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A judicialização do conflito do trabalho na reforma trabalhista brasileira de 2017

The judicialization of labor conflict in the Brazilian law reform of 2017

La judicialización del conflicto laboral en la reforma laboral brasileña en 2017

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RESUMO

Este texto discute o papel da judicialização do conflito do trabalho mediado pela Justiça do Trabalho. A partir de perspectivas teóricas conceituais de resolução do conflito do trabalho e acesso ao direito, o artigo apresenta como questão central da análise as alterações no controle da interpretação judicial introduzidas pela Lei 13.467 de 2017 ("Reforma Trabalhista"). Em seguida, o texto analisa o conteúdo e alcance das alterações normativas do artigo 8º da CLT, com o objetivo de identificar a reconfiguração que produz no sistema de interpretação da norma trabalhista. O objetivo fundamental do texto é apresentar elementos argumentativos que respondam adequadamente a um modelo interpretativo do artigo 8º da CLT em conformidade com a Constituição.

PALAVRAS-CHAVE: Direito do Trabalho. Reforma Trabalhista. Judicialização. Justiça do Trabalho. Interpretação da norma trabalhista.

ABSTRACT

This article discusses the role of the judicialization of labor conflicts mediated by the Brazilian Labor Justice. It lays out the changes introduced by the Law 13.467 of 2017 ("Labor Reform") as its central question of analysis by assuming the conceptual-theoretical perspectives of labor conflict resolution and access to justice. It is then analyzed the content and the reach of the normative changes of the article 8 of the CLT, with the aim of identifying the reconfiguration made in the Brazilian Labor Law interpretation system. The fundamental aim is to present argumentative elements which respond adequately to an interpretative model of the article 8 of the CLT in conformity with the Constitution.

KEYWORDS: Labor Law. Labor Reform. Judicialization. Labor Justice. Interpretation of Labor Law.

RESUMEN

Este texto discute el papel de la judicialización de los conflictos laborales mediada por la Justicia Laboral. Desde perspectivas teóricas conceptuales sobre la resolución de conflictos laborales y el acceso a la ley, el artículo presenta como tema central de análisis los cambios en el control de la interpretación judicial introducidos por la Ley 13.467 de 2017 ("Reforma Laboral"). A continuación, el texto analiza el contenido y alcance de los cambios normativos del artículo 8 de la CLT, con el fin de identificar la reconfiguración que produce en el sistema de interpretación del derecho laboral. El objetivo fundamental del texto es presentar elementos argumentativos que respondan adecuadamente a un modelo interpretativo del artículo 8 de la CLT de conformidad con la Constitución.

PALABRAS CLAVE: Derecho del Trabajo. Reforma Laboral. Judicialización. Justicia laboral. Interpretación del derecho laboral.

INTRODUCTION

The idea of judicialization of labor conflict is a central theme of labor relations, intrinsic to the scope of Labor Law, because it defines the model of state intervention through the judiciary, through the design of a system of judicial protection of rights. The enforceability of labor rights has as its theoretical and political foundation the access to justice or the justiciability of these rights, which act as mechanisms to ensure their effectiveness.

In the context of transformations in labor relations and labor law, conflict resolution and access to labor justice systems are undergoing significant changes. Since the crisis of 2008, reforms have been induced in the labor jurisdiction, especially in those countries where a specialized labor court is organized. The meaning of these reforms in jurisdiction is twofold: creating obstacles to access to justice, and neutralizing judicial control by judges and labor courts. What is clear is that for the aspiration to deregulate labor law to be fully realized, in addition to the derogation and relaxation of rights, some obstacles to the mediation of labor conflict by the Labor Court are removed.

In the Brazilian case, the 2017 labor reform – Act 13,476 from July 13, 2017 – is located in this global trend of reforms of labor jurisdiction, as it adopts the two major key drivers of jurisdictional change: first, it modifies the conditions of access to justice, with the restriction of gratuity and the imposition of defeated party's fees, among other measures and; second, it seeks to neutralize the control of judicial interpretation by limiting the interpretative role of judges and labor courts in law. These two modifying aspects promote a profound inflection in the base model of broad access to labor jurisdiction in Brazil, with the

potential to reconfigure the labor courts' judicialization of the labor conflict and to distort the meaning of the Labor Court.

