-REVISTA DA FACULDADE DE DIREITO DA UERJ- RFD- v.1, n.25, 2014

LABOR FLEXIBILIZATION AND THE RECENT CHANGES IN THE JURISPRUDENCE AND TST STF: theoretical and practical aspects

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ABSTRACT

The acknowledge of fundamental labor rights and its normative force represents an achievement obtained through intense struggles and various social movements. Nevertheless, *labor flexibilization* is an increasingly recurrent theme, as a relevant social and legal phenomenon that deserves a satisfactory solution by Law. The Brazilian Federal Constitution of 1988 in its first article, consecrates labor's social values and free initiative as the foundations of the Federative Republic of Brazil. Therefore, the adoption of a theory that coordinates those two principles, so that the core labor rights remains intangible non denatured behold, composes what is called the minimum level of civilization. According to the view adopted the thesis that should be taken and which better suits and ensures the concomitant effectiveness between social rights of workers and free initiative is the moderate current.

Keywords: Labor flexibilization. Labor's social values and free initiative. Moderate current.

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FLEXIBILIZAÇÃO TRABALHISTA E AS RECENTES ALTERAÇÕES NA JURISPRUDÊNCIA DO TST E DO STF: aspectos teóricos e práticos

RESUMO

O reconhecimento dos direitos fundamentais dos trabalhadores, bem como de sua força normativa representam uma conquista que foi obtida por meio de lutas intensas e diversos movimentos sociais. A despeito disso, a cada dia é mais recorrente o tema *flexibilização trabalhista*, sendo um relevante fenômeno social e jurídico que merece uma solução satisfatória por parte do Direito. A Constituição Federal de 1988, logo em seu primeiro artigo, consagra como fundamentos da República Federativa do Brasil os valores sociais do trabalho e da livre iniciativa. Portanto, faz-se necessária a adoção de uma teoria que coadune esses dois princípios, de maneira que o núcleo intangível dos direitos trabalhistas não reste desnaturado, já que compõe aquilo que se denomina patamar civilizatório mínimo. Conforme o entendimento aqui adotado, a tese que deve ser tomada e a que melhor se adéqua e garante a efetivação concomitante entre os direitos sociais dos trabalhadores e da livre iniciativa é a corrente moderada.

Palavras-chave: Flexibilização trabalhista. Valores sociais do trabalho e da livre iniciativa. Corrente moderada.

1 INTRODUCTION

This article has as goal approach the subject of labourist flexibilization proceeding to a theoretical and practical analysis, the last one based in recent modifications in the TST and Supreme Court understandings. Our focus is making compatible the foundations of Republic with the foundations of economic order, in the viewpoint of flexibilization, without disrespecting the central core of social labor rights.

The flexibilization happens in consequence of globalization and, recently, in consequence of a deeply crisis that was born in euro zone and United States, besides internal factors that contributed too. Brazil wasn't feeling the direct effects of this crisis, but our country doesn't live in a Welfare State because the social inequality is very strong and the country has a history of disrespect of social rights as whole.

The Republic foundations that will be studied are recognized in first article of Brazilian constitution. Also the Article 170 states as a foundation of economic order the values of human labor and free enterprise. Because that, it's important adopt a theory able to harmonize this two aspects in the way to avoid that the central core of social human rights of the workers been threatened in consequence of practices disrespectful to them.

The Constitution states the foundations of Federative Republic of Brazil, at the same states that free enterprise and work value are the foundations to implement the economic order. The target was harmonizing these two values in the way that the application of one doesn't exclude the other one. It's a hard task to legal hermeneutics in face of the values in conflict.

In this context, the TST and the Supreme Court changed their understandings about labor flexibilization, which will be analyzed in the following topics.

2 FLEXIBILIZATION OF LABOUR CONTRACT

Before proceed to approach the many ways of flexiblization of labor contract, we should make an important reflection. Is it correct say, as the neoliberal ideology, that work contracts in Brazil are too hard and protect so much the workers, avoiding, in this way, the economic growth of the country? Or, in fact, this argument is a fallacy to increase the exploration of workers to persecute the illegitimate goal to increase the gains of capital owners?

We choose the second option. The current Brazilian legal order state many ways of flexibilization like the outsourcing and its variations as the temporary work contract and the lowering wages by collective negotiations legally permitted although the limitation of the minimum wage. So, we believe that exist a lot of flexibilization in brazilian legal system. Ask for more flexibilization its disrespect the idea of a minimum standard of civilization. This minimum is when the State assure minimum right able to not deny the dignity of workers.

In fact, sometimes the Labor Law contains contradictions. One example is in case of arbitrary dismissal the employer has the faculty to do it, without any reason, been enough the payment of rescission dues. The worker becomes unprotected, regardless of the unemployment security.

