regard subsidiary condemnation of the contracting par-

ty, based in heart of main Labour rights and constitutional order, in item IV of TST Precedent 331 and articles 186 and 927 of Brazilian Civil Code/2002.

After these facts, conclusion is that services agreement in itself does not have power to withdraw liability from the applicant. Once proved it was direct beneficiary of services of the claimant, matter will be solved through application of Precedent 331, item IV of TST.

We stress that because of a damage, consubstantiated in offence to employee's labour rights caused by the employer [the outsourcing company] the contracting party, draws to itself presumed fault in 'in eligendo' and 'in vigilando' or in other words, not having done a good election of contracting party and not having observed duly supervision of fulfillment of labour obligations by his contractor, then becoming subsidiary liable as natural corollary. The fault, in its type, is not rebutting because of the fact that services were hired through a tender bid.

Manpower outsourcing does not have as scope contracting party's elision of liability regarding labour obligations unfulfilled by his contractor [Precedent 331, IV, TST], but only decentralization of services to optimize them.

Now, against perpetrated fraud, the claimant must comply with norms regulating banking work, and rights resulting from principle of equal protection, stated in article 5 'head' of Federal Constitution, in article 9 of CLT, and in analogical understanding of article 12 of Law 6.019/74 [OJ 383 of SDI-1 of TST] making public company to be subsidiary liable by labour dues, based in Precedent 331, IV of TST and articles 1, IV, 7, XXX and XXXII, 170, 'head' and 190, all of Federal Constitution of 1988. In these cases, application of equality aims mitigating discrimination of manpower intermediation, therefore making parts of payment and rights corresponding to employees of the institution making the claim, true beneficiary of services rendered, being extended to outsourced workers.

I allow appeal to condemn first claim [BSI] with subsidiary liability of the second [Caixa], to pay to claimant differences in salaries, based in banking Collective Convention Agreements (CCT) complying with minimum wage for bank cashier [CCT of 2008/2009, point 'c' of clauses two and three, folio 51] to be applied to April 2009 wage balance of April 2009, notice and thirteenth salary (Brazilian extra month's salary paid in December) vacation plus Employee's severance Guarantee Fund (FGTS) plus an increase of 40 pct, fines of articles 467 and 477 of CLT [process # 01563-2009-058-03-00-2]; substitutive compensation to meals allowance and food basket [without effects, due to compensatory nature, clauses fourteenth and fifteenth of CCT 2008/2009, folio 54/55]; and proportional profit and result sharing program (PLR) of 2008 [first clause, fourth paragraph, folio 75]" [our emphasis].

Caixa Econômica argued that subsidiary liability was not for the institution, even based in Precedent 331, IV, since article 71, § 1º, of Law 8.666/93 – object of referred ADCON 16 – immunized it. And also stated that equal pay was improper because claimant was not his employee, did not take civil ser-

vice examination, and was hired through a licit outsourcing. In decision, 6th Chamber of TST, Rapporteur Minister Mauricio Godinho Delgado, said that contracting party is liable for supervising the fulfillment of contracting party's labour-law and social security obligations, to hinder injury of rights. Down here we see partially this decision:

[...]

Regarding "extent of subsidiary liability", Regional Court's decision is in entire agreement with new item VI of Precedent 331, "subsidiary liability of the contracting party includes any dues arising from condemnation related to the labour prevision period". Therefore, unscathed remains article 5º, XLV of our Constitution.

In other sense, Regional Court supported sentence to pay dues granted to employees of contracting party [CEF] stating it is not an equal pay request.

The impossibility of recognizing joint liability or employment relation with the public body does not configure obstacle to worker's right of same legal and normative labour dues granted to a public employee performing identical job in contracting party public body, according to jurisprudence consolidated in this Superior Court.

Such understanding harmonizes constitutional interdiction to recognizing employment relation with state bodies not demanding public examination [art. 37, II and § 2º, Federal Constitution] with equitable principles [art. 5º, head and I], removing negative and discriminatory effects arising from outsourcing. It also harmonizes with valuing human work, emphasized among others, in arts. 1º, IV, 3º, III and 170, head.

This isonomy grants to workers illicitly outsourced, all legal and normative labour dues applicable to direct public employees, performing same function in contracting party public body, or all legal and normative labour dues corresponding to the function performed by outsourced workers at the public body benefited by the work.

[...]