There are a number of problematic and critical issues surrounding jurisdictional provision for access to justice, but the text specifically analyzes the aspect of control of jurisprudential interpretation and the impacts on the judicialization of labor from the new wording given by Act 13,467 to article 8 of Consolidation of Labor Laws – CLT, a device that has been disciplining the contours for the interpretation and application of labor standards since 1943.

The main hypothesis of this article is that the so-called “labor modernization” weakens the jurisprudence of the Labor Justice. This, combined with the other norms that create other obstacles to access to justice, loosens the state's mediation of law in favor of the emergence of a growing recontractualization and individualization of the employment relationship. The most radical substantive issue is the claim to break with the labor dispute settlement system linked to the idea of social justice to dissolve labor law into common law.

1 JUDICIALIZATION AND JUSTICIABILITY

It is almost commonplace to state that in Brazil there is a high judicialization of social rights, including labor rights. The phenomenon of judicialization by expansionism and greater judicial protagonism produces a fruitful debate in Brazilian legal theory, especially when highlighting the dangers of the tendency towards appreciation of judicial activism and the need to set limits on the institutional role of the courts. It is in this context of public debate that the control of the Labor Justice jurisprudence emerges as a central legislative innovation in the 2017 reform.

Act 13,476/17 emphasized the control of interpretative activity by the Labor Court through strict mechanisms to contain its performance, especially the role played by the judge in the process of interpretation and application of the law. There are basically three points of interpretation introduced in Article 8 of the CLT in its three paragraphs. The first is the reinforcement of the indication of common law as a source of labor law (CLT, art. 8, § 1);

second, it is the control of the jurisprudential production consolidated in Precedents and jurisprudential guidelines of the Superior Labor Court, forbidding the creation and restriction of rights and obligations "not provided for by law" (CLT, art. 8, § 2) and, lastly, it is the introduction of a limit on the judicial review of the collective agreement or bargaining, which determines the compliance with the “principle of minimum intervention in the autonomy of the collective will” (CLT, art. 8, § 3).

The proposal, originated in the Substitute Amendment of the Special Committee of the Chamber of Deputies, reported by Deputy Rogério Marinho, was not accompanied by any explanation of the meaning and scope of this new rule. As one judges by the content of the report submitted to the bill that would be approved and the statements published in the media, the proposal had a definite objective of reducing the judge's power, thereby giving companies a greater legal certainty and valuing the contractual will of the parties to the collective bargaining agreement.

The report to the bill in the House of Representatives justifies the concern with judicial activism by stating that: “We have often seen labor courts extrapolate their role of interpreting the law by way of precedents, and to go further to rule against the law." And further on, the report continues as follows:

> Regarding the above-mentioned phenomenon, also named judicial activism, it is worth noting the warning by the President of the TST, Minister Ives Gandra Martins Filho, that it is urgent to adopt a control to avoid that, under the justification that it is being subjectively interpreted, the judge creates or repeals law with their decisions, adding that 'the judge is free within the law and not outside it' (Bill Report No. 6787).

In the press, important statements were made by reform advocates against over-judicializing the labor conflict in Brazil, describing instability and difficulties in a business environment as factors for insecurity. To Mailson da Nóbrega, “Brazil is the only country where labor justice can make laws. It generates conflict and reduces the productivity and competitiveness of the national economy instead of protecting workers” (ISTO É DINHEIRO, 2017). A similar assessment regarding the over-protection of the Labor Court was made by

José Márcio Camargo, "In Brazil, the employment contracts are all bogus," he said. “This is because the Labor Court renegotiates everything that is written in the contract” (O GLOBO, 2016). These were the reasons that determined the construction of the limits of interpretation by labor courts.

The other justification for legislative intervention is the excessive judicialization of labor conflict, understood as a high number of judicial demands, which has been having an exponential growth in the 1990s. The causes of this judicialization, for some, is the model of labor relations that offers no alternative solutions, which can also be explained by the de-legitimization of labor law:

> The increase in individual labor demands in Brazil stems from the increasing delegitimization of law among employers who, for different reasons and formats, are evading their obedience [...]. That is, the unprecedented increase in labor lawsuits expresses both the capitalists 'delegitimization of labor law and the workers' attempt to enforce the rules of order. It is the legal order as a whole that is in crisis, and, paradoxical as it may seem, its most conspicuous symptom is the growth of judicial demands. (CARDOSO, 2003, p. 157-158).

