RESOLVING DISPUTES OVER EMPLOYMENT RIGHTS IN BRAZIL

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Social rights are at the core of Brazilian citizenship.[1] Of course, civil and political rights also constitute an important dimension of citizenship,[2] and this is not different in the Brazilian context. Yet, although the electoral body has grown over the years and is now composed of almost 141 million voters, the building of a democratic society in which equal opportunity is available to everyone remains a challenge for the country. Likewise, the question of property remains as an overwhelming defy for civil rights. As Brazilian citizenship has thus strongly relied on social rights for its development, labor rights gained an important prominence which may be acknowledged by the *Consolidação das Leis do Trabalho* (CLT) (labor code)'s perennity.

Since its edition in 1943, Brazil has undergone an authoritarian military period (1964–1985) and has known three different constitutions (1946, 1967, and 1988), the last one being a symbol of the country's re-democratization. As if it were immune to all these transformations, the labor code has resisted and remained almost unchanged. Even more, whenever talks about its need to be reformed and adapted to the 's new economic circumstances arise, especially forwarding the urge of according preference to parties' negotiations over legislative settings, resistance steps up and blocks the debate.[3] Still, such preference for a legislative approach does not eliminate the quest for social rights' effectiveness.[4] Engraving

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1. WANDERLEY GUILHERME DOS SANTOS, CIDADANIA E JUSTIÇA: A POLÍTICA SOCIAL NA ORDEM BRASILEIRA [CITIZENSHIP AND JUSTICE: SOCIAL POLICY IN BRAZILIAN ORDER] (1979) (Braz.); JOSÉ MURILO DE CARVALHO, CIDADANIA NO BRASIL: O LONGO CAMINHO [CITIZENSHIP IN BRAZIL: THE LONG ROAD] (2001) (Braz.).

2. *See* THOMAS HUMPHREY MARSHALL, CIDADANIA, CLASSE SOCIAL E STATUS [CITIZENSHIP AND SOCIAL CLASS] (1967) (Braz.).

3. SENADO FEDERAL [FEDERAL SENATE], *Entidades repudiam acordo coletivo como base das relações trabalhistas [Entities Repudiate the Collective Bargaining Agreement As the Basis for Labor Relations]*, http://www12.senado.gov.br/noticias/materias/2012/11/22/entidades-repudiam-acordo-coletivo-como-base-das-relacoes-trabalhistas (last visited Nov. 28, 2012) (Braz).

4. Roberto Fragale Filho, *Cidadania & Trabalho: fios de uma mesma fibra, constitucional? [Citizenship and Labor: Threads from the Same (Constitutional) Fiber?]*, *in* CONSTITUCIONALIZANDO

social (and labor) rights in the constitution (as well as in the labor code) is not enough to inscribe them in the workplace, which remains an extremely conflictive space. Labor courts therefore have an important role for implementing labor rights whose previous inscription in statute seems insufficient to make them effective. This Article explains this process of stipulating labor rights and implementing (or circumventing) them through the judicial system, particularly the labor courts.

I. SOURCE OF EMPLOYMENT RIGHTS IN BRAZIL

Though Brazilian labor regulation does not have a specific statute that sets minimum employment conditions, it nevertheless is all about statutes. As it has already been said, Brazilian labor world is drowning in laws.[5] Still, this does not mean that parties are not allowed to negotiate labor rights. However, it does mean that they cannot disregard the minimum standards set out by the law. As it is, once one thinks of the sources for employment rights in Brazil, one has to look at different statutes and collective bargaining.

A. Statute

Labor regulation spreads from the constitution to administrative ordinances issued by the Labor Ministry and it includes the labor code and several federal acts. It is a real normative labyrinth whose extension continuously grows due to an incredible legislative inflation.[6] As it is almost impossible to sum up this wide legal scenario, one might concentrate the examination to the two pillars of labor regulation: the constitution and the labor code (CLT).

1. The Constitution

Constitutionalizing social rights is not something particular to Brazil. Indeed, many constitutions deal with labor rights "often in language that is merely symbolic or evocative."[7] Yet, Brazilian constitutionalization of labor rights is extremely prescriptive. At first, it establishes that Brazil's employment laws can only be issued by federal authority. Among other rights, the constitution protects employment relationship against unfair

DIREITOS: 15 ANOS DA CONSTITUIÇÃO BRASILEIRA DE 1988 [CONSTITUTIONALIZING RIGHTS: 15 YEARS OF THE BRAZILIAN CONSTITUTION OF 1988], at 443–75 (Fernando Facury Scaff ed. 2001) (Braz.).

5. *See* JOHN FRENCH, DROWNING IN LAWS: LABOR LAW AND BRAZILIAN POLITICAL CULTURE (2004).

6. *See* JOSÉ EDUARDO FARIA, DIREITO E CONJUNTURA [LAW AND JUNCTURE] (2009) (Braz.).

7. Harry W. Arthurs, *The Constitutionalization of Labour Rights* (York Univ., 2009), *available at* http://ssrn.com/abstract=1531326; Harry W. Arthurs, *The Constitutionalization of Labour Rights: What Bliss in this Dawn to be Alive* (York Univ., 2010), *available at* http://ssrn.com/abstract=1634902.

dismissal[8] and entitles every employee to a minimum wage,[9] a thirteenth salary at the end of year,[10] payment for overtime hours of at least 50% more than the normal working hours,[11] annual vacation with an additional payment of one third of the employee's normal salary,[12] maternity leave for 120 days without employment and salary prejudice,[13] and a minimum thirty day delay for dismissal.[14] It also caps working hours at eight per day and forty-four per week.[15] Every employee is entitled to an individual *Fundo de Garantia de Tempo de Serviço*, or Time Service Guarantee Fund (FGTS), account to which the employer is required to contribute with a monthly deposit equivalent to 8% of the employee salary.[16]

Once the employee is dismissed, the employer is required to make an additional deposit equivalent to 40% of all deposits previously made, and the employee is allowed to withdraw all the savings from his FGTS account.[17] The employee is also entitled to unemployment insurance[18] that may last from three to six months according to the duration of his or her previous labor contract. However, if termination is due by "just cause" (e.g., employee's serious misconduct), none of these three benefits—additional employer's deposit, FGTS account withdrawal, and unemployment insurance—are available. A temporary job guarantee is entitled to union leaders from the time they present their candidacy until one year after their term if they are elected,[19] to pregnant women from the time of conception until five months after the birth,[20] and to victims of work accidents from the accident until one year after their full recovery as attested by the Social Security services.[21]

As this nonexhaustive inventory demonstrates Brazil has inscribed some of its labor rights in the constitution in a very prescriptive way. It thus establishes a minimum standard for labor relations that cannot be ignored by the parties as they negotiate either on an individual or on collective bases. Yet as most of these rights were already inscribed in the labor code, one may wonder why were they constitutionalized? A possible

8. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 7, I (Braz.).
9. *Id.* art. 7, IV.
10. *Id.* art. 7, VIII.
11. *Id.* art. 7, XVI.
12. *Id.* art. 7, XVII.
13. *Id.* art. 7, XVIII.
14. *Id.* art. 7, XXI.
15. *Id.* art. 7, XIII.
16. *Id.* art. 7, III.
17. Constitutional Transitory Dispositions Act, art,10, I (1988) (Braz.).
18. C.F., art. 7, II.
19. *Id.* art. 8, VIII.
20. Constitutional Transitory Dispositions Act, art. 10, II.b.
21. Federal Act 8,213, July 7, 1991, art. 118 (1991), *available at* http://www.planalto.gov.br/ccivil_03/leis/l8213cons.htm (Braz.).

answer stipulates that the drafting of the constitution (1986–1988) was guided by mistrust toward the State and each and every one who took part in its writing tried to fit in whatever rights one assumed could be jeopardized later. Because amending the constitution is extremely difficult, it became an insurance policy against the future. A more positive approach may argue that it all has to do with Brazilian legal consciousness (which assumes the law as a powerful tool inducing societal change) and its desire to enhance citizenship as the country was putting behind the military-authoritarian period and heading toward a new democratic scenario. In other words, inscribing social rights in the constitution would strength citizens' rights and help to consolidate Brazil's recent democracy. Although some complementarity might be found in these two perspectives, a juridical approach would more likely neglect them and turn its focus to the legal changes arguing that the constitutionalization of labor rights evidences a major shift toward treating labor rights as fundamental rights.[22]

As a matter of fact, at first sight, there is at least a topographical change in the 1988 constitution as labor rights were no longer among the articles dealing with the social and economic order but were transferred to the fundamental rights chapter of the new constitutional text. Inference from such a change may suggest that their normative strengthening was a legitimate desire of the constitution writers. Still, such change has remained "more formal than substantive, more political than juridical, more symbolic than normative"[23] as most of its prescriptions were emptied by the requirement of future regulation. Indeed, although extremely prescriptive most of the labor rights inscribed in the 1988 constitution were paradoxically interpreted as requiring further regulation. Thus, even though strengthened by the constitution, the labor code would remain as the main important statute for labor regulation.

2. The Labor Code

CLT dates back to 1943 and remains valid in every aspect that is not contrary to the constitutional regulation. Back in the 1940s, João Dirceu Mota, founder and president of the construction workers union of Quaraí in the State of Rio Grande do Sul, used to refer to it as "this is my bible." He used to wander around carrying his CLT booklet as a rampart to employers' abuses, suggesting that all dos and don'ts of the execution of a labor contract would be inscribed in it. Exploring workers' legal consciousness,

22. Fábio Rodrigues Gomes, *Ensaio Jurídico Sobre Direito do Trabalho [Legal Essay About Employment Law]* (2008), *available at* http://www.trt1.jus.br/c/document_library/get_file?uuid=7e417cf2-f83d-4aa6-aba3-0d54ad4953a1&groupId=10157(last visited June 13, 2013) (Braz.).

23. *See id.*

French argues that they looked at it simultaneously as fraud and as hope.[24] Indeed, on one hand, reality on the working floor seemed not to correspond to what was inscribed into the law, while, on the other hand, the law prescriptions seemed to establish a desired scenario in which workers' rights would be fully respected. Thus labor law was not just a simple instrument of domination as ideological and institutional analysis usually point out but it was mobilized by workers to transform an ideal situation into a real setting. In other words, CLT reached the workers' imagination as the inevitable framework for a better circumstance on labor relations. Struggle for better working conditions would also be a quest for labor law effectiveness and so it remains despite of the new constitutional status of social rights.

CLT regulates all dimensions of labor in a rather homogenous perspective. General standards of labor protection[25] are established in title II that regulates professional identification, labor duration, minimum wages, vacations, and occupational health and safety (OHS) conditions. Brazil's Labor Ministry is further entitled to regulate the latest and has edited a series of thirty-five OHS statutes that standardize most of the working conditions on the matter, the latest being issued in March, 2012. Title III contains specific standards of labor protection[26] related to labor duration concerning more than a dozen of precise professions such as teachers, journalists, and chemists among others, to labor quotas for nationals, and to women and children's labor protection. Individual labor contracts are regulated in title IV that includes specific dispositions on work remuneration, contract suspension, interruption, and resolution, previous notice to dismissal and act of god.[27] Unions' organization, collective bargaining and administrative fines are regulated respectively in titles V,[28] VI,[29] and VII.[30] Title VI-A regulates the *Comissões de Conciliação Prévia* (Previous Conciliation Committees (CCP)).[31] *Justiça do Trabalho* (Labor Justice), which had been organized two years earlier (1941), is structured in title VIII[32] in three different levels: *Varas do Trabalho* (Trial Labor Courts (VT)),[33] *Tribunais Regionais do Trabalho* (Appellate Labor Courts (TRT)), and *Tribunal Superior do Trabalho* (Superior Labor Court (TST)).

24. FRENCH, *supra* note 5.
25. CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [LABOR CODE] title II, arts. 13–201 (Braz.).
26. *Id.* arts. 224–441.
27. *Id.* arts. 442–510.
28. *Id.* title V, arts. 511–610.
29. *Id.* title VI, arts. 611–25.
30. *Id.* title VII, arts. 626–42.
31. *Id.* title VI-A, arts. 625-A–H; *see infra* Part II.A.
32. *Id.* title VIII, arts. 643–735.
33. Originally organized as Conciliatory and Adjudicatory Tribunals with a tripartite composition, Brazilian first level of labor jurisdiction has been transformed since the Constitutional Amendment 24 in 1999 into a single professionalized judge jurisdiction known as Trial Labor Courts.

Ministério Público do Trabalho (Labor section of the Public Attorney's Office) is regulated in Title IX.[34] Finally, Title X establishes the rules for labor judicial procedures related either to individual and collective claims.[35]

This almost septuagenarian body of labor law remains a controversial one. Uncritically and mostly perceived as a "mythical gift" of authoritarian President Getúlio Vargas—despite of other also available interpretations[36]—discussions over its reform have been on the public and legislative agenda almost permanently. Back in the 1960s, the core of the debate was related to the stability system of employment protection that assured tenure for employees after ten years working for the same employer.[37] Then, during the military authoritarian period in the late 1970s, unions' organization became the central issue of dispute.[38] More recently, throughout of the 1990s, in tune with international debate, flexibility came to be the main question as opposed to CLT's rigidity.[39] As Luiz Inácio Lula da Silva, a former union leader in São Paulo, became Brazil's President in 2003, expectations over a new turn on this debate were at its highest point.[40] Yet, despite some fragmented and circumstantial changes, one may say that CLT succeed to resist to most of its reform attempts. It persists as the main framework regulating labor relations, and its dispositions might be enhanced through negotiation.

