BRAZILIAN'S FISSURED WORKPLACE: DAVID WEIL'S VIGNETTES IN THE NEW WORLD

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David Weil's book opens up with five vignettes from *The Fissured Workplace*. They present stories of anonymous people who work in front-desk hotels, cable TV installation companies, janitorial services, logistics enterprises, and chocolate multinational companies.[1] Further developed in the book, these previews strike the Brazilian reader for two main reasons: the demystification of the U.S. labor market (whose peculiarities were blurred by the overall perception of a triumphant and world hegemonic economy that just did not go along with such a fragmented workplace scenario) and the astonishing resemblance with the Brazilian labor reality and some of its most perverse practices that can provide its own vignettes.

Fissuring in Brazil also started through peripheral jobs such as the ones in janitorial and security services. Their transferring out of the companies got so spread out as a labor practice that it became the recommended one even for the Public Administration. Employees doing such kind of service have certitude about not being public employees. Yet, even if they know the person responsible for paying their salaries, they do not necessarily know who their employers are as such services have to be periodically contracted for through competitive bidding. As a new enterprise with a better price offer wins the competitive bidding and succeeds the previous employer, it has become a common practice for it to hire the predecessor's employees to continue doing the same job they previously did. Deprived of their market share, previous employers renege on compliance with the legal obligations related to their employees' dismissal. As a matter of fact, such circumstances end up in a dead end situation: as previous employers lose

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1. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT, 1 (2014).

their market share, they do not have new positions to offer to their employees and are financially incapable of paying their salaries, but still argue that they did not dismiss their employees as they are incapable of complying with the minimum thirty days' prior notice of dismissal and the payment of the dismissal indemnities required by Brazilian law. Employees are then forced to move on to the new employer if they wish to stay employed. Due to the peculiar Brazilian collective bargaining system in which employees and employers are affected by collective agreements regardless of their union affiliation, some private security unions have included a clause in their collective agreements exempting private security employers from paying dismissal indemnities to employees who work for the Public Administration as their permanence under the same circumstances was to be interpreted as an employer succession and not as a rehiring by the successor enterprise.[2] As this "encouragement to continuity" collective agreement clause suggested, employer succession had nothing to do with an employer's transfer of assets and market share, but was related to an absence of change in employees' working conditions regardless of a change in whom the employer is. Yet, recent decisions from the *Tribunal Superior do Trabalho* (Labor Superior Tribunal, hereinafter TST) have declared such kind of clause unconstitutional due to the inalienable character of labor rights which unions cannot waive.[3]

Fissuring has been integrated into logistics and critically affects those who drive or deliver goods. Truck drivers have also been transferred out of the companies that previously employed them as most of this kind of work is now done through subcontracting. Distribution centers who used to have their own trucks and drivers are nowadays subcontracting to transportation companies to deliver their goods. In their turn, transportation companies hire self-employed truck drivers to do the job, but are paid on a per delivery basis. The latter, in order to get the work done, hire self-employed people to help on the loading and discharging of goods, paid on a daily basis regardless of the number of deliveries done or hours worked. Different layers of working conditions are then established ranging from the

2. MATTHEW W. FINKIN & JOEL CUTCHER-GERSHENFELD (with TAKASHI ARAKI, PHILIPP FISCHINGER, ROBERTO FRAGALE FILHO, ANDREW STEWART & BERND WAAS), MULTINATIONAL HUMAN RESOURCE MANAGEMENT AND THE LAW. COMMON WORKPLACE PROBLEMS IN DIFFERENT LEGAL ENVIRONMENTS, 60 (2013); Roberto Fragale Filho, *Resolving Disputes over Employment Rights in Brazil*, 34 COMP. LAB. L. & POL'Y J. 929 (2013); Ana Virginia Gomes & Mariana Mota Prado, *Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to Meaningful Reforms in the Labor Law System*, 32 COMP. LAB. L. & POL'Y J. 843 (2011).

3. TRIBUNAL SUPERIOR DO TRABALHO, RR 45700-74.2007.5.16.0004, 06.02.2015, *available at* http://aplicacao5.tst.jus.br/consultaDocumento/acordao.do?anoProcInt=2009&numProcInt=761897&dtaPublicacaoStr=06/02/2015%2007:00:00&nia=6191988 (Braz.), and RR 362-26.2013.5.10.0007, 17.12.2014, *available at* http://aplicacao5.tst.jus.br/consultaDocumento/acordao.do?anoProcInt=2014&numProcInt=80388&dtaPublicacaoStr=19/12/2014%2007:00:00&nia=6269275 (Braz.).

traditional employee entitled to a minimum salary and overtime to a self-employed helper who does not have any legal protection. Fissuring has become so entrenched in the logistics business that it ended up dictating other actions concerning unrelated matters. For instance, as distribution centers function on a twenty-four hours basis and public transportation is extremely scarce in the early hours of the morning, employees whose shifts finished at 3:00 a.m. first witnessed their employer change from the use of company buses and drivers to take them home to the hiring of a rental bus company to provide the same service. Later, they witnessed a second change as the rental company was replaced by self-employed bus owners whose work ceased after the workers' 3:00 a.m. shift ended. As drivers and workers went from an "all employed by the same employer" circumstance to an unforeseen "all unemployed" reality, the case ended up in a labor court, which was called up to rule on the existence of labor contract and the payment of dismissal indemnities.[4]