One ought to recognize that in Brazil there is a phenomenon of intense activity of jurisprudential construction of labor law from the 1990s that can be explained by a set of factors. This protagonism of the judiciary, according to its defenders, is linked to the enabling conditions of the 1988 Constitution itself, which instituted an extensive list of fundamental rights that began to receive legal protection. The performance of labor justice would not be a distortion, but an imposition to guarantee fundamental rights and the very meaning of the democratic order. The Constitution is rich in individual, social and collective rights in contrast to a social and political reality of ineffectiveness of such rights, which favored judicial activism. There is also a new context of labor relations, marked by changes in the production system, namely the need for responses to flexibility.

The judicialization of labor rights has historically been a policy practice and strategy for guaranteeing labor rights, at the same time, for the development of social justice. There

are basically two methodological approaches derived from this practice. On one hand, this judicialization can pose a risk to the effectiveness of social rights, because when labor rights penetrate the courts they may lose their specificity and become a common or ordinary right to change in their nature. The other aspect is the defense of judicialization as a strategy of social struggle for the conquest of rights, with the submission of demands of rights to the courts to be recognized and effective. These two apparently contradictory conceptions of the judicialization of rights are apt to show that the practice of judicialization can lead to the dilution of labor rights in common law. For this matter, justiciability is important when there is a value judgment, and not the mere logic of positivity of these rights.

In a context of erosion of labor guarantees, which has concrete and measurable effects of the gradual deterioration of rights, and at the same time as precarious work is increasing, the judicialization of the labor conflict is revalued as a defense mechanism of the Constitution. It is also a space for intervention and control of the new asymmetries of the labor relationship, so that there is no greater dissociation of the rights of working citizens from free enterprise.

2 APPLICATION LIMITS FOR COMMON LAW

The question of the application of common law rules in labor law to suppress normative gaps, as a supplementary and subsidiary law, integrates with a traditional theory of labor law. By this theory, the application has a mechanics of observing the absence of norms of labor law and the compatibility and adaptation with labor rules, including the general principles of labor law. In some cases, the labor standard itself makes direct reference to the rules of civil law.

The application of common law, however, is a renewed theme in light of the 2017 labor reform (Act 13,467/17). By the new wording given to the sole paragraph of article 8 of the CLT, transformed into paragraph 1 of art. 8, merely states that "Common law shall be a subsidiary source of labor law", suppressing the final part of the original wording that conditioned "to the extent that it is not incompatible with its fundamental principles."

The initial question is whether, according to the current rule, if the omission in the labor order is verified, it will be possible to use the precepts of civil law in a subsidiary way, without first using the compatibility test with the fundamental principles of labor law, notably with the protective principle. Despite the manifest intention of the labor reform to broaden the possibilities of recourse to common law, it continues to be by supplementary and subsidiary criteria. Labor law still has the characteristic of a special rule and the hypothesis of a "common labor law" cannot yet be considered. Thus, from the point of view of legal dogmatics, it is possible to apply common law to supplement labor law. The judge's role is to reconstruct the meaning of the norm from systematic, axiological, theoretical, ideological and historical elements. In this respect, the mere deletion of the final part of the device does not authorize the conclusion, for example, that common law is a source of labor law, even if it is incompatible with it.

Common law is applied supplementarily to fill in the gaps in labor standards and in cases where there is no incompatibility with the rule or principle of labor law. Strictly speaking, the supplementary application of civil law rules is important to improve labor law, such as the principle of objective good faith and the employer's liability rules (MANGARELLI, 2008).

The deletion of the reference to "fundamental principles" of labor law reveals an aspiration and ambition to increase the impact of common law on labor law, so that it is invoked without going through the compatibility filter. In this respect, there is a new rationality in reform, which can also be seen by several other changes in the same direction of valuing the autonomy of the will.