Question 4 – *Regarding TST, Outsourcing was locus of:*

This question aims verifying TST role in front of outsourcing, or if it was space of *Affirmation; Resistance; None* [process does not refer to outsourcing]; or, *Others* [outsourcing was discussed in lower courts but in Point of Law this topic was not anymore discussed nor in cases with declaration of invalidity of the decision or other procedural questions that made process go back to Regional Court for a new judgment]. Results are following:

Table 3 - Regarding TST, Outsourcing was locus of:

| Decision | Judgment number | Percentage |
|-------------|-----------------|------------|
| Resistance | 292 | 71.39 |
| Affirmation | 88 | 21.52 |
| None | 6 | 1.47 |
| Others | 23 | 5.62 |
| Total | 409 | 100 |

Source: <http://www.tst.jus.br/web/guest/consulta-unificada>

Elaboration: Thematic Project "Current Brazilian Labour contradictions: formalization, precariousness, outsourcing and regulation"; Outsourcing axis.

According to above data, TST prevailing attitude was *Resistance*, in 71.39pct. In only 21.56 pct situation was the opposite. Decisions classified as *None and Others* were minority. Considering phenomenon from a historic point of view, application of Precedent 331 *Resistance was majority*. In case its construction could be seen as a regression to previous understanding, Precedent 256/86, result would have been different. In studied period – 2000 to 2013 – it is seen a strong movement, mainly from employers to cancel Precedent 331, considered an obstacle to higher competitiveness and economic development.

The fact that obtained result points to a movement of *Resistance* from TST to outsourcing is expressly related to prevailing application by Regional Courts and TST of understanding of Precedent 331, allowing make subsidiary liable the contracting party, and in cases of fraud, recognize its condition of direct employer.

Point of Law TST-RR-86900-12.2009.5.07.0014, where applicant is CEF and defendant Andréa Pedrosa Pinheiros and other, is an example of how TST imposes *Resistance* to that way of hiring. In groundings of the judgment, Rapporteur Minister Mauricio Godinho, evaluates that Regional Court of the Seventh Region, in state of Ceará, recognized subsidiary liability of the contracting party, due to lack of supervision regarding fulfillment of social security and labour obligations by a third company– understanding expressed in last alteration of Precedent 331, after TST decision of ADCON 16. Down here is partially quoted:

[...]

Society protection, including worker's protection and presumption of legality of administrative acts, are Public Administration performance elementary aspects, guardians of fulfillment of rights granted by the Constitution. They have to be rigorously interpreted and adequate to the hypothesis of incidence of legislative and jurisprudential prevision, in case of recognizing or not subsidiary liability of the state body if any eventual labour dues unfulfilled by the contracting party would appear. This protection is a set of rights and labour dues of long scale with social, political and economic implications, as main constitutional principles listed in Federal Constitution of 1988, such as article 1 [dignity of the

person, social value of work and free initiative], and fundamental rights, consolidated through principles bound to social rights [articles 6º and 7º], economic order [article 170], social security [art. 194], health [art. 196], social assistance [art. 203], culture [art. 215], among other constitutional provisions.

The Federal Supreme Court, when deciding ADC 16-DF, reverted interpretation stated two decades ago in labour jurisprudence in the sense that state bodies – like other individuals or corporations – were strongly liable for contract and labour dues of outsourced state workers, in case of unfulfillment of outsourcer employer [Precedent 331, previous item IV, TST].

STF requires effective presence of fault *in vigilando* from the state body during services rendered [STF, ADC 16-DF].

If such parameters are observed, it has to be proved if public body has been at fault to occur unfulfillment of labour debts. This is interpretative point of view of STF when judging ADC 16-DF. If action or omission, direct or indirect, is not clearly evidenced in action or omission, be it direct or indirect, in guilty modality, the public agent to act as outsourced contractor, to the detriment of the administrative contract, it is not possible identifying Public Administration liability regarding contracting party's labour obligations, as in article 71, § 1º of Law 8.666/1993. We repeat: this is current STF line of understanding, based in what was decided in ADC 16-DF.

Based in this understanding, TST allied with thesis that subsidiary liability of direct and indirect Public Administration bodies is not result of mere unfulfillment of labour dues assumed by the company which was regularly hired, but only when explained in judgment of Regional Court its judicial misconduct in the fulfillment of obligations of Law 8.666, of June 21, 1993, especially when supervising fulfillment of contractual and legal obligations of contracting party as employer.

[...]