To take another prominent example, since 1978, Ford of Brazil, a subsidiary of Ford Motor Company, has run a proving ground at the city of Tatuí, in the State of São Paulo. It is a testing place for automobiles where one will find test drivers, mechanics, tooling specialists, and prototype makers. Even though these workers were important to the development of Ford's activities, they were not Ford employees. Actually, they were hired through the philanthropic association *Associação para Valorização de Pessoas com Deficiência* (hereinafter AVAPE), whose social work aims to valorize disabled people though professional inclusion, rehabilitation, and capacitation. The only problem here was that not a single one of the 280 workers hired through AVAPE was disabled. Light had been thrown on their situation by a lawsuit brought by the *Ministério Público do Trabalho* (Labor Prosecution Office, hereinafter MPT). As expected, Ford claimed it had no responsibility whatsoever as the workers were all provided for by AVAPE, who, in turn, claimed that it was Ford's payment that made possible the social work it provided for the more than 280 workers involved in the Ford situation. Our vignette ends up once again in a labor court, which required Ford to hire all 280 workers as employees and ordered both Ford and AVAPE to pay R$400,000,000.00 ($126,855,240.00)[5] to be applied on public policy for disabled people in the city of Tatuí.[6] Both Ford and AVAPE appeals are pending before the appellate court (Tribunal Regional do Trabalho da 15ª Região [Campinas, SP], hereinafter TRT-15).

4. TRIBUNAL REGIONAL DO TRABALHO DA 1ª REGIÃO [RIO DE JANEIRO], RO 0000953-80.2010.5.01.0059, 03.06.2013 (Braz.).

5. As of July 15, 2015, the exchange rate was of R$0.32 for $1.00.

6. VARA DO TRABALHO DE TATUÍ, ACP 0002153-24.2011.5.15.0116, 27.02.2013, *available at* http://consulta.trt15.jus.br/consulta/TAT/docs/000215324.2011.5.15.0116i42272.pdf (Braz.).

These Brazilian vignettes show us two trends: (1) fissuring is a phenomenon not unknown to Brazilian labor market and (2) Brazilian labor courts play a key role in efforts to address it. Yet, fissuring in Brazil has its own peculiarities and to highlight them, it is necessary to bring some precision on how the concept is employed here. Essentially, the Brazilian debate focuses on the precarity of work[7] and does not replicate the European discussion about the legislative balkanization of the labor contract.[8] Thus, it does not come as a surprise that German sociologist Ulrich Beck has chosen to name his (pessimistic) vision on the future of labor as *Brazilianization*.[9] As fissuring in Brazil comes along with the increased precarious nature of work, David Weil's hypothesis has to be viewed in a more nuanced light in order to be fully appreciated. As he explains:

> [W]orkplace fissuring arises as a consequence of the integration of three distinct strategic elements, the first one focused on revenues (a laser-like focus on core competency), the second focused on costs (shedding employment), and the final one providing the glue to make the overall strategy operate effectively (creating and enforcing standards).[10]

In the Brazilian context, workplace fissuring does not develop these three strategies alike. Actually, the Brazilian circumstance is all about shedding employment and how it divides workers into core (formal) employees and a vast network of precarious jobs (and unemployment).

The three business models – subcontracting, franchising, and supply chains (and its outsourcing and offshoring practices) – examined by David Weil are here condensed into the Portuguese word *terceirização*,[11] which although often translated as outsourcing, has a broader meaning as it literally stands for transferring to a third party all employment liabilities. When is it possible? What are its limits? Who is responsible for what? These questions were thoroughly discussed in the overburdened Brazilian labor courts, which have set standards for defining the limits of fissuring.[12]

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7. RICARDO ANTUNES, ADEUS AO TRABALHO? ENSAIO SOBRE AS METAMORFOSES E A CENTRALIDADE DO MUNDO DO TRABALHO (1998) (Braz.); Ricardo Antunes, *Trabalho e precarização numa ordem neoliberal*, *in* A CIDADANIA NEGADA: POLÍTICAS DE EXCLUSÃO NA EDUCAÇÃO E NO TRABALHO (Pablo Gentili & Gaudêncio Frigotto eds., 2001) (Braz.); Cristiano Vinicius Ferreira, Liana Carleial & Lafaiete Neves, *Terceirização: implicações sobre os setores elétrico e automotivo brasileiros*, 13 BRAZ. J. LAB. STUD. (2015), *available at* http://periodicos.ufpb.br/ojs2/index.php/abet/article/view/24860/13620, accessed July 10, 2015 (Braz.).

8. ALAIN SUPIOT, CRITIQUE DU DROIT DU TRAVAIL 36 (1994) (Fr.).

9. ULRICH BECK, THE BRAVE NEW WORLD OF WORK (2000).

10. WEIL, *supra* note 1, at 11.

11. MARIA DA GRAÇA DRUCK, TERCEIRIZAÇÃO: (DES)FORDIZANDO A FÁBRICA (1999) (Braz.); SÉRGIO PINTO MARTINS, A TERCEIRIZAÇÃO E O DIREITO DO TRABALHO (2001) (Braz.); RODRIGO DE LACERDA CARELLI, TERCEIRIZAÇÃO E INTERMEDIAÇÃO DE MÃO DE OBRA: RUPTURA DO SISTEMA TRABALHISTA, PRECARIZAÇÃO DO TRABALHO E EXCLUSÃO SOCIAL (2003) (Braz.).