B. Negotiation

Employees and employers are free to negotiate either on an individual or collective basis, although they may not reduce labor standards set by the constitution and the CLT. Following Subsections explore both possibilities.

34. C.L.T., title IX, arts. 736–54.

35. *Id.* title X, arts. 763–910.

36. *See* ADALBERTO PARANHOS, O ROUBO DA FALA [THEFT OF SPEECH] (1999) (Braz.); LUIS WERNECK VIANNA, LIBERALISMO E SINDICATO NO BRASIL [LIBERALISM AND UNIONS IN BRAZIL] (1976) (Braz.).

37. *See* VERA LÚCIA FERRANTE, FGTS: IDEOLOGIA E REPRESSÃO [FGTS: IDEOLOGY AND REPRESSION] (1978) (Braz.).

38. *See* IRAM JÁCOME RODRIGUES, O NOVO SINDICALISMO: VINTE ANOS DEPOIS [THE NEW UNIONISM: TWENTY YEARS LATER] (1999) (Braz.).

39. *See* ADALBERTO MOREIRA CARDOSO, SINDICATOS, TRABALHADORES E A COQUELUCHE NEOLIBERAL: A ERA VARGAS ACABOU? [UNIONS, WORKERS, AND THE NEOLIBERAL FADDINESS: ISTHE VARGAS ERA OVER?] (1999) (Braz.); FLEXIBILIDADE DO MERCADO DE TRABALHO NO BRASIL [LABOR MARKET FLEXIBILITY IN BRAZIL] (José Márcio Camargo ed., 1999) (Braz.).

40. Roberto Fragale Filho, *Flexibilização e reforma da CLT: mais do mesmo? [Flexibility and Reform of CLT: More of the Same?]*, 10 REVISTA TRABALHISTA [LAB. REV.] 221, 221–32 (2004) (Braz.).

1. Employment Contract

A labor contract is a tacit or express agreement corresponding to the employment relationship.[41] Although it does not require a written form, it is supposed to be formally registered in the *Carteira de Trabalho e Previdência Social* (Employment and Social Security Record Booklet (CTPS)).[42] Actually, every modification in the employment contract is supposed to be written in the CTPS. Yet, the absence of such formality does not invalidate the existence of a contract nor its posterior changes whenever they are not prejudicial to the employee.[43] Employment contracts are usually signed for undetermined duration although an experimental period of ninety days is possible.[44] If they are for a determined length of time, such contracts may not exceed two years.[45] A thirty day notice is required for dismissal during the first year of the employment contract if it does not have a fixed term or if dismissal is the consequence of the experimental period's end. For every completed year of work, three more days have to be added to the notice delay.[46] Notice, however, is not required in the case of employee's serious misconduct, which is exhaustively defined by CLT.[47]

Employers and employees can freely stipulate labor conditions as long as they do not overlap labor protection dispositions, applicable collective agreement clauses and authorities' decisions.[48] In other words, parties engaged in an employment contract can freely negotiate its dispositions even in an individual basis but such negotiation is limited, on the one hand, by statute, especially those generally related to labor protection, and, on the other hand, by the collective agreement clauses of the correspondent economic category.[49] As pointed out by TST in a leading case in the begging of the 1980s, "free contracting does not overlap, ever, workers

41. CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [LABOR CODE] arts. 442 & 443 (Braz.).
42. *Id.* arts. 13 & 29.
43. *Id.* art. 9; *Supremo Tribunal Federal* [Brazilian Supreme Court], *Summula* 225 and TST, *Summula* 12. 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* that was introduced by the Constitutional Amendment 45 (2004) (Braz.) and can only be issued by STF. *See* SUPREMO TRIBUNAL FEDERAL [BRAZILIAN SUPREME COURT], *Summula ("Súmula")*, http://www2.stf.jus.br/portalStfInter nacional/cms/verGlossario.php?sigla= portalStfGlossario_en_us& &indice=S&verbete=196031 (last visited June 13, 2013).
44. C.L.T., art. 445.
45. *Id.* art. 445.
46. *Id.* art. 487.
47. *Id.* art. 482.
48. *Id.* art. 444.
49. *See infra* Part I.B.2.

protection's provisions."[50] There is thus only room for improvement of the basic minimum labor conditions.

Discussing labor contract clauses throughout a hiring process is nonetheless extremely difficult for future employees as their job-seeker status often places them in a fragile position. Can they freely express their will in such circumstances? The question was posed to the courts in relation to two different facts: (1) the prearrangement to work two extra hours daily, and (2) the subscription to health insurance provided for the employer. The invalidity of the former has been explicitly established for bank employees by TST, whose decisions extend the prohibition to other professions.[51] On the other hand, the latter has been considered valid unless the occurrence of coercion or any other vice is demonstrated by the employee.[52] Briefly, as negotiation during the signing of a labor contract is scarce, one should look at collective agreements to better examine the importance of negotiation as a source of labor rights.

2. Collective Convention and Collective Agreement

Brazil has a unique situation for trade unionism and collective bargaining. Employers' and employees' unions are respectively established based on an economical or professional bases.[53] Thus, for example, collective bargaining in the civil construction area is done between the Civil Construction Industry Union and the Workers in the Civil Construction Union. Formerly, unions were required to have State approval before coming to existence. After the 1988 constitution, State approval is no longer required. Still, the constitution maintained the "unicity" principle, which allows the sole existence of one single union for each economical or professional category in a given territorial basis that cannot be inferior to a municipality.[54] Unions are allowed to regroup themselves and create a confederation. As requirements for the establishment of a confederation, they must: (1) reunite at least 100 unions from the five different Brazilian regions with a minimum of twenty unions in three different Brazilian regions, (2) cover five different economic sectors, and (3) represent at least 7% of all unionized workers in the country.[55] Nowadays, there are five union confederations in the country that play an important role in Brazilian

50. *See* TST, E-RR 2.530/1979, Coqueijo Costa, Ac. TP 2.129/1983, *in* VALENTIN CARRION, COMENTÁRIOS À CONSOLIDAÇÃO DAS LEIS DO TRABALHO 329 (36th ed. 2011) (Braz.).

51. TST, *Summula* 199.

52. *Id.* at 342.

53. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 8, II (Braz.); C.L.T. art. 511.

54. *See supra* note 52.