There we are not reproving the fact of the Labor Work assure the contract of anyone who is choose. The own Constitution assure the autonomy of each person will. The point here developed is the contradiction of labor legal system result of such a power to dismisses that are conceded to the employer as a result of FGTS system who that confer just monetary compensation although this funds are being used to finance the homeowners, in this way contributing to the housing rights.

This affirmation express the idea that law is, at the same time, one instrument of domination of the powerful and, in the other hand, one important way to establish limitations to those power owners. The Labor Law it's not different.

It's important clarify that we not defend the thesis that flexibilization is ever something hateful, repugnant, and it need be combated with any costs. But our intention is analyze if the argument of those who say that flebilization of labor contracts is necessary and the State should not interfere so much in this field is correct.

The growth of labor flexibilization is a result of deeply modifications derived of neoliberalism exacerbation, especially in the 90s. This results in a big growth of the unemployment, labor in dangerous conditions and in sub-human conditions, very low wages, and other effects. (ANTUNES, 2002)

This understanding it's stated by professor Ricardo Antunes. They show the crisis of work in a social perspective. This not necessary means that flexibilization it's a phenomenon that must be combated, just show the social context when this process emerges in the perspective of neoliberalism and capitalism.

It's not possible does a distinction between the norms of protection of workers and the norms of economic order stated in the Constitution. When the constitutional legislator stated this two values in the Magna Charta, it means that the variety of social rights have complementary principles and their goal it's the economic and social progress. In this perspective shimmer the relation between the Private Law, the Labor Law, and the Constitutional Law, that search one social order based in justice. (HESSE, 2001)

So, we shouldn't confuse progress and arbitrary growth in the earnings. It's not coherent, in the claim to achieve the progress, getting the contract flexible until the point of it's not assured a minimum social dignity of the worker, that constitute the projection of their personality in social way.

Other introductory topic that need be mentioned is the impossibility to flexibilize the rules of public policy. And what is this kind of norms? It's norms that go beyond the limits of the labor relation because these norms are interesting for all the society. Norms on subjects as the remunerated weekly rest and those about the correct use of personal protective equipments (PPE). These norms can't be abolished.

2.1 Briefs about labor contracts

Our main objective is labor contract, so it's pertinent make some appointments about this express or tacit consent when one person who take the manpower, in other words, the employer, contract the services of one person who offer their labor, that is to say, one worker. This contract contains the requirements of labor relation. These requirements are: work done by private individual – can't be done by legal person -, rewarding, subordination and non-eventuality.

It's a reciprocal contract. This means that has mutual duties and obligations. To the employer is required the respect to legal determinations resultant of this contract as: the obligation to pay the wages and other allocations, signature of Labour's Card and Social welfare, give the Personal Protective Equipment (PPE), award vacations in the correct moment, etc. To the employee is required: work with zeal, obey the orders of employer (if thar order are legal and correspondent to the nature of the contract).

Other subject that we can't forgot to mention is the differences between labor contract and the memorandum and the articles of association. In the articles of association it's necessary common interests, called *affectio societatis*, in other words, affection between the partners. The labor contract it's formed by different interests. What interests are these? The employer's interest is obtaining the profit. The employee's interests are receiving some remuneration, not always fair. (MARTINS, 2005, p. 117).

Other distinction that worth been mentioned is the responsibility in the labor contract, in consequence of the principle of protection. Just the employer takes the risks of the enterprise. This onus can't be extended to the employee. So, the employee has the right to receive his remuneration independently of the results of the company. In the memorandum of association the objective is the profit but all the partners share the losses if they came.

There are a lot of theories about labor agreement. The anti-contractualist theory says that the relation between employer and employee don't have legal nature of contract. The institutionalists consider the employer as one institution. This concept is present in articles 2, 10 and 448 of CLT. The theory of work relation denies the consent of the parts to develop the work relationship. The contractualists see the work relation as one contract. The mixed theories have divisions as the tripartite theory or the theory of work as a fact. (MARTINS, 2005, p 117)

The Brazilian researchers don't reached a majority agreement about what theory adopt but we think that constractualist is most suitable. To support our understanding we argue that happen one consent between the employer and the employee, in other words, don't exist one obligation to do the service because this relation has a negocial nature. (NASCIMENTO, 2009, p. 578).

Having said this, we going to analyze the aspects of International Law about laborist flexibilization, focused in the limits stated by ILO, the Declaration on Fundamental Principles and Rights at Work adopted in 1998, and other conventions ratified by Brazil.

2.2 Subjects of ILO about flexibilization

If we focus our analysis in Brazilian legal system, we can to run the risk of our study be poor in dynamic. Because of that our analysis about labor flexibilization can't be restricted to internal law. Furthermore, the ILO Conventions are very important to this study and Brazil is signatory of them.

The ILO was born in the Paris Peace Conference, 1919. It's based on Geneva. (DORNELES, 2004, p. 221). The legal nature of the institution is Public because is composed by independent States that agree to respect the Conventions (SUSSEKIND, 2002). We intend to approach only the major subjects.