12. Brazilian labor judiciary has had more than three million new cases every year since 2011, and just in 2014, it reached a peak of 3,472,861 new cases. *See* TST, SÉRIE HISTÓRICA DA MOVIMENTAÇÃO PROCESSUAL – 1941/2015, *available at* http://www.tst.jus.br/justica-do-trabalho2 (Braz.).

Nevertheless, criticism over the labor courts activism and its impact on the country's development has contributed to a debate that has shifted the focus from the legal aspects to economic matters. The debate has shifted as well into the legislative arena as the Congress is now discussing a Bill to regulate *terceirização*'s practices.

Therefore, this Article is divided into three Parts: first, the judicial debate is scrutinized in order to understand how labor courts dealt with fissuring. Second, the recent legislative discussion and its outcome so far are reviewed to what may be the legal future of *terceirização*. The third part addresses the question of job quality, missing from the debate thus far, examining how *terceirização* establishes a downward pressure on labor market. Concluding remarks reflect on how Brazilian labor regulation copes with fissuring and what may be the future in a more precarious work environment.

I. THE JUDICIAL DEBATE

Terceirização in the beginning of the 1990s became a critical problem for labor relations in Brazil. As flexibility and employability became the order of the day, no one wanted to be an employer any longer. Long before David Weil's description of the fissured workplace, Brazil became an intense laboratory for this kind of fragmented work environment. In the absence of a legislative response the labor courts, especially TST – jurisprudence on the matter dated from September 1986 – moved to fill the gap. This body of jurisprudence was inscribed in *Súmula* 256,[13] which only admitted *terceirização* in the restricted cases of temporary work and private surveillance services, both regulated by statute Federal Act n. 6,019/1974 and Federal Act n. 7,102/1983, respectively.[14] Clearly, the court's jurisprudence embraced a very restricted vision of *terceirização*, which required legal authorization and, in the case of temporary work, was limited to two circumstances (momentary replacement and exceptional increase of work) and to a period of three months.

As economic conditions changed in the beginning of the 1990s and *terceirização* became a major phenomenon in Brazilian labor relations,

13. Brazilian higher courts use the Latin word *Summula* (*Súmula*, in Portuguese) to state precedent in a brief and restricted abstract: "It is a synthesis of all similar cases, decided in the same way, put through a direct and clear proposition." It has no binding character exception made to the so-called *Binding Summula* (*Súmula Vinculante*) that was introduced by the Constitutional Amendment 45 (hereinafter, EC 45/2004) and can only be issued by the *Supremo Tribunal Federal* (Brazilian Supreme Court, hereinafter STF). *See* STF, http://www2.stf.jus.br/portalStfInternacional/cms/verGlossario.php?sigla=portalStfGlossario_en_us&indice=S&verbete=196031 (last visted July 10, 2015) (Braz.).

14. *Súmula* 256 literally states that "[e]xception made to temporary work and surveillance service, which are provided for Federal Acts n. 6,019 of January 3, 1974, and n. 7,102 of June 20, 1983, hiring workers through a third company is illegal, establishing employment directly with the services' contractor."

hundreds of thousands of cases came to the labor judicial system: between 1988 and 1994, the annual amount of new cases doubled going from 1,044,469 to 2,048,944.[15] As labor courts were then offering a wide set of different decisions concerning this supposedly new labor relations reality, in December 1993, TST reviewed its *Súmula* 256 and published *Súmula* 331 to set the new jurisprudence on the matter.[16] In her master's dissertation, Karen Artur soundly analyzes this turn-around in TST's jurisprudence.[17] She describes how seven TST members acknowledged the new fragmented working place environment and its reshaping due to economic pressure and how they tried to establish the limits on its new configuration with reference to vague categories such as civility, dignity, and minimum rights. The most economically liberal-minded took the view that the only nonegotiable aspect of *terceirização* was related to health and safety measures. Their reticence was nonetheless not strong enough to repudiate *terceirização* altogether. As a consequence, the newly edited *Súmula* 331 reaffirmed its possibilities related to temporary work and private surveillance services and extended it to maintenance and cleaning services. It also established that it would be lawful for the end-user to outsource the jobs related to its activities-means – those activities that are ancillary to means by which the enterpriser's basic ends or, to use Weil's terminology, its "core" functions – as long as personal identity and subordination are not present.

Súmula 331 was originally composed of four items. The first one reaffirmed *Súmula* 256 content under a new phrasing: "hiring workers through a third company is illegal, establishing employment directly with the services' contractor, exception made to temporary work (Federal Act n. 6,019, of January 3, 1974)." The second item specified that "the unlawful hiring of a worker through an intermediary company, does not establish an employment relationship with agencies of the direct, indirect or foundational Public Administration (article 37, II, 1988 Federal Constitution)." This was necessary to resolve the problem created by the application of item I to the Public Administration, which is required by the Constitution to hire public servants through civil service exams.

One of the two great novelties introduced by TST at the time was the undefined conceptual distinction between activities-end and activities-

15. *See supra* note 12.