55. Federal Act 11,648, Mar. 31, 2008, art. 2 (2008), *available at* http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2008/Lei/L11648.htm (Braz.).

politics.[56] Union density is around 18%[57] and regardless of being unionized every employee is required to pay an annual union tax equivalent to one day of work.[58] This peculiar scenario allows unions to exist despite of their legitimacy and creates extremely difficult requirements for the making of a confederation.

Employers cannot be forced to bargain. Still, since collective bargaining may happen between unions that represent economical and professional categories entirely, a collective convention reached through this manner will be enforceable to all labor contracts in their respective economical and professional category, regardless of the employers and the employees' desires.[59] Unions may also negotiate with single companies and, in such case, establish collective agreements whose dispositions will apply to all labor contracts of the particular company.[60] Collective agreements are valid for a maximum period of two years when they have to be renegotiated.[61] In any situation, once bargaining is initiated, all concerned must negotiate in good faith, though there is no obligation to bargain to conclusion. Briefly, labor conditions are primarily defined by statute and collective bargaining is mostly used to enhance employees' rights. Therefore collective bargaining cannot result in labor rights' reduction or go against statute dispositions.

An inflated legislation that spreads out minimum labor standards all over and inscribes a core of social rights in the constitution and still leaves a gigantic window of possibilities for collective bargaining as long as it does not imply in retrocession from statutory workers' protection: this might as

56. The five confederations officially recognized in 2012 were *Central Única dos Trabalhadores* (CUT), *Força Sindical* (FS), *União Geral dos Trabalhadores* (UGT), *Central de Trabalhadores e Trabalhadoras do Brasil* (CTB), and *Nova Central Sindical dos Trabalhadores* (NCST). Their representation of unionized workers was respectively of 36.7%, 13.7%, 11.3%, 9.2%, and 8.1%. Due to a downfall in its representation numbers the *Central Geral dos Trabalhadores do Brasil* (CGTB) lost its official recognition. *See* MINISTÉRIO DO TRABALHO E EMPREGO [MINISTRY OF LABOR AND EMPLOYMENT], *MTE divulga índice de representatividade das Centrais Sindicais [MTE Releases Index Representativeness of Labor Confederations]*, http://portal.mte.gov.br/imprensa/mte-divulga-indice-de-representatividade-das-centrais-sindicais.htm (last visited June 13, 2013) (Braz.); CONFEDERAÇÃO NACIONAL DOS TRABALHADORES EM TRANSPORTES TERRESTRES [NATIONAL CONFEDERATION OF WORKERS IN TERRESTRIAL TRANSPORTATION], *Cai o número de centrais sindicais reconhecidas pelo governo [The Number of Labor Confederations Recognized by the Government Falls]*, http://www.cnttt.org.br/subdestaque/cai-o-numero-de-centrais-sindicais-reconhecidas-pelo-governo (last visited June 13, 2013) (Braz.).

57. The last numbers available are for 2008 and 2009 and they were, respectively, of 18.2% and 17.7%. *See supra* note 55; INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA [BRAZILLIAN INSTITUTE OF GEOGRAPHY AND STATISTICS], *PNAD 2009: rendimento e número de trabalhadores com carteira assinada sobem e desocupação aumenta [PNAD 2009: Income and Number of Formal Workers Rise and Unemployment Increases]*, http://www.ibge.gov.br/home/presidencia/noticias/noticia_visualiza.php?id_noticia=1708 (last visited June 13, 2012) (Braz.).

58. C.L.T., art. 580, I.

59. *Id.* art. 611.

60. *Id.* art. 611, § 1º.

61. *Id.* art. 614, § 3º.

well be a good summary for the Brazilian labor law scenario, which seems to be a very good one. Who could ask for more? Yet, statistics indicate that the Brazilian labor world is extremely conflictive. Employees and employers often disagree and extensively use the labor justice system, a privileged space for labor dispute resolution, as Part II explores below.

II. AN EVOLVING APPROACH TO DISPUTE RESOLUTION

A foreign observer will most certainly be astonished by the Brazilian labor disputes statistics because they reveal that 1,097 out of every 100,000 inhabitants filed a new complaint at the VTs in 2011.[62] As a consequence, by the end of the same year, VTs were still dealing with 1,109,080 unsettled cases and had 2,874,695 settled cases whose decisions were still pending to be enforced.[63] Labor judges were thus averaging a workload of 2,471.69 cases per year.[64] How can such an overloaded labor justice system work comprehensively is a natural question that would be asked by the foreign observer. As the answer would definitely not be a simple one, this following Section introduces the reader into the Brazilian system providing the minimum information for a general grasp of its functioning.

A. The Judicial System

The Brazilian labor court system has jurisdiction over any and all lawsuits regarding work relationships (Figure 1 below).[65] It is completely separated from the Federal and State court systems and has three levels. There may be a forth level of jurisdiction if a lawsuit touches constitutional matters, because, in this case, it can go up to the STF that works as a constitutional court. TST is composed by twenty-seven members and is the highest jurisdiction in the labor court system.[66] There are twenty-four

62. *See* TRIBUNAL SUPERIOR DO TRABALHO [SUPERIOR COURT OF LABOR], CONSOLIDAÇÃO ESTATÍSTICA DA JUSTIÇA DO TRABALHO: RELATÓRIO ANALÍTICO 2011 [STATISTICAL CONSOLIDATION OF LABOR JUSTICE: ANALYTICAL REPORT 2011], http://www.tst.jus.br/documents/10157/54de5978-1794-4632-bf9a-fb494ea5f306 (last visited June 13, 2013) (Braz.).

63. The settled cases whose decisions are considered to be still unenforced correspond to the sum of pending executions (2,118,325) and executions that have come to a dead-end and were archived in a precarious and temporary basis (756,370). *See supra* note 61.

64. TST statistical rapport for 2011 shows some inconsistencies for the average workload figure which is presented on its table 3.7.1. Nonetheless, at first, it is written that the workload for the year per judge was of 2,509 cases. Besides that, as criteria for fulfilling the table was changed, the 2010 numbers are different from the previous rapport. *See* TRIBUNAL SUPERIOR DO TRABALHO [SUPERIOR COURT OF LABOR], CONSOLIDAÇÃO ESTATÍSTICA DA JUSTIÇA DO TRABALHO: RELATÓRIO ANALÍTICO 2010 [STATISTICAL CONSOLIDATION OF LABOR JUSTICE: ANALYTICAL REPORT 2010], http://www.tst.jus.br/documents/10157/076a9706-4a95-4679-b649-d9ea99d02bce (last visited June 13, 2013) (Braz.); *supra* note 61.