Every year the ILO promotes an International Forum to discuss subjects related with labor, to review international norms about labor and to affirm general policies. The Associated States finance the work and the budget done by Board of Directors. (SUSSEKIND, 2002, p. 66-67)

Initially the ILO Convention mentions, in many moments, the expression descent work. What importance does this information? It's the fact that to ensure a sustainable development and a democratic system it's a *conditio sine qua non* that the work be descent. Just in this case the social justice will be promoted. (ROMITA, 2008, p.83)

This statement reinforce the thesis that the foundations of economic order and the social rights of workers are indivisible. The both have common principles that converge to the progress of society. Because that we will comment this common points between them.

The Constitution establish the reduce of social and regional inequality. This prevision was expressed in constitution text and in subsection 10 of Article 34 of Transitory Acts. (ARAÚJO, 2005, p.47). Either this principle or the both mentioned previously want to reduce inequality. One by public policies to reduce the inequality between regions, specially between northeast and south or southeast. The other by the conjugation of social rights and free entrepreneur.

Based on above considerations, it's necessary check how ILO proceed to regulate labor flexibilization, in face of the main objective of the entity.

According to the report by ILO about descent work, the employer, when increase the flexibilization of work conditions, do it to attend market competitions. However, the ILO defends that the regulation of labor relations must be respect to avoid that employers with the only intention to increase their profit, exploit the workers. The more effectiveness was the respect to social rights, the better productivity will emerge by workers. (OIT, 2012)

The understanding of ILO has a fundamental importance because reinforce the value of regulation, by the State, to verify if the companies are respecting one minimum of social rights to ensure a minimum citizenship standard.

2.3 The diferents currents about labourist flexibilization: flexible, antiflexible and semiflexible or moderate.

The flexible current is supported by defenders of neoliberalism. To those, the markets should regulate working relations in accordance with the economic scenario. In a good scenario, with a good prospective of economic growth, the protective law can be normally applied. In other way, in moments of economic crisis, like Brazilian crisis in 2008, the labor contracts should to adequate to new context. (ROMITA, 2008, p.30)

In this moment, it's relevant make some appointments in social aspects about this theory. We can't criticise one theory without an empirical basis at the risk of our critique be without any fundament.

In advanced capitalist economy countries, the major of them, some many things happened in a conexion with the decrease of demand for manual and industrial workers. The technology advances in electronic, robotic, informatics create the phenomenon of structural unemployment. We can't deny that those facts generate an important develop in research area and digital inclusion. (ANTUNES, 2002, p. 52)

Another effect of this technological progress consists in a more rigorous process of qualification. Languages knowledge, informatics knowledge and previously experiences in the area are the requirements commonly requested. This effect affects other fundamental right: the right to education. The State should to invest more to provide a qualification to workers able to include them in the market. Unfortunately, in Brazil, this not happens.

Besides of this progress, many negative effects were generated. The low of wages, the precarious work conditions, subcontracted work, crisis of syndicates and extinction of these entities, exploration of female work receiving less than men and the unemployment of young people and old people. (ANTUNES, 2002, p. 53)

Back to flexible thinking, they don't consider welfare of workers. According to him the worker should to adapt to the requirements derived of economic scenario. The state shouldn't protect social rights of workers because doing this, the companies can't grow and create new jobs.

We concluded that this thesis is a fallacy going against social rights of the workers. They just consider the economic interests of big investors who want increase their profits without any concern about a minimum standard of dignity for the worker. Because that, this theory can't be adopted.

In the other side we have the anti-flexible thinking. They reject any way of flexibilization in work contracts. They said that the defense of flexibilization has interests opposed to the social rights of workers. Furthermore, the economic lack of sufficiency of the employee imposes one permanent action by legislator. To this current any idea to defend suppression of labor rights must be rejected under risk of a social regression. (ANTUNES, 2002, p. 32-33)

The bad point of this theory is the extremism. The legislator is responsible to regulate the flexibilization but the syndicates and workers don't take part in it. In consequence, happens one big dependence on the State. This can be dangerous because either a strong State or a silent one can conflict with a society that want democracy. The middle point is something more desirable.

Is it flexibilization something always bad? The answer is no. The labor flexibilization is a way to persecute the full employment however this should be looked as an exception and never a rule. Exist many ways of flexibilization. The flexibilization that must be fought is the one who disrespect a minimum standard of civilization and don' care about social rights. This flexibilization persecute just the growth of profits of big investors and must be fought all the way.

Finally, we have the current semi-flexible or moderate. In their thinking, we should try equilibrium between social rights of workers and private autonomy, according with the values of work and free entrepreneur. They propose a legal system that establishes norms about one minimum standard of civilization of rights. The other parts will be done through collective agreements. (CREPALDI, 2003, p. 69-70)

This current consist in a deregulation because the collective agreements and the syndicate actuation have more emphasis. At the same time this theory is coherent because ensure the respect to one minimum dignity to the workers by means of legislation, trying harmonize two constitutional values.