16. Magda Barros Biavaschi & Alisson Droppa, *A história da Súmula 331 do Tribunal Superior do Trabalho: a alteração na forma de compreender a terceirização*, 16 MEDIAÇÕES – REVISTA DE CIÊNCIAS SOCIAIS 124 (2011), *available at* http://www.uel.br/revistas/uel/index.php/mediacoes/article/view/9657/8494 (Braz.).

17. KAREN ARTUR, O TST E OS DOUTRINADORES JURÍDICOS COMO AGENTES DE NOVAS NOÇÕES CONTRATUAIS DO TRABALHO: UM ESTUDO SOBRE A TERCEIRIZAÇÃO (2004), *available at* http://www.bdtd.ufscar.br/htdocs/tedeSimplificado//tde_busca/arquivo.php?codArquivo=3708 (last visted July 10, 2015) (Braz.); KAREN ARTUR, O TST FRENTE À TERCEIRIZAÇÃO (2007) (Braz.).

means, which assumes that the former is related to the core activity of the end-user and the latter does not have such a characteristic. This distinction can be extracted out from item III, which states that "no employment relationship can be established with the end-user of private surveillance services (Federal Act n. 7,102, of June 20, 1983) and cleaning and conservation services, as well as specialized services related to activities-means of the end-user as long as personal identity and direct subordination are nonexistent." This is a very subtle and difficult distinction, not obviously or easily drawn. Accordingly, Brazilian Labor Inspection Office issued directions in 2001 attempting to explain it:

> In principle, activity-means can be defined as non-representative of the company's goal, therefore defragmented from its production process, configuring itself as a necessary service (parallel or secondary), but not as an essential one. Activity-end is one that comprises the essential and normal activities for which the company was formed. The company's purpose is the exploitation of its field of activity as expressed in its by-laws.[18]

A good example for such a conceptual distinction would then be the call-center of an automobile company – it would correspond to an activities-mean.

The second important innovation created by the *Súmula* 331 was inscribed in its fourth and final item: "the breach of labor obligations on the employer part implies in a subsidiary liability of the end-user as for those obligations provided that end-user has participated in the litigation procedure and is inscribed in the court enforceable decision." TST's judicial activism created subsidiary liability as the court decided to grant responsibility to end-users in face of insolvability of services' providers, but still prevented workers from directly claiming labor rights from the end-user.[19] TST innovative approach refused the use of solidarity liability which would make end-users and services providers simultaneously liable, and expressed a conciliatory effort to accommodate demands emanating from the Public Administration, from companies that claimed that *terceirização* was an important economic tool to improve economic environment, and from unions that feared the lack of protection for workers engaged in providing services. *Terceirização* was then clearly made available for private surveillance services, cleaning, and conservation services, as well as specialized services related to activities-means (exception being made for

18. BRASIL, MINISTÉRIO DO TRABALHO E DO EMPREGO, SECRETARIA DE INSPEÇÃO DO TRABALHO, TERCEIRIZAÇÃO: TRABALHO TEMPORÁRIO E ORIENTAÇÃO AO TOMADOR DE SERVIÇOS (2001), *available at* http://www.saudeetrabalho.com.br/download/manual-sobre-terceirizacao.pdf (last visited July 10, 2015) (Braz.).

19. ARTUR, *supra* note 17, at 87.

temporary work which can also be used in activities-end if in accordance to Federal Act n. 6,019/1974).

Later, on September 19, 2000, TST reviewed item IV of *Súmula* 331 to indicate that the Public Administration was also subsidiarily liable as long as it has participated in the litigation procedure and is inscribed in the court enforceable decision. Yet, controversy as *terceirização* possibilities for the Public Administration was far from being solved due to article 71 of Federal Act n. 8,666, of June 21, 1993, which exempts Public Administration from any responsibility on labor, social security, tax, and business duties of contractors hired through a public bidding. The dispute ended up in STF, which upheld the constitutionality of article 71 in November 24, 2010.[20] Once again, TST reviewed *Súmula* 331 to clarify that Public Administration subsidiary liability is not automatic and can only be declared whenever it can be proved that it has failed to insure that the labor provider has complied with all the required labor standards. Thus, in May 31, 2011, all references to Public Administration on its item IV were omitted and two new items were included. Item V establishes that "direct and indirect Public Administration have subsidiary liability as inscribed in item IV, if a culpable conduct has been identified in the fulfillment of obligations arising from Federal Act n. 8,666 of June 21, 1993, especially the ones related to supervision of legal and contractual compliance by the services provider as an employer." The aforesaid liability does not arise from mere breach of labor obligations undertaken by the services provider regularly hired. Finally, item VI indicates that "end-user's subsidiary liability embraces all monetary items arising from the judicial condemnation for the period of employment provision."

However, debate over this construction of *terceirização* has resulted in the TST's holding its first ever public hearing to discuss its impact and meaning with civil society and academia. Forty-nine specialists, scholars, and professional leaders were brought together for a thorough debate that lasted two days (October 4 and 5, 2011).[21] The public hearing was structured in two parts: the first dedicated to the conceptual and regulatory debate over *terceirização* and the second to different sectorial analyses (banking and finances, telecommunications, industries, services, electric energy, and information technology). Four issues were clearly addressed in the public hearing: (1) the scope of *terceirização* (activities-end and activities-means), (2) liability (subsidiary or solidary), (3) workers' representation (defined by end-user or services provider activities), and (4)

20. STF decision was pronounced on the *Ação Direta de Constitucionalidade* n. 16, *available at* http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=627165 (last visited July 10, 2015) (Braz.).

