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Labor outsourcing and the importance of collective bargaining – difficult to reconcile rulings of the Brazilian Supreme Court

Outsourcing pracy a znaczenie rokowań zbiorowych – trudne do pogodzenia orzeczenia Sądu Najwyższego Brazylii

Abstract

The publication takes a closer look at the issue of employment outsourcing and shows how far it is from labor law. The fundamental right of employees to collective labor law becomes illusory in the dawn of the decisions of the Supreme Court in Brazil and the adoption of the perspective of freedom of contract. This not only negatively affects the situation of the employed, but also undermines the concept and foundations of labor law.

Keywords

workers' rights; global supply chains; outsourcing; collective bargaining

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Streszczenie

Publikacja przybliża zagadnienie outsourcingu zatrudnienia i pokazuje, jak dalekie jest to rozwiązanie od prawa pracy. Fundamentalne prawo pracowników do zbiorowego prawa pracy staje się iluzoryczne w świetle orzeczeń Sądu Najwyższego w Brazylii i przyjęciu perspektywy swobody zawierania umów. To nie tylko negatywnie wpływa na sytuację zatrudnionych, ale również podważa koncepcję i fundamenty prawa pracy.

Słowa kluczowe

prawa pracowników; globalne łańcuchy dostaw; outsourcing; rokowania zbiorowe

Introduction

The authors of this publication ask whether the Supreme Court's jurisprudence on outsourcing and based on freedom of contract, which exists outside the realm of labor law standards, can be reconciled with jurisprudence aimed at the effective conduct, protection and development of collective bargaining. Labor outsourcing

being a key element in the construction of global supply chains, is part of a business strategy to achieve efficiency and productivity, often hides labor violations to reduce costs. The most brutal forms of labor exploitation, such as reducing workers to slave-like conditions and child labor, are usually mediated or outsourced rather than performed directly. Companies seek to escape risk and responsibility, yet at the same time aim to maintain

control over operations and production results. The aim is to show that the current jurisprudence on outsourcing and collective bargaining is not reconcilable, in the sense that freeing outsourcing, without concern for other aspects, can never lead to an effective strengthening of collective bargaining. In the jurisprudence of the Federal Supreme Court, the grounds for outsourcing are broad and unlimited. An analysis of the collective bargaining narrative followed, where attempts were made to demonstrate inconsistencies in the discourse of the Supreme Court. The progressive process of making collective labor law more flexible, recognizing that it is within the power of the legislature to adjust so that issues of protection and collective bargaining are removed from the scope of collective bargaining and move into the realm of individual autonomy of the will of the employer and employee. Instead of a natural collectivization to properly resolve labor disputes, does the discourse on collective bargaining serve to strengthen corporate control and individualize labor relations? There also remains the question of the value of collective bargaining without respect for the rules of workplace democracy and labor law as a whole.

Supreme Court's narrative in favor of labor outsourcing (outsourcing and production chains)

The Federal Supreme Court examined the constitutionality of Supreme Labor Court case law that imposed restrictions on outsourcing, primarily through the criterion of distinguishing between intermediate and final activities. Precedent No. 331 of the Supreme Labor Court declares labor intermediation unlawful, and the relationship is created directly with the service provider, except in the cases of temporary labor, supervisory services and transportation of valuables for financial institutions as provided for in Law No. 6,019/1974 and Law No. 7,102/1983, maintenance and cleaning activities, specialized activities and other indirect activities provided without employees subordinate and personal to the service provider. Legally compliant outsourcing entails the borrower's subsidiary liability for the entire claim in the event of the borrower's failure to comply with labor obligations. The handling of this case resulted from a change in the Supreme Court's stance toward labor issues, such as outsourcing and collective bargaining, which had previously been at an extra-constitutional level, such that they did not justify an extraordinary appeal to investigate a violation of the Constitution. By interpreting constitutional provisions more liberally, the Supreme Court paved the way for the labor law reforms that took place in 2017, promoted by Laws 13,429 and 13,467, the former of which introduced the provision of services to third parties in addition to temporary work, and the latter of which amended more than a hundred articles of the Uniform Labor Law.