About this statement we shall do a balancing. Some people think that the constitutional legislator was contradictory when ensure the protection of social right of workers at the same time ensuring the individual autonomy. This would mean breaking the protective system of Brazilian Labor Law. For those people the landmark of this process was the express exclusion

of ten-years-stability in the own constitution text just as well the fact of expanding the capitalist way of production. (XAVIER, 2012, p. 29)

The Supreme Court is discussing about the possibility of return to stability in the work relation, based on Convention no. 158 of ILO, not in the traditional ways but in a way able to reduce the arbitrary dismissal and the employer's power to do it. In the same way we should to analyze about the individual autonomy by the fact of this constitutional principle is the corollary of politic pluralism established on incise I of article 1 of Constitution.

The fact of Constitution states the individual autonomy as expression of political pluralism doesn't means that this guarantee is an expression of freedom rights and one first generation right. This only represent the possibility to the individuals do legal transactions. (PRATA, s.d). As explained below, the social function of the labor contracts represents a limitation to individual will. The best interpretation to social function on the contracts is that who affirms this function as integrant of the concept of contract and not as a limit, like the social function of propriety.

It's important say that this autonomy has limits that cannot be disrespected. These limits are linked with the horizontal application of fundamental rights. This application means that fundamental rights produce effects in private relations. It's horizontal because are applied to particular relations without hierarchy.

We disagree with those who think that Constitution is contradictory. Fundamental rights aren't absolute. All of them have limitations stated by the other fundamental rights. Even up the right to live is soften in declared war. What happens is a wrong lecture of constitutional text performed by neoliberals. In a correct view, in cases of conflict between two constitutional values, the interpreter of constitution should try apply the both, balancing its effects. This reinforces the affirmation that the interpreter create the norm in specific cases.

We have said in this study that it's not possible distinguishing between the social values of work and of economic order because the economic progress is good to all society. But we found so many distortions on this foundation because the big investors don't want the State regulation in work relation, but the State must ensure the social rights of workers. So, should be harmonized this two values by means of one principle called Practical Concordance.

Therefore, the view more suitable with the constitutional system it's the moderate. At the same time, this view tries to harmonize values of free entrepreneur and social rights

guaranteeing the direct participation of works by mean of syndicates. But we should reformulate the syndicates because they are weakened in 1990s and 2000s with neoliberal politics.

3 THE OUTSOURCING AND OTHER WAYS OF FLEXIBILIZATION IN THE JURISPRUDENCE OF BRAZILIAN SUPREME COURT AND BRAZILIAN MAJOR COURT OF LABOUR

In the most ways of flexibilization the most discussed by researchers and courts is outsourcing. For this reason it's necessary approach the positive and negative points of this institute used in 1990s beyond the necessary.

Before the practical aspects we should explain some things. The term "outsourcing" is not a consensus. This term was born in theories of management to maximize production and reduce costs to companies. The outsourcing was a try to compete in global scenario.

In other view, some people say "outsourcing" was created in business administration to decentralize to thirds persons. (FERRAZ, 2006)

Secondly, outsourcing isn't exclusivity of Labor Law. Administrative Law uses this term commonly. The law 8.987/1995 about public concessions says in the second paragraph of article 25 that the contract established between the concessionaire and third person is regulated by private law. This reveal the importance of study outsourcing in Administrative Law. The TST have understandings in this area just as well the law 8.666/1993. Because of that we will approach the outsourcing in Administrative Law in that contracts based on CLT.

Part of researchers says that outsourcing establishes one relation with one second person and not a third. This happens because the company who take the service and the company who does the service have autonomy. Because that the concept should be in tertiary sector of economy. (ROMITA, 1992)

Said this we should look to where was born this institute. In Brazilian scenario of 1990s, the courts changed their understanding about outsourcing. They just accepted outsourcing in the terms of law 6.019/1974 and law 7.102/1983 to security guards, but the courts needed change this view. (HOFFMANN, 2003)

The outsourcing can be legal or illegal. The legal outsourcing is expressed in Pronouncement no. 331 of TST. We will leave the modifications in this pronouncement

occurred in 2011. The situations expressed in this Pronouncement are: I – the expressed cases stated in law 6.019/1974; II – the activities of vigilance stated in law 7.102/1983; III – the activities of cleaning; IV - the intermediary activities of the companies.

We can't confuse vigilant and guards. The guard is a general category. They actuate in services that don't require specialization like the guard of condominium. The vigilant is a specialized category with own norms. (DELGADO, 2007)

Other important appointment is relative to intermediary activities. The break of this rule is common and it's generating discussion between the courts. The Pronouncement no. 331 doesn't states standards to identify these activities.