The rationality that explains this aspiration to apply common law, although incompatible with labor law, stems from the ambition of the law of exception work, to use the expression of Antonio Casimiro Ferreira, who intends to naturalize the idea of a right between equals, with a "power-weighting consensus" that does not recognize the vulnerability of workers in the sphere of justice (FERREIRA, 2012, p. 135).

The positive regulation of the scope of the remission of Brazilian labor law to the common law remains linked to the rule of autonomy to justify its real need. This does not

prevent the application of civil contractual rules that may contain an important contribution of worker protection. This reading comprises the traditional conviction born in the late nineteenth century that civil codes do not contain an answer to the questions of human labor and the relations it generates, which justified the construction of labor doctrine (BARBAGELATA, 2009).

In this sense, the common law as a source of Brazilian labor law remains a valid resource for the specific hypotheses of normative void, hypothesis that allows the subsidiary application, and the compatibility of institutes with the particularisms of labor law. Even so, this supplementary application must be adapted to be compatible with labor law by a logical imperative of labor law particularism in several respects, especially as it relates to principles aimed at disciplining a social reality different from that of ordinary law.

3 THE JUDGE, THE AGREEMENT AND THE COLLECTIVE CONVENTION

The interpretation of the agreement and the collective agreement is substantially modified by Article 8, § 3 of Act 13,467/17, by advocating the principle of minimum intervention by the judge in the analysis of the agreement or collective agreement. Decomposing the text, we observe two guidelines. The first, the idea of restricting the analysis “exclusively to the conformity of the essential elements of the legal business” and, secondly, that “will guide its action by the principle of minimal intervention in the autonomy of the collective will".[1]

A first grammatical reading, from a dogmatic perspective, could suggest that the Labor Court would henceforth be prevented from judicially reviewing the contents of collective agreements and conventions, that is, it could not exercise control over the legality and constitutionality of collective norms. But this is an insufficient and incomplete reading from the dogmatic point of view. The intention is to discipline the interpretative activity on

[1] Texto do art. 8º, § 3º na íntegra: “No exame de convenção coletiva ou acordo coletivo de trabalho, a Justiça do Trabalho analisará exclusivamente a conformidade dos elementos essenciais do negócio jurídico, respeitado o disposto no art. 104 da Lei nº 10.406, de 10 de janeiro de 2002 (Código Civil), e balizará sua atuação pelo princípio da intervenção mínima na autonomia da vontade coletiva".

the collective labor agreement or agreement and it is not considered the possibility of prohibition of judicial action.

This provision should be read in conjunction with and substantively altered in the system of collective bargaining, with the prevalence of the collective agreement or agreement on the law (CLT, art. 611-A, § 1), which expressly refers to article 8, § 3 of the CLT.[2] This new rule gains meaning when the legal reconfiguration in collective bargaining is understood, with the new architecture of articulation between the law and collective agreements and conventions, which aims to neutralize the application of the most favorable standard and, consequently, eliminates the hierarchy rule of labor standards (CLT Articles 611-A, 620). The most favorable standard (*favor laboratoris*) is one of the main mechanisms of state intervention to rebalance collective bargaining. One of the dimensions of using the principle of the most favorable norm in the Brazilian collective bargaining system, for example, is to prevent the collective agreement from creating less beneficial norms than the collective agreement.

There is also a second level of systematic reading of the interpretative rule, which is the setting of the limits of collective bargaining, indicating that the absence of counterparties in collective bargaining does not lead to its nullity by vice (§ 2 of article 611). Within the same theme, the suppression and reduction of some rights is defined as illicit, making reference basically to provisions of art. 7 of the constitutional text (Art. 611-B).

Traditionally, the Brazilian model is that of the judicial solution through the system of interpretation of the legal standards, observing the particularism of the interpretation of the labor standards by the own rules of the contracts. The conflict of interpretation may also be general by the special procedure of collective bargaining, which serves precisely to resolve the disputed interpretation of the collective rule or, in the present case, by individual action. These two mechanisms remain untouched by the 2017 labor reform.