Therefore, although impossibility of constituting a direct labour relation between claimant and CEF is recognized, this company has to be kept in the passive pole of the action, to be subsidiary liable for any funds granted to the worker, not as rights directly arising from labour relation, but based in equality principle.

In another sense, impossibility of constituting a labour relation with a Public Administration body, due to lack of civil service examination is not obstacle to worker's right of having same legal and normative funds granted to a public worker performing identical function at state body contracting party, as per jurisprudence consolidated within environment of this Superior Court, based in OJ 383 of SBDI-1/TST. Such understanding harmonizes constitutional interdiction to recognizing labour relation with state bodies without civil service examination [art. 37, II and § 2º of Federal Constitution] with equality principle [art. 5º, head and I], removing negative and discriminatory effects arising from outsourcing. And also valuation of human work, stressed among others, in articles 1º, IV, 3º, III and 170, head, of Federal Constitution.

This isonomy grants to workers illicitly outsourced each and all labour, legal and normative dues applicable to state employees performing same function in state body contracting party, or any labour, legal and normative dues corresponding to function performed outsourced workers for the state body benefited by the work.

[...]

Question 5 - Regarding Outsourcing, Labour Justice was locus of:

The objective of the fifth question is verifying whole role of Labour Justice, if it was: *Affirmation*; *Resistance*; or *Both* [when contradictory movements arise]; *None* [when it is not about this aspect or decides nothing about outsourcing]; or, *Others* [in case of not being discussed anymore at the TST, the Outsourcing issue and its consequences]. Down here, table 04 and chart 3 express this reality:

Table 4 - Regarding Outsourcing, Labour Justice was locus of:

| Decision | Judgment number | Percentage |
|-------------|-----------------|------------|
| Resistance | 269 | 65.77 |
| Affirmation | 20 | 4.89 |
| Both | 91 | 22.25 |
| None | 6 | 1.47 |
| Others | 23 | 5.62 |
| Total | 409 | 100 |

Source: <http://www.tst.jus.br/web/guest/consulta-unificada>

Elaboration: Thematic Project “Current Brazilian Labour contradictions: formalization, precariousness, outsourcing and regulation”; Outsourcing axis.

As per data, Labour Justice position during research period was *Resistance*: 65.77 pct. In 4.89%, only 20, situation was the opposite: *Affirmation*. The result *Both* went to 22.25 pct, showing a contradictory movement among decision making authorities, deciding sometimes *Affirmation* and others, *Resistance*, proving correctness of initial theoretical hypothesis stating that Right and State are relations, or a material condensation of forces, as states Nicos Poulantzas, Greek formative neo-Marxist theorist of politics. Divergent decisions within the Judiciary and its dynamics are included in that understanding.

Above fact is a main contribution to understand recent attacks to Precedent 331. However, position of *Resistance* to outsourcing remains, supported by understanding incorporated through Precedent 331, breaking the Outsourcing, and also as consequence of deepen work precariousness.

Final considerations

The capitalist system demands permanent development of productive forces²⁵. This affirmation, ratified when observing historical evolution of the system during the time, is evidenced through the analysis of outsourcing phenomenon and through judiciary demands focused on it. Starting from an interdisciplinary vision, involving several areas of juridical and economic knowledge and history, we studied sources to understand complexity of this phenomenon, core of this research regarding outsourcing and role of Labour Justice in front of this issue.

If we consider that Judiciary is not a monolithic power, it was based in judgments that Labour Justice - focused in TST, answered lawsuits involving outsourcing backed in following assumptions: social tensions are reflected in the role this institution performs, reproducing material condensation of active forces of civil society; pleadings from actors and content of decisions are part of the dynamic and complexity of social, economic and political social relations of a country in the historical moment they are pronounced; outsourcing is understood as business strategy, or even as a "protection mechanism" used by corporations when in search of conditions granting competitiveness and profits; Labour Justice, in spite of contradictions and difficulties, has been locus of resistance to the expansion of that way of hiring.

Research continues in outsourced axis of the thematic Project *Current Brazilian Labour contradictions: formalization, precariousness, outsourcing and regulation*, including outsourcing as one of contemporary capitalist dynamic expressions, and discusses role of Labour Justice in this way of hiring, focused on TST. We are currently studying Bills of Review filed on orders dismissing Points of Law to the TST in lawsuits involving same professional categories, allowing a more deep analysis of the role of TST and Labour Justice in view of this phenomenon, in a political conjuncture mobilizing economic sectors to flexibilizing even more working relations and established an organized resistance to outsourcing, without any limits.

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