The Supreme Court's ruling in Extraordinary Appeal with General Repercussion 958.252, DJE 13/09/2019,

Topic 725, on the issue of the permissibility of outsourcing services to carry out a company's core business. This issue was also the subject of a complaint for failure to comply with Basic Rule 324. Although the appeal and complaint were evaluated in the context of the new regulations on the provision of services to third parties, the analysis was limited to the case law of the Supreme Labor Court, consolidated in Precedent 331. The thesis contained in Topic 725 was formulated as follows: "Outsourcing or any other form of division of labor between different legal entities is lawful, regardless of the corporate purpose of the companies." The reasoning used in the judgment is a praise of freedom of contract and the need to make existing labor law protections more flexible. The constitutional provision identified as violated in Topic 725 was Article 5, II, of the 1988 Brazilian Constitution, which states, among the basic rights and guarantees of Title II, that "no one may be compelled to do or refrain from doing anything except by law." According to the arguments used in the appeal, freedom of contract, in the absence of legislative restrictions, is part of the protective content of this provision. The argument was taken up in terms of the fundamental right to free enterprise to ensure that entrepreneurs have the power to organize their activities in the way they see fit. This is a value brought about by modernity in contrast to the period of rigid regulation of work in the time of the "guilds", which gave those at the top of the hierarchical structure "the prerogative to monopolize the means of production, as well as to set wages, prices and quality standards. In this environment, which was hostile to competition and innovation, it was easier to control the masses and ensure that the power of the ruling nobility was maintained."¹ The majority view is "that the enrichment of the poorest is the right result of a more productive economy, while the fundamental conditions for this are the absence of arbitrary interventions by governments and the guarantee of freedom of economic organization".²

The principle of legal freedom guaranteed in the Brazilian Constitution (art. 5, II), which the Court integrates with economic freedom, is "a consequence of the dignity of the human person". In this way, the freedom to contract and undertake has been elevated to the category of a fundamental right, just as it was in the so-called *Lochner* era of the U.S. Supreme Court. American Supreme Court.³ It was also argued that the division of activities by several companies would not lead to the weakening of the unions, in the same way that a company that operates in several locations, with a size that goes beyond the territorial bases of the unions, would have to consider the various unions.⁴ We then move on to the theory of the firm developed by Ronald Coase, with the aim of replacing "transaction costs" with a hierarchical command structure with powers to assess the internalization or externalization of activities. The current trend for companies is to concentrate on certain activities, making use of a wide range of outsourced activities, contributes to an increase in economic

production and to "the material well-being of the world's population."⁵ For the Court, outsourcing offers improved activities, cost reduction and organizational rationalization, transparency, employee benefits, a boost to competitiveness, greater flexibility and efficiency, as well as facilitating the incorporation of know-how and new technologies. But, as mentioned, there are votes to the effect that widespread outsourcing does not imply violating workers' rights or authorizing the illegal intermediation of labour. What we want to emphasize is that, regardless of the criteria used to deal with outsourcing, the Superior Labor Court views this practice with some suspicion, above all because of the risks it poses to the labor protection system. The Federal Supreme Court, on the other hand, refutes this view by praising outsourcing as a rational instrument for achieving efficiency, flexibility and greater competitiveness in the market, with increased productivity, which ends up benefiting workers. The Federal Supreme Court, in Declaratory Action of Constitutionality 48, examined the constitutionality of the legal regime for road freight transportation established by Law 11.442/2007, establishing the possibility of outsourcing in end-activities, a legal relationship of a commercial nature and not an employment relationship. Based on the principle of free enterprise, the Court held that the employment relationship is one of the possibilities for contracting work, but it is not exclusive in the Brazilian Constitution of 1988. Considering these decisions, a justice of the Supreme Court ruled that a labor court decision recognizing an employment relationship between an app driver and a digital platform violates the Court's aforementioned pronouncements, which is why the case was referred to the ordinary courts.⁶ In another decision, the Court clarified that other forms of hiring in core activities, such as "outsourcing of labor, partnerships, companies and the provision of services by legal entities are lawful alongside hiring under the Consolidated Labor Laws, as long as they are not used to defraud the legislation."⁷ The acceptance of unlimited outsourcing has led the Court to relax the presumption in favor of the existence of an employment relationship, as well as the competence of the Labor Court to identify whether hiring of a different nature is intended to mask a genuine employment relationship.