21. TST, AUDIÊNCIA PÚBLICA: TERCEIRIZAÇÃO, *available at* www3.tst.jus.br/ASCS/audiencia_publica/index.php?audiencia=nav/home (last visited July 10, 2015) (Braz.).

equal rights (between direct employees and subcontracted workers).[22] TST's jurisprudence, which concentrated on the two first issues – scope and liability – was reinforced, although the questions related to workers' representation and equal rights have never been directly examined by the court.

Despite of this reinforcement, Brazilian labor courts still face the difficult task of defining which are activities-end and activities-means as the call-center example, mentioned above, brought the matter again to STF. A call-center for the automobile industry may as well represent an activity-means, but what if the work is transferred to a telephone company? Actually, *terceirização* of a call-center in a telephone company has been examined by TST, which has declared it to be an activity-end and therefore unlawful. The problem here lies in article 94, II, of Federal Act n. 9,472 of July 16, 1997 (General Federal Act of Telecommunications), which indicates that telephone companies are allowed to contract with third parties to develop inherent, accessory, or complimentary activities related to its services as well as the implementation of associated projects. Do inherent activities mean activities-end? This is exactly what telecommunications companies unsuccessfully argued in labor courts. Article 94 was not held to be unconstitutional; its reach was limited to the extent of what can be considered activities-end and activities-means. Nevertheless, STF has declared that the constitutional issue is an important one and as a consequence has recognized the existence of "general repercussion" on the matter.[23] The case is still pending, and it is unclear if STF will dodge the conceptual framework created by TST and limit its analysis to the constitutional aspect or if it will throw some light on *terceirização* limits. For now, the limits remain defined by *Súmula* 331. The continuous debate around its impact in the workplace is evidenced in how labor courts became the arena where flexibility gained legal recognition and had its limits defined. Clearly, TST's jurisprudence was not intended to give *terceirização* a free pass, but it introduced an ambiguous conceptual difference between activities-end and activities-means and invented a subsidiary responsibility unknown to the law. Controversy, far from being

22. RODRIGO HINZ DA SILVA, A AUDIÊNCIA PÚBLICA DO TST SOBRE TERCEIRIZAÇÃO: UM ESPAÇO SOCIAL DE LUTAS POLÍTICO-COGNITIVAS (2014), *available at* http://wp.ufpel.edu.br/ppgs/files/2015/03/SILVA-Rodrigo-Hinz.-Audi%C3%AAncia-p%C3%BAblica-TST-terceiriza%C3%A7%C3%A3o.pdf (last visited July 10, 2015) (Braz.).

23. General repercussion is a procedural filter introduced by Constitutional Amendment 45/2004, which allows STF to select cases to be heard by the Court according to their juridical, political, social, or economic relevance. Although similar to the North-American writ of certiorari, it has a fundamental difference as it is up to the Court to define in a justified manner that cases present general repercussion regardless of the appellant's ability to demonstrate its importance. *See* STF, *Glossário Jurídico*, *available at* http://www.stf.jus.br/portal/glossario/verVerbete.asp? letra=R&id=451 (last visited July 10, 2015) (Braz.).

avoided, is still framed by the ideological criticism of a supposedly rigid labor regulation and its impact on the country's economic development, and it has moved from the judicial to the legislative field.

II. THE LEGISLATIVE DEBATE

Congress has not ignored the *terceirização* debate and its first reaction to *Súmula* 331 was the approval of Federal Act n. 8,949, of December 9, 1994, which established that "whatever the field of activity of a cooperative society, there is no employment relationship between it and its members or between them and the end-user of the labor services provided by a cooperative society." However, Congress's response was pleonastic as the new law was a mere reproduction of article 90 of Federal Act n. 5,764, of December 16, 1971 (Cooperativism National Policy). Its real intention was to make *terceirização* easier whenever it was done with a cooperative society. As a result, shedding employment through cooperatives became a common practice. Countless cases of employers dismissing employees immediately to rehire them through a cooperative or forwarding new employees to a cooperative already providing services to the company as well as the use of cooperatives to circumvent the *terceirização* interdiction on activities-end flooded labor courts. The judicial reply as expected mobilized article 9 from *Consolidação das Leis do Trabalho* (Brazilian Labor Code, hereinafter CLT), which establishes that "all acts aiming to undermine, prevent or circumvent the application of its precepts are full-fledged null" and, of course, *Súmula* 331.

An explicit attempt to regulate *terceirização* would only be made in October 26, 2004 when Bill Proposition 4,330 was introduced. The Bill aimed to regulate *terceirização* practices arguing that it had become a reality that could no longer be ignored:

> The world has witnessed in the last 20 years a true revolution in the production organization. As a consequence, profound transformations in work organization can be observed. New hiring forms have been adopted to meet the new company demands. In this context, *terceirização* is one of the management techniques that has had widespread development due to the modern enterprise necessity to focus on its main business and in the quality improvement of its products or its service providing. In Brazil, legislation has been run over by reality. Trying, in a myopic way, to protect workers simply ignoring *terceirização*, Brazilian legislation managed to leave Brazilian workers under such type of contract more vulnerable.[24]

24. BRASIL, CONGRESSO NACIONAL, PROJETO DE LEI N. 4,330 (2004), *available at* www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=830A1E9E087190598BC25482A67B8DCD.proposicoesWeb1?codteor=246979&filename=PL+4330/2004 (last visited July 10, 2015) (Braz.).