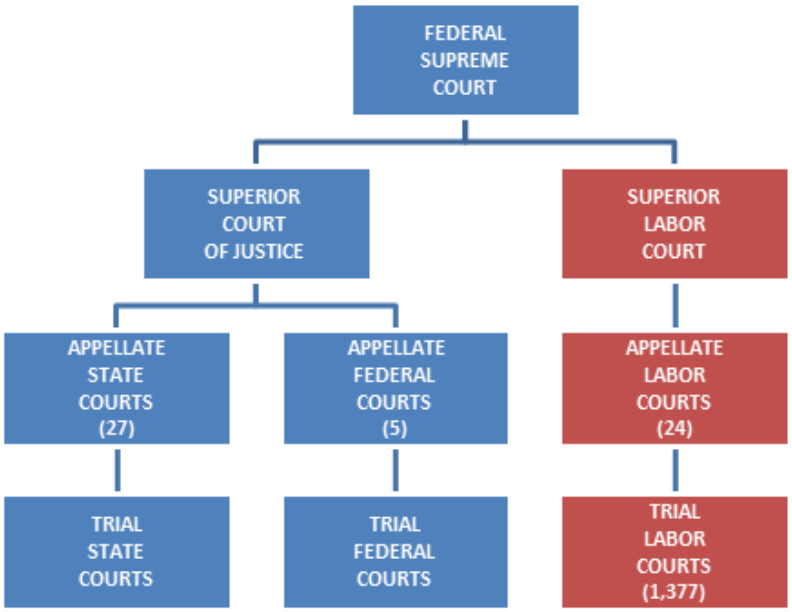
65. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 114 (Braz.).

66. *Id.* art. 111-A.

TRTs whose compositions vary from a minimum of eight[67] (as it is the case for the TRTs in the States of Acre and Rondônia, Alagoas, Maranhão, Mato Grosso do Sul, Mato Grosso, Piauí, and Sergipe) to ninety-four members (which is the case for the TRT in the State of São Paulo).

Although there should be 554 appellate judges in total, there is an actual shortage of seventy appellate judges as such positions have not been yet filled. As for the lowest labor jurisdiction, there are 1,413 VTs around the country. There should be 3,286 judges in function. Still, due to a lack of new appointed members, there is an actual shortage of 507 judges. The impressive numbers of the labor judicial system workload can be explained, as already mentioned above, by its complete jurisdiction over all labor claims. Although averaging 2,471.69 cases per labor judge, the workload is not homogeneously distributed among them. As a matter of fact, while labor judges from the VTs average 2,452.24 cases on a yearly basis, the twenty-seven TST members must cope with 15,857.29 cases in the same period. The workload is not totally inversely proportional as one goes up the jurisdictions because appellate judges "only" deal with 1,924,30 cases on a yearly basis.[68]

Figure 1: Brazilian Judicial System



67. Although the constitution sets the minimum in seven members, none of the TRTs has less than eight members. *See* C.F., art. 115.

68. *See supra* note 61.

These numbers explain why the TST backed up the legislative reform introducing CCPs in the Brazilian labor world.[69] These committees are nonjudicial structures that could be put into place by companies and unions to solve—in a nonjudicial way—individual labor disputes.[70] In companies, they could have from two to ten members, one half appointed by the employer and other half elected by employees, all of them for a term of one year, and a second term is allowed.[71] Whenever placed in unions, its composition and ways of proceeding should be established through collective convention or agreement.[72] Whenever a CCP was created, all labor cases in its jurisdictional area were supposed to be previously submitted to it in a conciliatory attempt before being filled in the judicial system.[73] Also, in a case of reconciliation, the dispute could no longer be renewed on the judicial system.[74] Obviously, such dispositions, if implemented, could result in a reduction of the judicial labor system workload. But, thirteen years later, the outcome was not as expected.

Different factors contributed to CCP's actual almost virtual existence: on the one hand, a legal culture—from judges to lawyers including workers—extremely resistant to nonjudicial solutions and, on the other hand, a 2009 STF provisory ruling establishing that the mandatory nonjudicial conciliatory attempt was unconstitutional.[75] Thus, although its existence is still formally foreseen by the law, as the CCP pre-judicial stage was recognized as optional, and its conciliation efforts were mitigated by the judicial system, the few remaining committees were completely emptied of their meaning. In other words, a formal representation of the Brazilian labor court system would be pictured, as shown in Figure 2 below, even though the first stage (CCPs) is almost nonexistent and the last level (STF) is exceptional, reserved to constitutional matters related to labor disputes.[76]

Actually, not just the effort to lessen the labor courts workload through the CCPs failed, but also new disputes were brought to them as their competence was expanded by EC 45/2004 to include matters related to

69. Federal Act 9,958, Jan. 12, 2000 (2000), *available at* http://www.planalto.gov.br/ccivil_03/leis/l9958.htm (Braz.); *see supra* note 30.

70. CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [LABOR CODE] art. 625-A (Braz.).

71. *Id.* art. 625-B.

72. *Id.* art. 625-C.

73. *Id.* art. 625-D.

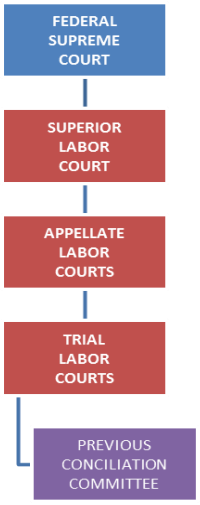
74. *Id.* art. 625-E.

75. Although two *Ações Diretas de Inconstitucionalidade* (Unconstitutional Direct Actions (ADI)) were filed a few months after the Act's promulgation, STF took nine years to issue a provisory exam establishing that the mandatory nonjudicial conciliatory attempt was a denial of access to the judicial system and therefore should not implemented as a necessary stop over before going to court. Three years later, a definitive exam is still pending. *See* SUPREMO TRIBUNAL FEDERAL [BRAZILIAN SUPREME COURT], ADI 2,139 MC/DF and 2,160 MC/DF, http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?id=604545 (last visited June 13, 2013) (Braz.).

76. Roberto Fragale Filho, *Employment Litigation on the Rise? A Brazilian Perspective*, 22 COMP. LAB. L. & POL'Y J. 284 (2002).

strikes, unions' disputes, moral damages compensations, and labor accidents.[77] Clearly, such amendment intended to extend labor courts competence to include all different dimensions of the labor world and no longer limit it to the narrow sphere of formal employment as characterized by CLT. Indeed, in the previous constitutional writing labor courts had the competence to "conciliate and decide individual and collective disputes between workers and employers," while after EC 45/2004 the writing formula for its competence was changed to establish that it is up to labor courts to "process and decide claims arising from work relations."