The other side of labor outsourcing

Although the Federal Supreme Court has highlighted the positive aspects of labor outsourcing, there is a large body of doctrine that addresses the other side, as will be examined in this topic. David Weil (2014) in his research, found numerous problems related to the degradation of working conditions resulting from what he calls fissured work, looking for ways to avoid it, which involves a re-signification of labor responsibility and inspection so that legislation is effectively observed. The outsourcing of activities has become a recurring practice today, often

done in order to reduce wages and cut benefits. Outsourcing jobs that were previously direct, through fissured work, leads to more precarious conditions because the risks are transferred to smaller employers or to individual workers, usually characterized as self-employed or other non-employment forms. The working conditions of the borrowing company are usually preserved, while the outsourced jobs have very different conditions, in addition to an increase in non-compliance with labor protection standards.

According to Weil, fissured work results from this intention to transfer labor costs and responsibility for risks to smaller or intermediary companies. Outsourcing has been facilitated by new technologies, which make it possible to ensure that the company's strategy is dedicated to the heart of the business, transfer costs and responsibilities, such as those arising from employment, and ensure that the process runs smoothly by supervising the activities carried out by third parties. Large companies tend to pay higher wages and provide better working conditions, so outsourcing reduces this cost. In other words, while there are mechanisms for exercising control over the activities carried out by third parties, the borrowing company does not want to take responsibility for exercising this control. In this respect, fissured work, by allowing the company to take care of the heart of the business, providing greater flexibility and productivity, also generates a social cost due to the lowering of working conditions. In the past, large companies consolidated by internalizing activities carried out by intermediaries, such as the storage and distribution of goods, with the aim of reducing costs and product prices. The consolidation of trade unions, together with concerns about employee loyalty, led to the granting of benefits and job retention through collective bargaining agreements. This reality changed dramatically with financialization and the opening up of companies' capital, with management and control being transferred from the owners to professionals. The capital market put pressure on companies to reduce their boundaries and dedicate themselves to the heart of the business, and the advance of new technologies made it possible to ensure that the standard of outsourced activities was maintained, through new forms of supervision and control of the standards required in the execution of tasks transferred to third parties. A more efficient model was sought to satisfy the interests of shareholders.

The administration of labor relations and benefits for workers, negotiations with unions and agreements and the preparation of payrolls required a bureaucratic structure to carry out, and this part was soon seen as costly and unprofitable, so that outsourcing it would provide greater efficiency and profit. Companies that concentrated many operations were seen as inefficient and unproductive. Alongside the human resources sector, peripheral activities such as cleaning and maintenance and information technology were transferred to third parties. Outsourcing is part of the re-engineering of companies, which have re-evaluated

routines in order to reduce waste and streamline processes. Although it is not possible to outsource activities to avoid union action, it does occur with some subtlety, in areas where it is more difficult to organize into unions. There is also outsourcing to reduce liability by transferring the risks of the activity to third parties. Weil mentions subcontracting, franchising and production chains as forms of fissured labor. With regard to the latter, he cites Foxconn as an example of the degradation of working conditions, which in the Supreme Court decision is mentioned as a case of "healthy competition". However, the court does not reveal the dramatic side of the workers and the oppressive working conditions, in an environment of humiliation and forced to perform activities to the point of exhaustion that lead not only to illnesses and accidents, but to taking their own lives.⁸

In Brazil, where cases of work in conditions like slavery are concentrated in the north and central-west regions, work in these conditions has recently been detected in the south of the country through outsourcing and production chains. The wine industry in the south of the country is known for the quality of its products, with international awards. Some of these award-winning wineries hired outsourced companies where workers were found in inhumane working conditions, including torture. The wineries involved were certified and committed to protecting human labor⁹, but turned a blind eye to the human rights violating practices of the outsourced company, in a kind of "willful blindness", whereby adequate measures are not taken to prevent the illegal act, trusting that disregard for the contractor's attitude exempts the service provider from responsibility. Also in the south of the country, the company BASF contracted rice farms where workers were found, some of them children, in extremely precarious conditions similar to slavery. The company claimed that it was unaware of the case but made itself available to help solve the problem.¹⁰

Richard Sennett (2006) opposes the institutional narrative of security, stability and the ability to absorb and overcome contradictions to move forward. This narrative is replaced by that of corporate image, in which attention shifts from management to the interests of shareholders. Stability and permanence become weaknesses because they show an inability to face up to challenges and innovate. With regard to workers, Sennett mentions that the narrative of relationships lived and experience gained at work is replaced by short-term relationships and the ability to move from one activity to another, driven by the fear of not getting a job. Long-term transactions do not allow for lasting relationships, the formation of bonds of solidarity or the organization of trade unions. As if they were in a war, the victors, the entrepreneurs, win the support of the victims, the workers, to operate in a flexible mode, submitting to this logic, without the conditions or capacity to change its course. The workers' resignation and impotence are justified by the fear of losing their jobs, which are

constantly threatened by replacement by new technologies and job crises, presented as the inevitable and irresistible future.