The Bill sets out the nonexistence of an employment relationship between the end-user and the workers hired by the provider or its partners. Basically, it allows *terceirização* of any activity, eliminating TST conceptual distinction between activities-end and activities-means. Textually, it establishes that "the contract for the provision of services may relate to the development of activities inherent, ancillary or complementary to the economic activity of the user-end." Discussion over the Bill went on for three legislatures (2003-2006, 2007-2010, and 2011-2014) and even though it never reached the plenary voting stage, the debate intensified since 2013.

Notably, TST reacted against the Bill as nineteen of its twenty-six members addressed a public petition to the Constitution, Justice and Citizenship Commission of the House of Representatives stating that approval would result in a severe harm to labor and social security rights of Brazilian workers.[25] The scenario described by TST members was one of wage reduction and greater precarity in the workplace. The reaction was not limited to TST but also came from the *Associação Nacional dos Magistrados da Justiça do Trabalho* (hereinafter ANAMATRA), the national labor judge's association, which released an open letter calling on congressmen and political parties to refuse adoption. It released together with the NGO *Movimento Humanos Direitos* (hereinafter MHuD) a series of videos casting well-known TV actors speaking against *terceirização*, which is there explained in a very simple and striking way: "[c]an you imagine your children's school without teachers, a hospital without doctors and nurses, a contractor without blue collar workers, all replaced for workers with less rights and guarantees? *Terceirização* occurs when someone's labor is sold by a third party who profits from it."[26] Although *terceirização* was a minor question in the 2014 presidential campaign, which witnessed reelected President Dilma Rousseff declare that labor rights would only be touched when pigs fly,[27] the 2015 newly elected House of Representatives speed up the legislative debate over Bill Proposition n. 4,330 and brought it to a vote in April, 8, 15 and 22, 2015. The Bill was finally approved by a majority of 63% and has been forwarded to the Senate where it has yet to be examined.

25. CONSULTOR JURÍDICO, MINISTROS DO TST CONDENAM PL DA TERCEIRIZAÇÃO (2013), *available at* http://www.conjur.com.br/2013-set-03/maioria-ministros-tst-condena-pl-libera-terceiriz acao (last visited July 10, 2015) (Braz.). The public petition is available at http://s.conjur.com.br/dl/oficio-tst-terceirizacao.pdf (last visited July 10, 2015) (Braz.).

26. ANAMATRA & MHuD, TODOS CONTRA A TERCEIRIZAÇÃO (2013): VÍDEO 1 *available at* https://www.youtube.com/watch?v=ajDjKK2Q9kA, VÍDEO 2 *available at* https://www.youtube.com/watch?v=tybXNwLfMco; VÍDEO 3, *available at* https://www.youtube.com/watch?v=QfHdC0d1ZTg (last visited July 10, 2015) (Braz.).

27. REUTERS BRASIL, DILMA DIZ QUE NÃO MUDA DIREITOS TRABALHISTAS "NEM QUE A VACA TUSSA" (Sept. 19, 2014), *available at* http://br.reuters.com/article/topNews/idBRKBN0HC1WS20140918 (Braz.).

The approved Bill, which only applies to private companies, defines *terceirização* as "the transfer made by the end-user to a third party of the execution of any of its activities to be done under the terms of this law." The Bill allows *terceirização* of all activities related to the end-user's business whether they be inherent, accessory or complementary or, to be put in the previous wording of the debate, regardless of the jurisprudential distinction between activities-end and activities-means. Hereinafter, the only restriction would lie in the services provider specialization as to avoid a mere intermediation of labor force. Furthermore, besides being specialized in the contracted activity, the services provider cannot be a former employee who has worked for the end-user in the previous twelve months (exception being made for retirement circumstances) and must have the economic capacity compatible with its execution. When a part of the service is related to specialized technical matters, the Bill allows the service provider to hire another service provider to execute the contracted activity, creating yet another layer of subcontracting as long as unions from the correspondent activities are notified. Unless the requirements established by CLT for an employment contract are to be found, no employment relationship can be established between the end-user and the employees of the service provider.

In order to avoid the lack of labor rights' compliance, the service provider has to make a deposit of 4% of the contract's value, limited to 50% of the monthly revenue obtained under the contract. On the other hand, the end-user has to assure compliance by the service provider on to the payment of wages, overtime, weekly day off and thirteenth salary, vacations, transportation aid, Time Service Guarantee Fund (hereinafter FGTS) deposits, dismissal indemnities, and social security charges. If the service provider fails to meet these obligations, the end-user can dispose of the 4% deposit and is entitled to retain payment to the service provider in order to honor such legal obligations. The end-user is also required to assure compliance with all social security charges and fiscal obligations of the service provider. This supervision goes along with a solidarity liability, which eliminates the jurisprudential subsidiary liability established by *Súmula* 331.