In some activities is easy does a distinction between intermediary activities and principal activities, for example one shoe factory where each part of the shoe is done by a different company and the company who takes the service is an assembler. (PEREIRA, 2010) The problem is when it's not clear this distinction. The common example is the automobile industry. The tires are done by one factory, the dashboard is done by other, etc. But in relation to mounting all of them are responsible. In this case, the painter isn't a worker but a new outsourcing category. (PEREIRA, 2010)

The illegal outsourcing is that not expressed in the Pronouncement no. 331. Some cases not expressed in this pronouncement are legal because they emerge after that. We defend the update of this pronouncement to amplify its application. This pronouncement was done to clarify blanks on law 6.019/1974 and law 7.102/1983.

Even in 1990s was edited two other acts: the law 8.987/1995 about public concessions and the law 9.472/1997 about telecommunications. These two laws aren't inside the pronouncement. (PEREIRA, 2010)

The outsourcing in public service is criticized by legal doctrine. They said that this institute encourage corruption, increase complexity in public costs, and imply an income concentration. (MACHADO, 2006)

This understanding is related with the effects of outsourcing in elections. In fact this is commonly used to benefit no ethics businessman who disrespect labor legislation and the own Constitution. The losses go to the explored worker and to the State.

The Constitution states in article 37 the obligation to provide the public functions by competitive tendering but what is happening is the increase of illegal outsourcing to provide

those positions. This violates the express constitutional principles of morality, legality, impersonality, publicity and efficiency and some others implied principles.

In the area of telecommunications the TST, recently, decided cases about call centers services on phone companies. The Court understand that the use of outsourcing in this cases are illegal for lack of legal support. The law doesn't concede this way of outsourcing. In consequence of this understand, the employment relationship is directly between the person who does the service and the company who take it. (PETRY, 2012)

This precedent was very important to clarify the adequate treatment to outsourcing in communication companies. The legal treatment before this precedent was very controversial. It's clear to all the people the growth in call center services in these areas. This precedent is very useful and important to clarify the legal regulation of those services.

However, this precedent it's not the only modification in TST pronouncements about outsourcing. In 2011 happened some alterations. The first and more important was the modification in the Pronoucement n. 331. This alteration happen after the judgment of ADC 16 by Supreme Court. This writ decides on constitutionality of article 71 of law 8.666/1993. (NORAT, 2012)

About this modification we should to do two briefs commentaries. The first is that Administrative Law, specifically in the field regulated by law 8.666/1993, regulate outsourcing with the government. Indeed in this area the controversial cases are more dangerous because can result in losses to public costs.

The second is about the nature of the writ. This kind of action integrates the system of judicial review in Brazil. The purpose of this writ is ensuring the legal security in controversial cases about the correct view on constitution. It's the case of article 71 of law 8.666/1993. Because of that we make this appointment on this judgement.

This precedent was based in a supposed violation to Pronouncement no. 10 of Supreme Court. This pronouncement treat of the minimum judges in courts to declare unconstitutionality of a law.

The ADC n. 16 was proposed in March 7, 2007. We going to describe the main ideas of this action and comment the votes of the ministers.

The reporting justice was the minister Cézar Peluso. The writ want to declare the constitutionality of first paragraph in article 71 of law 8.666/1993. This article disposes about

the impossibility to impute the Union on debts of the companies contracted. Tax debts, commercial debts and labor debts can't be transferred to Union or increase the contract costs. The justice Carmen Lucia recognizes the requirement of judicial controversial by the fact of a lot of decision in Labor Justice declaring unconstitutional this article. Justice Cézar Peluso don't recognize this controversial. (STF, 2010)

The writ has as requirement a judicial controversial. It's a specific requirement to this Action of Constitutionality. It's not any controversial able to fill this requirement. This controversial should be manifested in several decisions. The justice Carmen Lucia vote to recognize the fill of requirement but justice Cézar Peluso vote to not recognize.

Proceeding to the analysis of this requirement, the Supreme Court establishes that the Public Administration has the obligation to supervision the execution of contract. The Union can't be responsible by the debts but has this obligation. That was the decision of Supreme Court on article 71 of law 8.666. If the government doesn't do this fiscalization they are responsible subsidiary. (STF, 2010)

About this understanding in Supreme Court, two institutes of Private Law should be explained. It's about the modalities of guilt. The guilt can be *in eligendo* or *in vigilando*. The guilt *in eligendo* is when the contractor doesn't take care about the contracted. The contractor doesn't be aware of the precautions. The guilt *in vigilando* is when the contractor has the obligation to check the execution of service but he doesn't do it. One example is the obligation of the employer check the use of PPE by their employees. The public administration has this obligation to check their contracted too.