The sensitive issue of the reform is that it intends to shape the labor court's interpretation to weaken and immunize the broad interpretative system that the labor judge

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[2] Texto do art. 611-A: "A convenção coletiva e o acordo coletivo de trabalho têm prevalência sobre a lei quando, entre outros, dispuserem sobre: § 1º. No exame da convenção coletiva ou do acordo coletivo de trabalho, a Justiça do Trabalho observará o disposto no § 3º do art. 8º desta Consolidação".

has to use their own normative system to apply and resort to figures such as the in *dubio pro operario* and more favorable norms.

The major problem is that for this the new rule defines that the interpretation of the agreement and the convention is given by its contractual character. Although collective norms are dual in nature, as they are contractual and normative, a contractual interpretation is proposed.

What is inferred from the norm analyzed is the claim to confer a contractual notion of interpretation, restricting judicial review. Nevertheless, the standard tends not to have the intended effectiveness, as it starts from the lack of opposition between the law and the contract and transports this problem into the rule of interpretation. A coherent interpretation of contractual matrix would have to analyze the documentation of all processes prior to collective bargaining to enforce the will of the parties in collective bargaining. As the wording of the law puts it, there is no way to contain a normative interpretation by the rules of interpretation of law. Further, in the case of general conflicts of interpretation, it may occur through the judicialization of collective conflicts, through collective bargaining of a legal nature.

The jurisdiction of labor exercised in Brazil is no longer defined by the classical positivist conceptions, which explained the judge's activity as the factual analysis of cases and the determination of a previously defined legal rule applicable to that particular case. Application of the law is marked by problems of interpretation, relevance, proof and qualification. The interpretative dimension is an essential element of law and of judicial activity, which is not to be confused with the risks of excessive discretion.

From this perspective, the relationship between the judge and the collective bargaining agreement depends on the nature of the contract and the rule. Doctrine and jurisprudence give the collective agreement a normative nature. Decree-Law 229 from February 28, 1967, which creates the collective agreement and agreement, provides for the superior hierarchy of the normative instrument to the individual labor contract and the *erga omnes* effect. Thus, from the standpoint of the hierarchy of standards, the individual labor contract is distinct from the collective agreement and convention, because it is assumed that

the valuation of collective autonomy to emphasize the right to participate. In this base model, the purpose of judicial control is the objectivity and collective interest of the act, not the individual interest.

An alternative model, with the restriction on judicial control of collective standards, would be possible through the adoption of a system of conflict management by the parties, the product of collective autonomy, as adopted in some countries. It could be agreed that the first control of interpretation in the event of conflict should be carried out by the parties themselves by means of a joint committee, which would have the advantage of producing an authentic and appropriate interpretation for the settlement of the conflict. In this case, only when there was a conflict over the scope of the collective standard could the judicial body be invoked to produce an interpretation. In this alternative, the collective standard would have to foresee proper mechanisms of administration of the interpretation and application of the agreement and the collective bargaining. This self-regulating model with collective conflict resolution rules could be developed in collective bargaining.

Yet, under the system in force, even with the minimum intervention rule, the judge cannot abandon control of the legality and constitutionality of the collective bargaining agreement. The open question is whether the practice of Brazilian jurisprudence, given the new text of art. 8, §3 of the CLT, will adopt the control as a strong, moderate or light control of the contents of the normative instruments that will be submitted to judicial review.

4 INTERPRETING AS A TRAIT OF LABOR JUSTICE

The third major innovation in the interpretative model of labor law is the restriction of the production of Jurisprudential Precedents and Guidelines of the Superior Labor Court and the Regional Labor Courts, whose text indicates that these courts “cannot legally restrict foreseen rights or create obligations not provided for by law ”(CLT, art. 8, § 2). This provision must still be read in conjunction with other requirements of the law that impose a two-thirds vote quorum on court members to amend Summary or Statements (CLT art. 702, item I, “f”). This rule creates strict limits on the prerogative of the Superior Labor Court to

establish autonomously procedures to standardize its jurisprudence, alteration of disputable constitutionality in view of the constitutional principle of court autonomy.[3]

This harsh restriction on the editing of Summaries and Statements, which in principle intends to control the outcome of interpretation, has a more sensitive effect on the model of protection of rights by justice, which has been historically constructed around its particularism.