The Bill also addresses workers representation. The approved text establishes that workers are to be represented by the same union of direct employees from the end-user if their work falls into the same economic category. Besides that, unions representing service provider's economic activity are to be notified whenever a *terceirização* contract is signed and an accident occurs. Likewise, whenever a service provider fails to pay salaries and its fiscal and social security payments, union notification is required. Enforcement is thus split between unions and labor inspection. The

circumstances related to the encouragement of continuity clauses mentioned in the opening vignettes are also regulated by the approved text in order to avoid wage reduction and to guarantee workers' vacations.

While the approved Bill is now under discussion in the Brazilian Senate, workers' unions, progressive congress members, and legal academics have joined to fight against it. A campaign to hold public hearings in every one of twenty-seven Brazilian States has been launched by Senator Paulo Paim (*Partido dos Trabalhadores* [Workers' Party]) and a national forum assembling legal professional associations, workers confederations, and unions.[28] Hearings have already been held in half dozen of Brazil's major cities and are supposed to go on until every Brazilian State Capital is visited.[29] Resistance to regulate *terceirização* differently from what has been established by TST is therefore well organized. The claim is that the law would transform workers into merchandise and degrade the human condition as workers become treated as objects. This argumentative line points to what has been the missing in the debate so far: workers' conditions and job quality.

III. THE MISSING DEBATE: A MATTER OF JOB QUALITY

While legislative debate goes on, labor courts remain attached to *Súmula* 331 and continue to confront new vignettes that reproduce the fissuring circumstances described by David Weil. The most recent came to light in July, 2015. It deals with the *terceirização* by Aeroméxico of its activities related to airplane ticket reservations, selling, and passenger reception, as well as check-in and check-out procedures in Brazilian airports. After inquiry at the Guarulhos International Airport in the State of São Paulo, the MPT proposed the signing of a *Termo de Ajustamento de Conduta* (Conduct Adjustment Agreement, hereinafter TAC), but it was refused by Aeroméxico, which claimed the lawfulness of its practices. As a consequence, MPT engaged a judicial procedure against Aeroméxico claiming that these were activities-end and therefore could not be given to a third party. The judicial procedure revealed that Aeroméxico had forty people working on such activities, but only three of them were its employees. Later on, evidence showed that not even a single worker dealing with these activities was an employee of the company. Basing its decision on the distinction between activities-end and activities-means established

28. FÓRUM EM DEFESA DOS DIREITOS DOS TRABALHADORES E TRABALHADORAS AMEAÇADOS PELA TERCEIRIZAÇÃO, *available at* http://www.combateaprecarizacao.org.br/ (last visited July 10, 2015) (Braz.).

29. Belo Horizonte (May 29, 2015), Florianópolis (June 8, 2015), Curitiba (June 19, 2015), Porto Alegre (June 25, 2015), Rio de Janeiro (June 26, 2015), São Paulo (June 29, 2015), Recife (July 3, 2015), Fortaleza (July 21, 2015), Natal (July 22, 2015), João Pessoa (July 23, 2015), Manaus (July 29, 2015), and Belém (July 31, 2015).

by *Súmula* 331, and acknowledging that the business activity of Aeroméxico was the transportation of passengers, mail and cargo in general, the labor court held that such core activities could not be devolved. As the decision states, passenger transportation derives from the previous selling of a travel ticket, and it cannot be accomplished without reception, check-in and check-out procedures. Therefore, as this *terceirização* must be considered unlawful, AeroMéxico was ordered to refrain from using the labor force in the future under such conditions (as it had already hired these workers as its own employees) and to pay R$ 200,000.00 ($ 63,427.62)[30] to the *Fundo de Amparo ao Trabalhador* (Workers' Support Fund, hereinafter FAT) for collective moral prejudice.[31] The decision remains subject to appeal. Before it comes to an end, new vignettes will probably be pressed before the labor courts.

As these cases proceed the debate over them will fail to focus on the larger issues of job quality. Workers under the *terceirização* system suffer a higher fatality risk, work longer hours, are paid less and are subject to a higher turnover rate, all of which translates into a more precarious worklife. David Weil points to an increased risk of fatality for subcontracted workers in mining and telecommunications in the United States.[32] In the Brazilian electric energy sector, subcontracted workers, whose market share in the sector has almost doubled over a decade (2002-2011), going from 28.9% to 56.2%, are from three (2011) to ten times (2010) more likely to experience fatalities than direct employees.

30. *See supra* note 5.

31. 12ª VARA DO TRABALHO DE GUARULHOS, ACP 1001176-34.2014.5.02.0322, 15.05.2015, *available at* http://www.jusbrasil.com.br/diarios/95169643/trt-2-judiciario-02-07-2015-pg-1355, (last visited July 10, 2015) (Braz.).