Capitalist expansion represents new conquests of space, converting territories into objects to achieve economic advantages. Expansion makes use of cheap labor by decentralizing production costs, which increases forced, slave, child and degrading labor practices. The process is reinforced through functional distributions from the center to the periphery, as happens with production chains that dissociate social and environmental damage from the generation and concentration of wealth. The center concentrates the income and the clean part of the process, while the periphery receives the damage, the losses, the waste and all the resulting dirt. Economic power increases political power and the asymmetry of power is a structural part of the society of externalization, since it allows the costs of well-being to be unloaded on third parties, who are excluded from any benefits (Sennett, 2006). The transformation of money, labor and land into commodities is nothing more than a fiction, since they are directly associated with human life. Treating them as commodities only fuels the subordination of society to the economy. Work is directly linked to the person of the worker and cannot be stored as a product. Money represents purchasing power and is not a commodity. It follows that converting them into commodities cannot really be anything other than a fiction. Separating work from the activities of life, and inserting it into the laws of the market, empties organic social relations and gives prestige to individual and atomized ways of life. The autonomy of will be manifested by the contract is the way to eliminate non-contractual human relationships (Sennett, 2006). This reality is also described by Sandel, portraying the invasion of the market into spheres of life that were previously guided by other factors. Markets govern human activities separately from morality. Human relations are guided by the logic of the market and money increasingly determines people's behavior and lives. Sandel uses the term "corruption" in the broader sense that it is regularly used to refer to illicit payments and bribes, in order to indicate the degradation of practices that lose their moral value to become the object of transactions, aimed only at increasing profits (Sandel, 2016).

The invasion of market logic into all spheres of life disfigures the dignity of the human person, based on the Kantian maxim that people have no price, but dignity. However, with the inversion of the categorical imperative in the externalization society, as Lessenich observed (Sandel, 2016, Note 7), dignity, which represents the field of the non-negotiable and unavailable, is replaced by market instruments, which make everything available and alienable. Social rights and welfare policies, in this logic, are seen as undue intervention by the state, with individuals having to acquire the goods of life on the market according to their means. The instruments for protecting and guaranteeing human dignity are also made more flexible. Rights lose their unavailability and

become flexible, precarious and temporary. In labor law, precariousness is introduced in various places, but above all through outsourcing and production chains, which are instruments for exploitation and the creation of labor liabilities due to countless misfortunes and non-payment, without it being possible to identify those responsible for the debts. The workers themselves must bear these losses. Labor rights come under pressure in this type of market-driven society and are considered obstacles to economic development. The logic of the market has co-opted the new forms of work brought about by technological development. Work through application platforms has expanded with the appeal of entrepreneurship. It is the promise of self-employment, which frees service providers from rigid rules imposed by employers. The entrepreneurs of the future are free to set their own hours and financial targets. In addition, the prospects for advancement in life are presented as opportunities that would never be available in typical employment relationships. Carrying out these activities outside the safety net is part of the process of commodifying work (Wood et al., 2019, pp. 931–950).

The narrative of valuing collective bargaining in the Federal Supreme Court

This topic will present decisions of the Federal Supreme Court, in which arguments favoring the valorization of collective bargaining were adopted, and decisions that point in the opposite direction, which indicates inconsistencies in the narrative alluding to the subject. The Federal Supreme Court, based on valuing collective bargaining for resolving labor disputes, considered an amendment to the Constitution regarding the normative power of the Labor Courts to be constitutional. Constitutional Amendment 45/2004 introduced the requirement of mutual agreement in economic bargaining. Collective bargaining is only the competence of the labor courts when there is an impasse in collective bargaining. Before this constitutional amendment, any of the collective subjects could initiate collective bargaining before the court, with some exceptions laid down in case law. Once the economic conflict has been decided, the Labor Court, exercising its normative power, defines the working conditions in the so-called normative sentence, which is applied in place of the collective instrument that was not signed due to the impasse in negotiations. Based on the requirement of a common agreement for collective bargaining of an economic nature, the issue was brought before the Federal Supreme Court, on the grounds that the common agreement would correspond, among other constitutional violations, to a limitation of access to justice guaranteed in article 5, XXXV, of the Constitution, which states that "the law shall not exclude injury or threat to the right from the appreciation of the Judiciary". The Supreme Court rejected the claim of unconstitutionality, adopting in Extraordinary Appeal with General Repercussion 1002295, Theme 841, DJE