Figure 2: Brazilian Labor Court System



The formula is much broader and brought up two judicial controversies as to what would therefore be submitted to labor courts: (1) disputes over services fees should be conceived as a part of a work relation (and therefore be examined and decided by labor courts) or as a consumer's conflict (and consequently be examined and decided by State courts)? And (2) labor courts' increase of competence was up to include public servants or they were to remain under Federal and State jurisdictions? As both controversies touch constitutional matters, they will only be settled after being examined by the STF. As for now, only the latter has been directly scrutinized by the STF, and its answer concluded that EC 45/2004 did not change the previous competences on the matter.[78] The former has been

77. *See supra* notes 42 & 64.

78. *See* SUPREMO TRIBUNAL FEDERAL [BRAZILIAN SUPREME COURT], ADI 3,395 MC/DF, http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?id=390700 (last visited June 13, 2013) (Braz.).

examined on a case-to-case basis and so far has indicated that nothing did change on the matter either.

On the other matters in which the new labor courts' competence did not become controversial, two important questions arose: (1) were the specificities of the labor courts' procedures to be applied to all new cases, especially the ones related to labor accidents, or were the courts supposed to adapt themselves to the civil procedure that used to be previously applied to such cases? And (2) the statute of limitations to be applied to such cases should be the one stipulated by the CLT or by the 2002 Brazilian civil code (CC)? Both questions have being decided on a case-to-case basis by TST in favor of the prevalence of the labor courts' traditions. Thus, claims based on the new competence were to adapt to labor courts' proceedings and were submitted to labor ruling on the statute of limitations, which is set in five years limited to two years after the end of the labor contract.[79] Yet, a transition rule was to be followed in the case of labor accidents: accidents prior to the 2002 CC were to be examined under the 1916 CC rules and for those that took place in between the 2002 CC and EC 45/2004, statute of limitations should be of three years, as it was stipulated by the 2002 CC.[80]

These additional competences did not, however, ended up in a statistical workload growth due to a general effort from the entire judicial system coordinated by the *Conselho Nacional de Justiça* (National Council of Justice (CNJ)) to reduce judicial time length and to mitigate the stock of pending cases all through conciliation.[81] It is odd that the same judicial body that once resisted to a nonjudicial conciliatory effort is now promoting a conciliatory wave in the assumption that its judicial character may somehow be a better qualification for its results. Yet, there is a lack of empirical evidence that such it is the case.

Labor courts and their judges are thus extremely specialized in the labor and employment law field. Actually, labor judges are professionalized and appointed through a public contest of several exams specifically done for the labor judicial system. Accordingly, constitution guarantees to adjudicators a lifelong and irremovable post and the irreducibility of their salaries in order to assure that judges will not suffer any outside pressure and, therefore, will fulfill their duties with the proper

79. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 7, XXIX (Braz.); CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [LABOR CODE] art. 11 (Braz.).

80. *See* TRIBUNAL SUPERIOR DO TRABALHO, *SDI-1 define prazo de prescrição para propor ação de indenização [SDI-1 Defines the Statute of Limitation Length to Bring an Action for Damages]*, http://ext02.tst.gov.br/pls/no01/NO_NOTICIASNOVO.Exibe_Noticia?p_cod_area_noticia=ASCS&p_cod _noticia=11332 (last visited June 13, 2013) (Braz.).

81. Since 2006, CNJ promotes a conciliatory week every year in order to promote conciliatory spirit among judges and litigators. Later, it created a national judicial policy of conciliation—CNJ, Resolução [Resolution] 125 (CNJ, 2010)—incentivizing courts to create mechanisms that favor conciliation.

impartiality and independence.[82] On the other hand, the Brazilian *Código de Processo Civil* (Civil Procedure Code (CPC)) expressly establishes that judges must be impartial during the conduction of the proceedings as well as in their decisions.[83] In the same way, the *Código de Ética da Magistratura* (Judge's Ethics Code (CEM)) states that it is an obligation of the adjudicator to be impartial and independent.[84] Judges have the liberty to freely conduct the proceedings in order to find the real truth of the facts.[85] As a consequence of such freedom of action that favors judicial activism, adjudicators' impartiality, and independence have been highly discussed.[86] Even though Brazilian labor judges are far from being portrayed as it was before the case for French "red judges,"[87] it is fairly common to have them characterized as "pro-worker" or "pro-employer" judges.[88] As such labels may come despite of their efforts, the challenge remains in securing that the parties' right to due process and full defense is not jeopardized.

The role played by Brazilian labor courts is quite important as much of the labor world disputes are submitted to them. Labor judges have to deal with an extremely complex set of rules that are mostly State based.[89] Collective bargaining may improve work conditions but cannot lower public regulation. Congress is thus an important actor of such system and judicial deference, a necessary corollary. Yet, labor courts, especially TST and TRTs, have lots of room to maneuver when it comes to decide on collective labor disputes. Indeed, they are entitled to what is called *Poder*

82. C.F., art. 95.

83. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE], art. 125 (Braz.).

84. CÓDIGO DE ÉTICA DA MAGISTRATURA [C.E.M.] [JUDGE'S ETHICS CODE], arts. 1, 5, 8 & 9 (Braz.).

85. C.L.T., art. 765; C.P.C., art. 131.

86. *See* Luis Roberto Barroso, *Constituição, Democracia e Supremacia Judicial: Direito e Política no Brasil Contemporâneo [Constitution, Democracy, and Judicial Supremacy: Law and Politics in Contemporary Brazil]*, 21 REVISTA DE DIREITO DO ESTADO [J. STATE L.] 82–122 (2011) (Braz.); Luis Roberto Barroso, *Judicialização, Ativismo Judicial e Legitimidade Democrática [Judicialization, Judicial Activism, and Demoracatic Legitimacy]*, *in* CONSTITUIÇÃO & ATIVISMO JUDICIAL—LIMITES E POSSIBILIDADES DA NORMA CONSTITUCIONAL E DA DECISÃO JUDICIAL [CONSTITUTION & JUDICIAL ACTIVISM—LIMITS AND POSSIBILITIES OF CONSTITUTIONAL STANDARD AND JUDICIAL DECISION] 275–90 (Jacinto de Miranda Coutinho, Roberto Fragale Filho & Ronaldo Lobão eds. 2011) (Braz.).

87. *See* PIERRE CAM, LES PRUD'HOMMES: JUGES OU ARBITRES? [THE LABOR MAGISTRATES: JUDGES OR ARBITRATORS?] (1981) (Fr.); Pierre Cam, *Juges rouges et droit du travail [Red Judges and Labor Law]*, 19 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES [ACTS SOC. SCI. RES.] 2 (1978) (Fr.), *available at* http://www.persee.fr/articleAsPDF/arss_0335-5322_1978_num_19_1_2584/article_ arss_ 0335-5322_1978_num_19_ 1_2584.pdf (Fr.).