The Brazilian system of protection of labor rights has been built since the 1930s, after a deep theoretical debate, by the choice of a Specialized Justice and a special process, different from the more abbreviated, faster civil common process. A specialized process to ensure and facilitate the application of labor law, conducted by specialized judges, with a view to broadening the protective principle and enabling the development of a specialized doctrine. Lastly, absolute gratuity was elected. This Brazilian model is formed, therefore, within three principles: specialized justice, special process and the principle of gratuity. Moreover, as a major particularism in the Brazilian Labor Court, the adoption of the normative power of the Labor Court.

The idea of Labor Justice was structured to resolve conflicts between employers and employees, but as a value of access to justice, administration of justice and distribution of justice. This model was not immune to criticism for a lack of effectiveness, basically for its slowness and for becoming cheap justice or, as it says *John French,* in "a discounted justice" (FRENCH, 2001, p. 19). The system of Normative Power also remained controversial.

This system of the 1930s and 1940s, with the creation of Labor Justice and later in 1946 with its incorporation into the judiciary, survived the periods of authoritarianism and was maintained in the 1988 Constitution. It is in the 1990s that criticism of the slowness and the high cost of labor justice and also proposals for its extinction. For Almir Pazzianotto, "Labor Justice is slow, conservative, has a great deal of vanity and needs to understand that it will not solve the country's problems" (O ESTADO DE S. PAULO, 1992).

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[3] The matter of the constitutionality of art. 702, item I, f of the Labor Code is the subject of discussion in the Federal Supreme Court (ADC 62) and in the Superior Labor Court itself (ArgInc-696-25.2012.5.05.0463), which intends to carry out the diffuse control of constitutionality.

In 1999, the Judiciary Reform Project proposed its extinction, transferring its structure, members and powers to the Common Federal Justice. The report by Deputy Aloysio Nunes Ferreira proposes changes in specialized justice, including the extinction of Labor Justice. The bill is rejected by the Brazilian Bar Association, opposition parties to the government and the judiciary of lower courts, which have been threatened by centralizing proposals. With the departure of Aloysio Nunes to assume the General Department of the Presidency of the Republic, the committee appoints Zulaiê Cobra Ribeiro (PSDB-SP) as rapporteur. In September 1999, Mrs. Zulaiê Cobra presented a different report from Aloysio Nunes, with tougher mechanisms for controlling the judiciary. The report, however, was also rejected.

There was a new initiative during the Judiciary Reform to extinguish Labor Justice, but it not only resisted but succeeded, by a Constitutional Amendment (EC 45/2004), to strengthen its role by redefining the jurisdiction of labor justice, and to renew its purpose. Experiences of labor flexibilization and deregulation over the 1990s threatened this model of labor justice, but it has continued and strengthened.

The classical doctrine of labor law in time emphasized the particularism of the interpretation of labor standards. Bargagelata stated that: “It is obvious that the characteristics of labor relations exclude all possibility that the judge merely becomes in the mouth of the lion, but they do not seem sufficient to define the situation of the labor judge, as long as it is not exclusive.” (BARBAGELATA, 2009, p. 27). What this doctrine of particularism emphasized was in harmony with a labor process aimed at performing labor law.

Moreover, in a democratic society, giving meaning to standards is no longer a monopoly of judges, but of every society, from the perspective of an open society of interpreters of the Constitution (HÄBERLE, 2002). Judges are therefore bound by the Constitution and fundamental rights. Aside from this, the integration of labor law in the human rights system, exercised also through control of the conventionality of laws (Constitution art. 5, §§ 2 and 3), increased the powers and responsibilities of labor judges.

The fact is that the foundations of the Democratic Rule of Law represented a paradigmatic framework that forced the protagonism of labor justice to respond to the demands of the effectiveness of various rights and legal protection linked to the attainment of citizenship, the dignity of the human person, the reduction of social and regional inequalities.

The fundamental issue contained in the 2017 labor reform is the claim to adjust labor justice to the spirit of labor re-contractualization and individualization, so that there is a minimal intervention of the guarantee law. The problem is that, in this logic, there is a risk of the dismantling of protective protections by the autonomy of contractual will. From this perspective, the labor reform of 2017, by seeking to restrict the labor courts' performance in the production of summaries and statements, produces a tension with the labor law model and the meaning of the 1988 Constitution.