Other discussion is about the cases that Public Administration contract workers by thirds. If the third don't observe their obligations with the worker what happens? Has the Union joint liability in the terms of paragraph 2 of article 2 of Consolidation of Labor Laws (CLT)? The Supreme Court denies this possibility. (STF, 2010)

The understanding on this study is in the same direction that the Supreme Court. The paragraph 2 of article 2 of CLT establishes some requirements to joint liability. This requirements are control, direction and administration. It's not the case of Public Administration who doesn't have the management of the provider. The big controversial point will be the paragraph 1 of article 71 of law 8.666/1993.

The justice Carmen Lucia, based on paragraph 6 of article 37 of Constitution, says that is the case of non-contractual liability because don't contained in the terms of contract. It's not the case of strict liability of the Administration. (STF, 2010). About the non-contractual liability we will do some appointments to help in understanding the position of Justice Carmen.

It's not the focus of this study doing an analysis of the evolution in the liability of the State or the theories about liability of the Public Administration. We just will mention what is the non-contractual liability.

When we talk about non-contractual liability, this involves pass to Public Administration – either the direct or indirect – the obligation to pay damages caused by their practices or their omissions that can be attributed to public agents. (DI PIETRO, 2010)

Summarizing, in relation to liability of Public Administration in cases of non accomplish of duties relatives to services of manpower by thirds, the Supreme Court decide for the constitutionality of article 71 of law 8.666/1993. This means that Administration keep don't having strict liability or joint liability but just one subsidiary liability when they not accomplish duty of fiscalization. This subsidiary responsibility was based on guilty *in eligendo* or *in vigilando*.

After this briefs considerations about outsourcing in Public Administration, we pass to the analysis of consequences on Private Law, especially on Labor Law.

But is not just the jurisprudence of Supreme Court having changed in outsourcing cases. The TST changes were more relevant. They increase two incises to Pronoucement no. 331. One of them, incise V, mention expressesly the subsidiary liability of Public Administration caused by lack in fiscalization. The incise VI established that the debts who was born by the disrespect of labor contracts are inside of the subsidiary responsibility as a whole.

However, about incise IV, TST include two requirements with nature procedure[3]. There were followed common requirements to execution phase extended to Public Administration. (TST, 2011). Before that modification occurred in May, 2011, not so much time ago, the responsibility of Public Administration was consequence of the simple non-payment.

[3] The requirements are: 1) the organ of the government must be in the enforcement order; and 2) has take part in procedure relation. These requirements are necessary to guarantee the due process of law and full defense.

Increasing these two incises to the Pronouncement no. 331, the TST follow the understanding of Supreme Court and, at the same time, states procedural standards guarantying full defense to Public Administration.

At this point it's relevant clarify why employers use outsourcing. In a recent research were identified three causes: the costs necessary to good develop of the company; the specialty that the service provider has; the possibility to focus on the main activity of the company. (BASTOS, 2010).

In countries with a high developed capitalism, as Brazil, the companies feel the necessity to reduce costs to compete in global scenario and provide a real growth. The main point is identify to what extent this can reflect in labor relations and how avoid distortions by employers using the institute of outsourcing.

According with this topic were identified more disadvantages than advantages about outsourcing. To confirm this point we will show the advantages and disadvantages of outsourcing to the worker and to the takers of service.

Where are the advantages for using outsourcing? To the worker is the opportunity to occupy some services adequate to their interests. This provides more possibilities to worker choose and try different functions and provides more freedom in economic and professional areas. In other side, the takers of service get gains in productivity, especially in times of workers shortage. (FERRAZ, 2006). As example of this last case, the growth in sales in festive dates as the Mother's day, Father's day, Easter or Christmas, generates a necessity to increase the manpower but this necessity is temporary.

About this topic we should make some appointments. Beyond those benefits other can be identified like the use of outsourcing to insert young people on the market. In this way, the outsourcing can be one way to initiate this young people on markets even more competitive and demanding. Beside this, outsourcing can be fundamental to persecute the right to work, derived of principle of social dignity and individual of the worker as a human.

Another good aspect of outsourcing is the reinsert of old people in the market. On account of ageing process of population, even more the senior citizens were coming back to labor activities. Just as example, in the social security law is stated the action of dis-retirement. The objective of this writ is give the possibility to the retired back to work and contribute more to social security system while this retirement was suspended.

Still regarding the retireds and the markets, the outsourcing can promote a socially reinclusion of them. The prejudice to older worker exists in society. The State should to promote public policies to aware citizens and change this prejudice view. Even that, the young workers can learn some activities with the oldest. This fact was an important social progress.

At least, one last positive aspect of outsourcing use is their use to insert disable people on the markets. It's clear that people with some physical or mental limitation found difficulties to insert themselves in market. The outsourcing can help to reach this goal as done by the retired.

In those cases the State can promote social programs to increase outsourcing. These policies benefits the society as a whole. The entrepreneur can satisfy their temporary demands for manpower. The young people, the retired and disabled people can get a job and this help to persecute the fundamental right to work.

One main point to be mentioned is a kind of outsourcing called temporary work. This is the most common form of outsourcing. It's regulated by law 6.019 edited in January 3, 1974. We will treat the temporary work in a specific topic.