88. *See* Regina de Moraes Morel, *Magistrados do Trabalho no Brasil: Entre a Tradição e a Mudança [Labor Magistrates in Brazil: Between Tradition and Change]*, 37 REVISTA ESTUDOS HISTÓRICOS [HIST. STUD. J.] 29 (2007), *available at* http://bibliotecadigital.fgv.br/ojs/index.php /reh/article/view/2253/1392 (Braz.); GABRIEL EIDELWEIN SILVEIRA, (DI)VISÕES DA MAGISTRATURA DO TRABALHO: ESTRUTURA E TRAJETÓRIAS [(DI)VISIONS OF THE LABOR JUDICIARY: STRUCTURE AND PATHS) (2008), *available at* https://www.repositorioceme.ufrgs.br/bitstream/handle/10183/15899/ 000693407.pdf?sequence=1 (Braz.).

89. *See supra* Part I.A.

Normativo (labor courts' normative powers) that allow them to establish new economic conditions for labor contracts of a given workers' category.[90] In other words, when negotiations for collective bargaining fail and both parties agree on going to court to settle their dispute, labor courts may decide, based on their normative powers, to create new working conditions. In such situations, it is no longer a matter of judicial deference because it becomes about making the law.

Labor courts hear and decide labor disputes and, eventually, in very specific circumstances, may create the law. May the source of the law be the constitution, statutes, administrative rules, judicial rules, collective agreements, individual agreements, or shop rules; everything related to labor disputes is decided by labor courts. There is no alternative body (outside the almost nonexistent CCPs) to compete for the prerogative to establish what is the adequate outcome for a labor conflict. Yet, due process establishes that its decisions are always subject to a double degree of jurisdiction. Consequently, appeals against VT's decisions, which are always taken by a single judge, may be addressed to the TRTs where they are examined by a panel of at least three judges. One of judges is supposed to propose the result of the appeal after reporting the case to the others. Parties are allowed to present oral arguments in court sessions after which the appellate judges deliberate on the result of the appeal. Such appeals may result in a reexamination either of facts and norms.

This is not the case for appeals from the TRT's to the TST. Indeed, in this case, appeals are limited to juridical aspects and can only be made if present one of three situations: (1) jurisprudential discrepancy due to different judicial interpretation of Federal Statute, (2) jurisprudential discrepancy due to different judicial interpretation of State Statute, collective agreement, normative decisions, or shop rules, and (3) literal violation of Federal Statute and/or constitution.[91] In extraordinary situations, appeals may go to the STF if there is a constitutional matter involved. Also, after the TRTs all appeals are decided on a collective basis. In all levels of jurisdiction, there is one odd appeal that is addressed to the same decision maker—it is the so-called *embargos de declaração* (motion for clarification), which may be used whenever a decision shows signs of obscurity, omission, or contradiction.[92] It is quite exceptional that it may result in the reversal of the decision appealed.

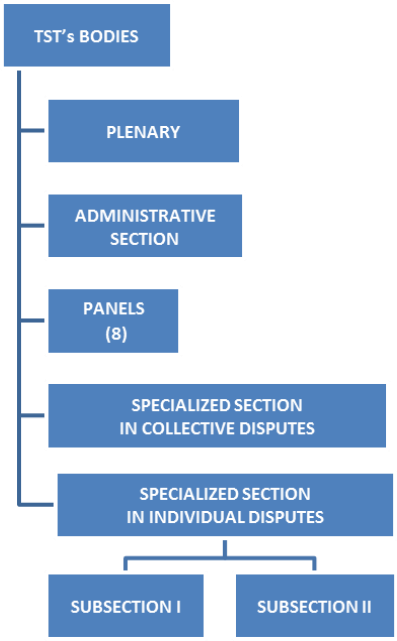
90. A DC might have economic and normative clauses. The former are the ones related to monetary aspects such as salaries raises while the latter establish new rules for the labor contracts in the economical category. For instance, creating a new job guarantee would be a typical normative clause. *See* VALENTIN CARRION, COMENTÁRIOS À CONSOLIDAÇÃO DAS LEIS DO TRABALHO [COMMENTS ON THE CONSOLIDATION OF LABOR LAWS] 802 (36th ed. 2011) (Braz.).

91. CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [LABOR CODE], art. 896 (Braz.).

92. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE], ARTS. 535–38 (Braz.).

The TST is a complex structure as shown in Figure 3 below.[93] Its plenary assembles all twenty-seven court members while only fourteen members take part in the administrative section. There are eight panels composed by three members. The court is also split in two specialized sections: one third of its members compose the section dedicated to collective disputes while the remaining two thirds are members of the section focused on individual disputes. This last section is divided in two subsections with equal number of members. The sections may review panels' decisions as well as the plenary does with their rulings. It is a very intricate structure that sets the precedents for the labor judicial system. Its decisions are consolidated in formal judicial statements that should guide lower courts.[94]

Figure 3: TST's Bodies



Actually, an important debate over judicial independence has arisen from the TST prolific production of judicial statements. As of now, if one includes all kinds of judicial statements edited by the TST they add up to almost a thousand.[95] How binding are they is an often-asked question,

93. *See* TRIBUNAL SUPERIOR DO TRABALHO [SUPERIOR LABOR COURT], *Sobre o Tribunal Superior do Trabalho [About Superior Labor Court]*, http://www.tst.jus.br/es/institucional (last visited June 13, 2013) (Braz.).

94. *See supra* note 42.

95. *See* TRIBUNAL SUPERIOR DO TRABALHO [SUPERIOR LABOR COURT], *Súmulas, Orientações Jurisprudenciais (Tribunal Pleno/Órgão Especial, SBDI-I, SBDI-I Transitória, SBDI-II e SDC), Precedentes Normativos [Precedents, Case Law—Regulatory Precedents]*, http://www.tst.jus.

especially in the argument over judicial discipline. In other words, are they mandatory for lower courts or should they be used as guidance for lower decisions? Even though they have been recognized as nonbinding, the quality of the work done by the lower courts is nowadays assessed by the frequency they comply with such judicial statements.[96]

As for alternative dispute resolution (ADR), parties are entitled to the use of arbitration to settle disputes over nondisposable rights.[97] Still, the use of arbitration to settle individual labor disputes is extremely scarce due to the strong reluctance of the courts to recognize labor rights as disposable ones and the absence of nongovernmental structures available to decide labor disputes apart from the CCPs. Thus, arbitration would most probably not be recognized by labor courts and decisions reached through such procedures would not be enforced in a labor court. These circumstances push away employers and employees from arbitration and encourage them to settle their disputes in the judicial arena. Alternatively, arbitration can be used to settle collective bargaining, as it is clearly allowed by the constitution.[98] Actually, in the event of a collective negotiation blockage parties may appeal to arbitration or to the labor courts (TRTs and TST). Here, arbitrators have a greater possibility of action, even though they cannot diminish State law standings. Decisions issued from arbitral proceedings have the same status as a judicial ruling and are to be enforced by the courts.[99] As mediation is even scarcer, labor disputes seem to be naturally driven to a labor justice that is still extremely resistant to arbitration.