13/10/2020, the following thesis: "The requirement of a common agreement between the parties to file a collective bargaining agreement of an economic nature is constitutional, according to article 114, § 2, of the Federal Constitution, as amended by Constitutional Amendment 45/2004." The matter had already been the subject of Direct Action of Unconstitutionality 3423, DJE of 18/06/2020, which cited the recommendation of the International Labor Organization's Committee on Freedom of Association that the State should not unduly interfere in collective labor relations, in accordance with Conventions 98 and 154, so that the requirement of a common agreement encourages collective bargaining and the self-composition of conflicts.

In Extraordinary Appeal with General Repercussion 590.415, Theme 152, DJE 29/05/2015, a collective agreement that approved an incentivized dismissal plan, with a broad and general discharge of all the installments arising from the employment relationship, was considered valid. The court held that in collective labor relations there is not the same disparity between the parties as there is in individual labor relations, so that the limits of collective autonomy are lower than those of individual autonomy of will in the field of labor relations. The Brazilian Constitution of 1988, as well as Conventions 98/1949 and 154/1981 of the International Labor Organization, favor collective autonomy and the settlement of labor disputes by the parties themselves. The thesis was drafted as follows: The out-of-court settlement that results in the termination of the employment contract, due to the employee's voluntary adherence to an incentivized dismissal plan, gives rise to a broad and unrestricted discharge of all the installments subject to the employment contract, if this condition has been expressly included in the collective agreement that approved the plan, as well as in the other instruments entered with the employee.

At the end of his argument, the rapporteur points out that the Brazilian Constitution of 1988 kept remnants of the corporative system, such as the prohibition on the creation of more than one union per category in the same territorial base, known as union uniqueness, and at the time the mandatory contribution imposed on all members of the category. These remnants do not encourage the formation of truly representative unions. These shortcomings may justify, depending on the circumstances of the case, the application of the principle of protection to collective labor relations, just as it does in individual relations. However, in the specific case, this justification is not present, insofar as there was effective participation by the workers in the union to approve the plan, in the terms in which it was included in the agreement. Recently, in the Extraordinary Appeal with General Repercussion, ARE 1121633, DJE 28/04/2023, Theme 1046, the court's understanding was more comprehensive, adopting the following thesis: Collective agreements and conventions that, when considering the negotiated sectoral adequacy, agree on limitations or withdrawals of labor rights are constitutional, regardless

of the specified explanation of compensatory advantages, provided that unavailable rights are respected.

In these cases, the court seeks to highlight the importance of collective bargaining, but the aim is to extend the collective autonomy of will when it clashes with a right provided for by law.

The Federal Supreme Court, in Extraordinary Appeal with General Repercussion 999435, DJE 15/09/2022, Theme 638, also examined the position of the Superior Labor Court, which held that collective bargaining was necessary in collective dismissals when examining the Embraer case, in which around 4,400 employees were dismissed without prior collective bargaining. The ruling was as follows: "Prior union intervention is an essential procedural requirement for the mass dismissal of workers, which is not to be confused with prior authorization by the union or the signing of a collective bargaining agreement".

Despite the Supreme Court's discourse on the importance of collective bargaining, in this case it was decided to require mere union intervention, for fear that once collective bargaining was frustrated, the way forward would be collective bargaining, under the terms of article 114, paragraph 2, of the Constitution. There is thus an ambiguity in the court's understanding of the scope of collective bargaining and its recognition as a preferable means of resolving collective labor disputes. This ambiguity is most evident in the case of the dismissal of employees in state-owned entities, in which the Federal Supreme Court decided, in the Action for Failure to Comply with Fundamental Precept 486, that the requirement for collective bargaining must be met. In the judgment of Extraordinary Appeal with General Repercussion 1018459, Theme 935, the Supreme Court had confirmed its jurisprudence of not admitting the collection of contributions from workers who are not members of the union, establishing the following thesis: "It is unconstitutional to institute, by agreement, collective agreement or normative sentence, contributions that are compulsorily imposed on non-unionized employees of the category".