Initially we should to conceptualize the institute of temporary work. According to article 2 of law 6.019/1974, the requirements to one work be considered temporary are: 1) the service provider must be private individual; 2) the reason to company modify it workers composition, being that regular and permanent, must be transitory in the necessity to improve extraordinarily the services.

Based on these requirements we can do one concept of temporary work. Temporary work is the kind of work contract, made by private individual, to attend transitory necessities or to increase extraordinary the services.

Note that the necessity for more services happens in extraordinary situations. Exemplifying this statement we can look to Fortaleza in Ceará state. During the high season, in the period of school holydays, the number of tourists increases considerably. Consequentially the clients on beach hubs increase and are common the hubs hire temporary workers to supply this necessity of addition service.

Another example is in Christmas Celebrations in the end of the year. Traditionally, temporary workers are hired just for that period to produce typical foods like panettone. In Easter period too when are produced the chocolate eggs. In these cases the necessity to increase the manpower is temporary. But, if in any way they disrespect the legal system of temporary

work, recognizing a permanent link is possible, according to the principle of maintenance of labor relation.

Established this briefs appointments, we going to talk about a controversial issue in the case of temporary work. It's the bill 4.302-C that modify the bill 4.302-B proposed in October 15, 1998. What the reason for controversial? It's the fact of this bill promote modifications in the law of temporary work (law 6.019/1974) and overlap the Pronouncement no. 331 of TST. The most relevant alteration is the rise of period of temporary work to 180 days may be prorogated by more ninety days when proved the same situation that generated the temporary hired, without recognize the employment link between the service taker and the service provider. (SENADO FEDERAL, 2012)

By those reasons and many others, the constitutionality and legality of this bill are been questioned. The fundamental points of controversial it's about the disrespect of principle of maintenance of labor relation and by the unreasonable flexibility to work contracts. This facts may contribute to become more precarious the work relation and disrespect the central core of social rights of workers. In 2011 the legislative commission of constitution and justice, responsible to analyze the constitutionality of bills, approved the bill 4.302-C. The commission understood by the constitutionality of this bill. (SENADO FEDERAL, 2012)

In this study it's not possible one detailed analysis about all the point of this bill. Anyway we will point the more controversial issues in the bill to base our opinion about constitutionality of the project.

The first issue of the bill 4.302-C is about the modification in the concept of temporary work stated in article 2 of law 6.019/1974. What the changes are proposed? It's the fact that even if the services contain predictability, the service with seasonality, periodic or intermittence, and other fact non predicable, it's able to fill the legal requirement. This is disposed on paragraph 2 of article 2 in the bill 4.302-C. (SENADO FEDERAL, 2012)

Despite the opinions in defense of flexibility current, we think that this bill extend too much the forms of temporary work. The labor contract have a specific characteristic compared to the other private contracts. It's the otherness. For this reason it's inadequate the use of outsourcing in temporary works in this terms because disrespect the essential value of work, in consequence of this dangerous kind of flexibilization.

Other alteration is in article 4 of Law 6.019/1974. In the current text the employer can be individual person or legal person. In the bill 4.302-C want exclude the individual person and give permission just for the legal person registered in Labor Ministry (MTE).

In this point we agree with the Project because is conditioning the register in MPE. This makes fiscalization easier for the executive.

Other modifications are according to the social rights system. The paragraphs 1 and 2 of article 9 are examples of it. The paragraph 1 state that is responsibility of the service taker guarantee the security, hygiene and healthiness of workers when the work is realized in their own locals or in locals designed by them. The article 2 extend to the workers in temporary service the same medical assistance and the same meal of other workers.

We celebrate this two dispositive of bill 4.302-C. The hygiene and health norms are rules of internal public policy. Because of that they must be respected strictly to ensure the health, the security and the life of worker. The paragraph 2 it's important too because guarantee the meal and health assistance to temporary workers. Constitute an extension of social rights of workers to this category.

However other dispositives on the bill 4.302-C are unconstitutional. Among them the article 10 that rise the period of temporary work to 180 days may be prorogated by more ninety days when proved the same situation that generated the temporary hired, even the exclusion of paragraph 2 of article 12 of the current law 6.019/1974. This dispositive states the obligation to the service taker proceed to communicate the occupational accidents.

About the article 10 we exposes our critics. Now we going to analyze the paragraph excluded (paragraph 2 of article 12 of law 6.019/1974). What the arguments to support the unconstitutionality and illegality of this modification? The obligation to communicate the occupational accident is a rule of internal public policy because aboard the life and security of workers. Excluding this rule the bill disrespect the legal system.

Beyond this reason, exist the duty to inspection the company service taker. If until the Public Administration can suffer the consequences of the non-inspection, even more the private companies as the temporary service takers. Exemplifying, the duty to check if the workers are using the PPE, by the risk to respond by guilty *in vigilando* for this omission. In this way, it's arbitrary this norm going against the TST precedents.