B. The Litigation Morphology

Labor disputes arrive at the labor courts in two different types: (1) individual and (2) collective lawsuits. As for the latter, competence is defined by its kind. Basically, there are three different categories of collective lawsuits. The first two ones are *ação civil pública* (civic public actions (ACPu)) and *ação de cumprimento* (enforcement actions (AC)) and both can be filled at the VTs. Public labor prosecutors are the primarily entitled authors for the ACPu for the defense of diffuse, homogeneous, or collective interests while the AC may be filled by unions for the

br/documents/10157/63003/Livro-Jurisprud-26-11-2012-igual-IRem.pdf (last visited June 13, 2013) (Braz.).

96. CÓDIGO DE ÉTICA DA MAGISTRATURA [C.E.M.] [JUDGE'S ETHICS CODE], Resolução [Resolution] 106, art. 5, item "e" (Braz.).

97. Federal Act 9,307, Sept. 23, 1996, art. 1 (1996), *available at* http://www.planalto.gov.br/ccivil_03/leis/l9307.htm (Braz.).

98. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 114, § 10 (Braz.).

99. Federal Act, 9,307, art. 31.

enforcement of disrespected provisions of collective bargaining arrangements.

Dissídio coletivo (collective labor dispute (DC)) is a third category that deals with lawsuits resulting from unsuccessful negotiation of collective bargaining arrangements. Competence is established by the union's representative geographical area. For the national unions, claims should be addressed to the TST, while for the local and regional unions, the TRTs are the competent courts to hear such cases. As for the DCs, the law allows the parties to elect an arbitrator to decide the terms of the collective agreement. If any of the parties refuse to negotiate or to elect an arbitrator, both parties must agree on the filing of a DC, and the court can only rule on the economic clauses of the collective agreement.[100] On the other hand, the former must be originally addressed to the competent VT (which is established by the last place of work of the employee[101]), and they can follow either an ordinary or summary procedure, which is defined by the value of the claim. As a matter of fact, the former applies to all lawsuits whose value exceeds 27,120.00 *reais* ($13,311.08) as it equals to forty times the national minimum wage (678.00 *reais* or $332.78 as of January 2013).[102] All claims whose value does not add up to such amount must follow the summary procedure that is quicker because it establishes a much more informal and speedy trial.[103] Because the procedure is determined by the value of the claim, it does not matter if it is based on constitution, statutory law, administrative regulation, judicial rule, collective agreement, shop or work rule, or individual employment contract. In other words, the same procedure applies in all of the above situations regardless of the sources of law, rule, or standard. In all situations, plaintiff has to file a labor claim before a labor court.

Once one starts to look at litigation morphology, especially from the individual perspective, a wide variety of judicial claims can be identified. Grezzana and Ponczek[104] categorize sixteen different kinds of claims: (1)

100. *See supra* note 89.

101. CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [LABOR CODE], art. 651 (Braz.).

102. Federal Act 12,382, Feb. 28, 2011 (2011), *available at* http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Lei/L12382.htm (Braz.), and Federal Decree 7,872, Dec. 26, 2012 (2012), *available at* http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Decreto/D7872.htm (Braz.).

103. CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [LABOR CODE], arts. 852-A–I (Braz.).

104. *See* Stêfania Grezzana, *Viés de Gênero no Tribunal Superior do Trabalho Brasileiro [Gender Bias in the Brazilian Superior Labor Court]* (Master's Dissertation, 2011), *available at* http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/8384/63090100011.pdf?sequence=1 (Braz.); Stêfania Grezzana & Vladimir Ponczek, *Viés de Gênero no Tribunal Superior do Trabalho Brasileiro [Gender Bias in the Brazilian Superior Labor Court]* (39th National Encounter of Economy, paper, 2011), *available at* http://anpec.org.br/encontro/2011/inscricao/arquivos/085-e1283505b9764b152c5744f83ae1b70e.pdf (Braz.).

overtime payment, (2) social charges,[105] (3) social benefits,[106] (4) additional payments, (5) retirement, (6) lawyers' fees, (7) income, (8) equal payment, (9) qualification and contract recognition, (10) contractual aspects, (11) damages, (12) contributions and salary's discounts, (13) labor accidents, (14) civil responsibility, (15) job guarantees, and (16) others.[107] This fragmented categorization, however, does not help to systematize the different types of litigation. As a matter of fact, a more concise classification can be obtained as one realizes that overtime payment, social benefits, additional payments, income, equal payment and contributions, and salary's discounts are all categories related to employees' payments. On the other hand, contractual aspects, qualification, and contract recognition are all categories related to the interpretation of labor circumstances in the light of an existing (or claiming to exist) labor contract. A more concise morphology would then postulate the existence of four basic different types of claims: (1) payment issues, (2) contract circumstances (including dismissal indemnities and job guarantees), (3) labor accidents, and (4) (moral and material) damages. Nevertheless, just about everything in a labor relation seems to be included and find its way to the courts.

CONCLUSION

Labor disputes in Brazil, whenever they are not solved by the parties themselves, basically have the judicial arena as a locus for its settlement. As a possible and interesting hypothesis, one may claim that Brazilian labor justice is an institutional space for judicial tradeoff inflated by lawyer intermediation and keenly protected by labor judges as its gatekeepers. Employers use the judicial arena to lower their labor chargers, and employees do so in order to recover rights that were knowingly ignored in their labor contract. This is probably why both of them seem to be against ADR. At the end, this may help the foreign observer to understand the amazing workload of Brazilian labor judges and the importance attached to labor justice. Moreover, it helps to explain why the Brazilian labor world is drowning in laws and labor judges tend to act as its life savers. Although driven to exhaustion, they keep doing their jobs and trying to solve labor conflicts. Or, at least, they think they are solving them. Still, one cannot refrain from thinking they are trying to dry water. As if it were possible!

105. Grezzana and Ponczek place contributions paid to finance social insurance under this category but go as further as to include vacations, thirteenth salary, thirty days delay prior to dismissal, and FGTS among them. *See supra* note 103.

106. Grezzana and Ponczek list under this category all kinds of assistance provided by employers: alimentation, transportation, funeral aid, health insurance, and telephone, among others. *See id.*

107. All procedural questions were reunited under the "Others" category. *See id.*