With the filing of motions for clarification after the labor reform promoted by Law 13,467/2017, which converted compulsory union dues into voluntary ones, there was a repositioning in the vote, which led the rapporteur and other justices to also review their initial position. The prevailing argument is that the reform has significantly altered the role of trade unions, and in line with the case law valuing collective bargaining, it would be incoherent to maintain the prohibition on collecting contributions provided for in collective bargaining instruments. The judgment has not yet been concluded, but it is already moving in the direction of forming a majority to establish the following thesis: "The institution, by collective agreement or convention, of assistance contributions to be imposed on all employees in the category, even if they are not union members, is constitutional, provided that the right to object is ensured." In the judgment of Direct Action of

Unconstitutionality 5954, DJE 09.08.2023, the constitutionality of a provision introduced by the labor reform, article 59-A, was examined, authorizing the adoption of a 12-by-36-hour work schedule by means of a written individual agreement, in addition to collective bargaining and collective bargaining agreements. The argument for ruling that the provision is constitutional, in terms of its establishment by individual agreement, is completely different from the decisions that proclaim the value of collective bargaining. Labor law is associated with the Fordist means of production and the welfare state. Ronald Coase's theory of "transaction costs" and the tendency to outsource production are cited. Union organization in the context of Fordism is referred to as the "lost paradigm".¹¹, marked by being paternalistic and protectionist. Through the ideology of "demonization of capital"¹², This imbalance is no longer justified. It is argued that the labor reform came at a time when the informal market was growing, according to data from the ILO itself and the World Bank, and that the 12 by 36 scale does not lead to precariousness. The 2017 labor reform is said to have adopted appropriate measures to meet the challenges of current times, valuing workers' autonomy of will and freedom. In this way, the institution of the 12-by-36 work schedule is within the framework recognized by the Constitution to the legislator (Pereira, 2022).

The last decision shows the inconsistencies in the narrative adopted by the Supreme Court of valuing collective bargaining. An analysis of the judgments points more towards a narrative aimed at making labor law more flexible, and both encouraging outsourcing and collective bargaining would be instruments to achieve this end. On the other hand, if the new understanding prevails that contributions provided for in collective bargaining instruments are constitutional and can be demanded from affiliated and non-affiliated workers, this change could encourage collective bargaining. But there will still be the challenge of repairing the broken windows, in David Weil's expression, to make collective bargaining viable in the context of outsourcing activities.

Valuing collective bargaining without workplace democracy and valuing labor law?

This topic proposes examining the criticism or revision of Coase's theory of the firm, with a view to adjusting it to the demands of democratizing workplaces. The need for adjustment is that the firm, as it was conceived at the time Coase developed his theory, was based on Fordist verticality. Today, business organizations have more varied and hybrid models. While Coase's theory is based on authority and control over the activities of employees, defining the stages of the production process, the new forms of organization are more adjustable to the mechanism.

Democracy provides appropriate ways of resolving conflicts, in which the possibility of participating in deliberations gives those involved a voice, putting them

on the same level, and stimulates high levels of internal coordination, which is a comparative advantage in economic competition. Group loyalty amplifies the collective voice and stems from common values and norms that are internalized. Involvement and interaction offer more power than the mere contractual exchange of service for remuneration and, in the Coasean conception, the agreement by employees to submit to the power and command of the employer. In this respect, democratic organization can be much more efficient than organizations based on market transactions or the hierarchy of the firm. In addition to the contribution of capital, business dynamics depend, especially nowadays, on a flow of information and knowledge that converge for the success of the business. Digital, outsourced and temporary platform workers are characterized by high segmentation, which does not allow for the formation of group bonds and relationships of solidarity and loyalty. Generally, these workers are part of an authority structure, but they simply submit to it, as they don't have access to it to raise questions and demands, in addition to its low degree of responsibility.

Ideally, we should look for a "coalition of cultures" that involves the interplay of various organizational principles, without the exclusivity of one of them to the detriment of others. Because they are incomplete principles, exclusivity would end up generating social instability. The prevalence of egalitarianism would eliminate diversity; individualism would lead to inequalities and a lack of solidarity; and finally, hierarchy would lead to arbitrariness and authoritarianism. Therefore, democracy presupposes the coexistence and combination of hierarchy, egalitarianism and individual autonomy, in a systematic vision that includes liberal, participatory and deliberative democracy. It is not a democracy that opposes the market or hierarchy but establishes the institutional environment that guides organizational restructuring. Democratic workplaces are associated with societies that have labor protection legislation, a balanced and distributive economy, with limits on financialization, and non-authoritarian governments. The opposite is the environment conducive

to the expansion of forms of work such as digital platforms.