About this, we can ask: if the law 8.213/1991, law of social security system, is emphatic to determine the duty to proceed the communication of occupational accidents to the Security System, what kind of argumentative standard was used to don't apply this command?

It's not correct the literally interpretation of the Law 8.213/1991. The fact of this norm states the duty to employer communicate the accidents, this not exclude the duty of service taker who not does inspections in execution of services. This article should be read in a systematic view.

Other kind of flexibilization is the contract for a determined period. We not analyze in all the meanings this kind of contract but just the aspects relative to flexibilziation in labor law and with the social rights of workers.

The contract for a determined period, even as the other ways of flexibilization, it's an exception and not the rule as the neoliberal doctrine want. This happens because socially more adequate the permanent link because the employees sustain themselves by the work. (MANUS, 2006)

So many ways of contract for a determined period are stated. One of them is experience contract. Other kinds of these contracts are the contract for the period of the harvest, contract for determined construction, common in building area, and the contract for season. All this kind of contracts have details that will not be studied here. We focus on controversial points in precedents and doctrine. We focus on fixed-term contract regulated by law 9.601/1998 avoiding to talk about fixed-term contract regulated by CLT.

Initially we need to distinct the contract for determined period and the contract temporary. In the temporary contract the service provider act in name of the company who provide the temporary work. In contract for determined period emerge a direct link between the worker end the service taker. (NASCIMENTO, 2009).

Made this considerations about flexibilization we going to analyze the recent decisions on TST about this kind of labor contract. In 2012 happens the modification of a lot of pronouncements. We will focus on that related to the subjects choose.

One important change was the extension of stability to pregnant contracted by determined period. This guarantee is stated on article 10, II, b of Transitory Acts. Other important change was the extension of rights to the workers that can't work in consequence of one occupational accident or occupational disease. (JOÃO; ADANI, 2012).

About the professional disease we must clarify some things. This disease it's different than the occupational disease. That is related to the work in specific activities like the silicosis developed by gold-washers and prospectors. The occupational work are relates with some work conditions that results in some infirmity like repetitive motion injuries. These two modalities are species from the gender occupational diseases. The professional disease is called tecnopaty and the works disease is mesopaty. (COSTA, 2009)

One relevant information to Social Security system, it's that the occupational diseases are compared to occupational accidents to security system effects, how stated in law 8.213/1991.The consequence is that the worker affected by these diseases get the same stability. The Pronouncement no. 378 from TST suffered alterations in this way.

Recently, in the end of 2012, TST proceed to a reviewing their pronouncements and precedents. They extend the stability guaranteed to the employer for undetermined period to the employer for determined period.

Certainly this understand will generate a thousand of actions discussing this. It's correct the understanding of TST extending one right constitutionally recognized.

Equally relevant the alteration in precedents of TST about the journey "12 by 36" very common in health area. This generate a new pronouncement. What happens in this modification? The court accepts the understanding about the validity of the flexible journey. This wasn't regulated by law yet. The controversial points were about the 11ª and 12ª hours as supplementary. With the new pronouncement was stated the double paid when the employee work in holydays and the employee don't have right to receive this hours as extra-hours. (NAMATRA, 2012)

The Court define the requirements to be valid that special journey. The requirements are: be exceptional; existence of some norms or collective agreement stating this journey. (ANAMATRA, 2012). Some people questioned the possibility to discuss the journey by collective agreements. We don't think this is a problem if respected the minimum guarantees of Constitution and if the workers and syndicates take part in the negotiation.

The precedent for TST was very important to fill a blank in this field. Having no law regulating the subject and this fact generate many discusses about the correct application. It was a good progress.

CONCLUSION

This article want to analyze the flexibilization in Labor Law in the perspective of recent modifications in TST and Supreme Court understandings in a context of globalization and inevitable flexibilization. The challenge is show how this institute can be valid without disrespect the social rights of workers.

About the doctrine currents in the field of flexibilization (flexible, anti-flexible and moderate) the last one is most suitable with the fundamental rights by the fact that propose more participation of syndicates in the agreements. The other two currents are bad to being extremist. The excess of flexibilization and the excessive rigidity it's not conform the constitutional system that establish the value of work and free entrepreneur.

In the aspect of precedents we repute more important because it's more controversial in doctrine or courts. The question is how distinguish intermediary activities and mains activities in the cases of Pronouncement no. 331 of TST, recently modified to dispose that the responsibility of Public Administration is subsidiary.

Finally, the TST end with the journey "12 by 36" in the meaning of the workers in this journey don't have right to 11ª and 12ª hours as supplementary. This not means that they don't go propose these arguments to the local courts judges because in Brazil the precedents aren't obligatory for the lack of one Stare Decisis system, but this precedent can guide the labor judges and the courts.

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