The Summaries and Statements aim at stability and legal certainty through uniformity. Without them, legal instability is greater. The restriction on the edition of Summaries and Statements will cause a tension with the labor law model, which will be atomized in the face of an increasing re-contractualization of work, without a jurisprudential construction of a guaranteeing bias. This poses a choking hazard for a democratic aspiring labor law.

5 THE DESCONSTITUTION OF LABOR JUSTICE

The debate about the role of labor jurisdiction in Brazil has a new context from 2019, with the rise of the government of the president of the republic, Jair Bolsonaro. In an interview on the SBT television channel, on January 3, 2019, the president said that he intends to discuss with the National Congress the possibility of extinction of the Labor Court. The deconstruction of Labor Justice – which emerged in the 1990s and is not an original agenda of the Bolsonaro government – has a new meaning, along with an actual threat to the establishment of Labor Justice, with the potential to increase the erosion of workers' rights.

Specifically, the proposal was not presented to the National Congress, but this political act reveals a new tension with the public institution of labor. While the 2017 Labor Reform aims to create an obstacle to access to labor justice and to reduce the role of intervention in the labor conflict, the new political environment seeks to go further to eliminate the public Labor Justice institution, thereby completely delegating the solution of labor law conflict to common or federal courts.

The deconstruction of an institutional design built in the 1930s, when the Conciliation and Judgment Boards, in 1932, established in the 1934 Constitution, and finally installed in 1941, which survived authoritarian periods and remained in the text of the Constitution of 1988, would imply the suppression of the characteristic of our model of judicialization of labor conflicts, built around a specialized justice to reconcile and judge the capital and labor conflict.

In many ways, the arguments for the extinction of the Labor Court – on the accusation that it is an overprotective, face-to-face justice, that creates obstacles to investment and business – have a sense of reducing and defrauding the idea of defending labor law equality regarding social justice and the exercise of citizenship rights in favor of the free market.

The first key to understanding this Brazilian public debate on the institutional role of Labor Justice, which contributes to justifying the conditions for weakening its institutional function, was the 2017 labor reform, which represented the significant victory of political forces against the public institution of Labor Justice.

From the point of view of the judicialization of the labor conflict, the proposal to terminate the Labor Court stems from the understanding of some sectors of society that their jurisprudence still resists the intended changes under the 2017 labor reform law, for example, that the High Labor Court quickly revised its Precedents to bring them into line with Act 13,467/17, which did not occur. TST Minister Ives Gandra Martins Filho said that those who have contributed most to bringing the idea of extinction back to the fore "are those magistrates and prosecutors who ostensibly resist reform and continue their

superlatively protectionist judicial activism, unbalancing labor relations" (JORNAL VALOR, 2019).

Embedded in the proposal aimed at the extinction of the Labor Justice, although unfeasible, there is a reaction to the labor jurisprudence that, on one hand, presents resistance to the incorporation of the reform law, on the other hand, shows signs of resistance to promote changes in the law particularism, concerning its model of jurisprudence construction.

FINAL CONSIDERATIONS

A new rationality on the judicialization of the labor conflict is underway, promoted by the 2017 reform, guided by interests in reorienting the mission of the State and the institution of Labor Justice to execute freely signed contracts. It is an evaluative model that threatens the right to work, as it intends to restrict the judicialization of the labor conflict as a barrier to access to rights and, thus, to empty the sense of social democracy of the 1988 Constitution, with certain signs of exception. In any case, the interpretation that should be drawn from the wording of article 8 of the CLT, taking into account the substantial values of the Democratic Rule of Law, is that: (i) common law remains a supplementary source of labor law, even though as a rule not expressed; (ii) the agreement and collective bargaining agreement are contractual and normative in nature. The change promoted by the 2018 reform defines contractual control, but does not eliminate normative control by controlling legality and constitutionality; (iii) the Summaries and the Statements cannot create rights, but the decision-making activity of the courts in the standardization of their jurisprudence is authorized to extract the meaning of the text, whose own legal interpretation becomes the norm itself.

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