32. WEIL, *supra* note 1, at 105 & 111.

Table 1: Labor Force Distribution and Fatalities in the Brazilian Electric Sector[33]

Year	Employees		Subcontracted	
	Total	Fatalities	Total	Fatalities
2002	96,741	23	-	55
2003	97,399	14	39,649	66
2004	96,591	9	76,972	52
2005	97,991	18	89,283	57
2006	101,105	19	110,871	74
2007	103,672	12	112,068	59
2008	101,451	15	126,333	60
2009	102,766	4	123,704	63
2010	104,857	7	127,584	72
2011	108,125	18	139,043	61

Job quality has also to do with wages, working hours and employment stability. As Table 2 shows, on average, workers affected by *terceirização* practices earn 24.7% less, work 7.5% more hours on a weekly basis, and have 53.5% less job tenure than direct employees. In sum, job quality is worsened by *terceirização* because it divides the labor market into core employees and subcontracted workers. Extending *terceirização* possibilities to all labor activities will result in a reduction in labor rights and in labor market deterioration. Indeed, even if this divide incorporates a simplified opposition on qualified (core employment) versus nonqualified work (*terceirização*), what it really establishes is an "in" and "out" logic that brings social exclusion to the order of day.[34] If the debate is no longer about how to maintain stable, long-lasting jobs that characterized Fordist times, which may be witnessing their last days, it most certainly is about how work contributes to economic development and income distribution and what can be done to improve everyone's societal conditions.

33. Luis Geraldo Gomes da Silva, *Os acidentes fatais entre os trabalhadores contratados e subcontratados do setor elétrico brasileiro*, 12 Estudos do Trabalho (2013), *available at* http://www.estudosdotrabalho.org/RRET12_2.pdf (Braz.); *see* 2010 REPORT STATISTICAL ON ACCIDENTS IN THE BRAZILIAN ELECTRIC ENERGY SECTOR, *available at* www.funcoge.org.br/csst//relat2010/index_en.html (last visited July 10, 2015).

34. Roberto Fragale Filho, *Celebrating Twenty-Five Years and Speculating over the Future from a Brazilian Perspective*, 25 COMP. LAB. L. & POL'Y J. 21 (2003).

Table 2: Working Conditions and Terceirização[35]

Working conditions	End-users	Services providers	Difference
Medium wage	R$ 2,361.15	R$ 1,776.78	-24.7%
Weekly working hours	40	43	+7.5%
Length of employment	5,8 years	2,7 years	-53.5%

Brazil is engaged in a debate about how work enhances citizenship. CLT was a powerful tool for such strengthening worker citizenship throughout the second part of the past century.[36] Despite the Brazilian business world's continuous demands for greater flexibility in labor relations, Brazilian citizenship was enriched through labor and social rights. *Terceirização*, by foregrounds the economic aspect without taking cognizance of its consequences, threatens to eliminate much of the gains in job quality currently secured.

IV. CONCLUSION

Precarious labor has been part of the Brazilian labor market long before the fissuring fragmented scenario became the new workplace reality described in David Weil's book. Change to the old scenario was basically brought up by law and resistance to the new circumstances found a privileged locus on labor courts. From a legal perspective, labor rights advocacy has always insisted on the positive effect brought up by legislation enhancing workers' rights. Also, collective bargaining was necessarily done in order to improve working conditions, rendering null and void any clause suppressing or retarding labor rights. Brazilian legal culture believes in the law's transformative potential and most of the time, it struggles for better legislation. Whenever attempts were made to alter that scenario the labor courts became a source of resistance.

Terceirização has blurred all of this. At first, it became a workplace reality, acknowledged by labor courts, but which also established its limits. Indeed, in an innovative approach, the courts established a distinction between activities-end and activities-means and a subsidiary liability that, howsoever blurred, has been a cornerstone for the last two decades. But this legal frame has been unceasingly criticized and is now under STF scrutiny as well as under legislative debate. Although it is uncertain if Proposition

35. SECRETARIA NACIONAL DE RELAÇÕES DE TRABALHO e DEPARTAMENTO INTERSINDICAL DE ESTATÍSTICA E ESTUDOS SOCIOECONÔMICOS (DIEESE), TERCEIRIZAÇÃO E DESENVOLVIMENTO: UMA CONTA QUE NÃO FECHA. DOSSIÊ ACERCA DO IMPACTO DA TERCEIRIZAÇÃO SOBRE OS TRABALHADORES E PROPOSTAS PARA GARANTIR A IGUALDADE DE DIREITOS (2014), *available at* www.cut.org.br/system/uploads/ck/files/Dossie-Terceirizacao-e-Desenvolvimentolayout.pdf (last visted Aug. 10, 2015).

36. JOHN D. FRENCH, DROWNING IN LAWS: LABOR LAW AND BRAZILIAN POLITICAL CULTURE (2004).

Bill n. 30/2015 (as Bill Proposition n. 4,330/2004 has been renumbered at the Brazilian Senate) will become the future legal framework for *terceirização* in Brazil, it seems that a part of the debate is missing: the discussion over job quality and how it is reshaped by *terceirização*. Is it just a matter of defining who the employer is or who the employee is and who should be responsible for what or is it a matter of discussing what kind of labor market is suitable for the country? Fissuring in the United States and *terceirização* in Brazil are one and the same in their ability to render work bad for so many. In order to improve it, David Weil's book proposes to rethink responsibility and enforcement. The Brazilian debate does not seem to follow the same path as it has chosen resistance as its first option. Resistance is done through the labor courts and nowadays through the legislative process. If the latter fails, hope may still lies in the labor courts as, at the bottom line, it will be their task to interpret the law. To sum up, in the Brazilian context, it all started in labor courts and it looks like it will get back to them sooner or later.