Conclusion

The aim of this article was to show that the narratives of the Brazilian Supreme Court on the broad and unrestricted outsourcing of productive activities and the valorization of collective bargaining cannot be reconciled, as they violate the labour standards established in the Federal Constitution and the Consolidation of Labour Laws (CLT), representing legal and social setbacks. This is not about proposing limits to outsourcing or a model of collective bargaining and labor regulation. The idea is simply to highlight the inconsistencies of basing the analysis on labor regulation, which requires the effectiveness of constitutional, international and legal norms, which aim to protect human beings and their social inclusion from the employment relationship. Collective bargaining cannot be a normative instrument that legitimizes social regression and the removal of the effectiveness of labour rights, which are norms that must be obeyed by all, as well as a minimum standard of civilization.

This is also an example that the problem of the delaborization of trade unions and the decline in the protection of workers' rights is an international problem. In fact, collective bargaining must take as its starting point the labor standards established by international and national law, being an instrument that leads to the improvement and adjustment of workers' rights so that protective standards can be established. The standards established by law are minimum levels that cannot be abolished through collective bargaining. Effectively assign merit collective bargaining presupposes giving workers a voice and empowering them with forms of organization and representation, as well as ensuring the conditions for authentic, good-faith bargaining. The reality of subcontracted and platformed workers is a far cry from an environment in which working conditions are determined through the collective participation of workers.

Notes/Przypisy

¹ Recurso Extraordinário com Repercussão Geral (Extraordinary Appeal with General Repercussion) 958.252, DJE 13/09/2019, Tema 725, p. 31.

² Id., p. 34.

³ The so-called *Lochner* era corresponded to the period between 1905, when the *Lochner* case was decided by the Supreme Court, and 1937, when the Court adopted a different stance in the *Parrish* case. In the *Lochner* case, the Court ruled that a New York state law limiting the working hours of bakers was unconstitutional, on the basis of due process of law, which guarantees individual liberty and implies the right to contract. *Lochner v. New York*, 198 US 45 (1905). This tendency to strike down federal and state laws for violating freedom of contract and property rights lasted until the *Parrish* case, when the Supreme Court ruled that a state law guaranteeing a minimum wage for women workers was constitutional. *West Coast v. Parrish* (300 U.S. 379 (1937)).

⁴ Id., p. 41. The Brazilian Constitution of 1988 maintained the unity of trade unions by establishing in article 8 "Trade union or professional association is free, subject to the following:

II – it is forbidden to create more than one trade union organization, at any level, representing a professional or economic category, in the same territorial base, which will be defined by the workers or employers concerned, and cannot be less than the area of a Municipality."

⁵ Id., p. 47.

⁶ Rcl 59.795 MG, DJE 23.05.2023.

⁷ Rcl 56.285, DJE 30.03.2023.

⁸ <https://www.theguardian.com/technology/2017/jun/18/foxconn-life-death-forbidden-city-longhua-suicide-apple-iphone-brian-merchant-one-device-extract> Access: 07 listopada 2024 r.

⁹ <https://reporterbrasil.org.br/2023/04/vinicola-flagrada-com-trabalho-escravo-no-rs-ostentava-o-selo-great-place-to-work/> Access: 07 listopada 2024 r.

¹⁰ <https://racismoambiental.net.br/2023/05/12/basf-firma-acordo-de-r-9-milhoes-em-caso-de-resgatados-em-fazendas-de-arroz-no-rs/> Access: 07 listopada 2024 r.

¹¹ Supremo Tribunal Federal, ADI 5954, DJE 09.08.2023, p. 14.

¹² Id., p. 15.

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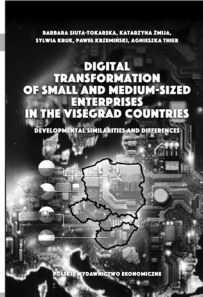
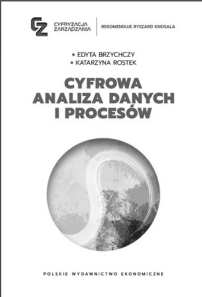
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