EMPLOYMENT LITIGATION ON THE RISE? A BRAZILIAN PERSPECTIVE

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Litigation is on the rise, so much so that some see in it the collapse of the judicial system. As a result, many argue in favor of alternative forms of dispute resolution as an answer to a judicial system overwhelmed by popular demands and incapable of offering proper answers in a timely fashion. But one could argue just as well that the rise in litigation can be indicative of a better access to justice. In either way, the increasing number of cases brought to justice leaves no one indifferent. Not only in Germany and Great Britain, as Martin Schneider shows,[1] but in Brazil as well.

As Schneider indicates, while the caseload of British employment tribunals went from 29,000 to 74,000 complaints resolved in a year, an increase of 150% in the 90s, in Germany, the number of cases resolved by the local labor courts went from some 45,000 to some 310,000 cases. These impressive figures constitute evidence of an explosion in individual litigation. These figures could evidence individual responses to acts of "managerial prerogative" in the face of diminished union density or effectiveness. Thus, Schneider attempts to understand "the various factors that may explain the rise in employment litigation and to pinpoint some of the evolving issues." This commentary, providing a Brazilian perspective on the employment litigation explosion, will follow the structure of Schneider's paper for comparative purposes.

I. THE LITIGATION RISE

The Brazilian judicial labor system has experienced a litigation explosion. As Table 1 shows, except for the first part of the 70s, when

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1. Martin Schneider, *Employment Litigation on the Rise? Comparing British Employment Tribunals and German Labor Courts*, 22 COMP. LAB. L. & POL'Y J. 261 (2001).

the number of finished cases decreased by 8%, the number of cases has grown extraordinarily.

Table 1
Labor Justice
1941-2000

Period	Received	Finished
1941-1945	163,128	146,790
1946-1950	346,609	341,981
1951-1955	538,238	467,245
1956-1960	713,107	699,799
1961-1965	1,316,566	1,256,030
1966-1970	2,356,958	2,121,203
1971-1975	2,042,441	1,945,653
1976-1980	3,037,948	2,762,994
1981-1985	4,232,785	3,913,091
1986-1990	5,582,119	4,967,282
1991-1995	9,744,846	8,981,483
1996-2000	11,979,148	12,016,795
Total	42,053,893	39,620,346

Source: The General Reports of the Labor Justice, *available at* http://www.tst.gov.br (visited February, 2002).

A close look at the figures from the 90s (Table 2) will show a growth of 100% in the number of finished cases between 1990 and 1997, when it stabilizes around 2,400,000 complaints a year. As one can easily see, the general picture at least in growth is not that different from Great Britain and Germany.

Table 2
Labor Justice
1990-2000

Year	**Received**	**Finished**
1990	1,399,332	1,203,089
1991	1,730,090	1,437,422
1992	1,799,992	1,540,851
1993	1,882,388	1,816,164
1994	2,048,944	2,067,129
1995	2,283,432	2,119,917
1996	2,396,040	2,281,044
1997	2,441,272	2,421,519
1998	2,475,630	2,453,948
1999	2,399,564	2,461,270
2000	2,266,642	2,399,014

Source: The General Reports of the Labor Justice, *available at* http://www.tst.gov.br (visited February, 2002).

These extraordinary figures gain greater impact once they are compared to the market labor. As Table 3 indicates, the number of cases received and resolved by the Brazilian judicial labor system concerns about 10% of those employed. Because neither the British nor German figures come close to such a figure, one could argue that two (or three) different realities are represented: One related to European countries and another associated with Brazil. That is to say, these numbers are so incomparable that one could assume that they do not deal with comparable realities.

Table 3
Formal Employment
1995-1999

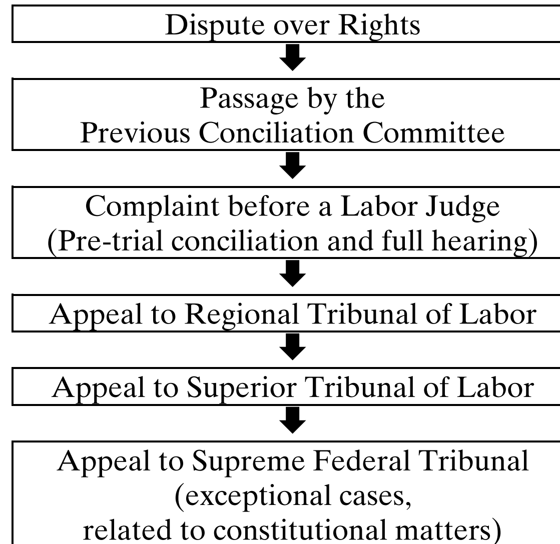
Year	Number of Positions
1995	23,755,736
1996	23,830,312
1997	24,104,428
1998	24,491,635
1999	24,993,265

Source: RAIS, *available at* http://www.mtb.gov.br (visited February, 2002).

A critical difference, however, may yet render these figures comparable so to test Schneider's thesis in the Brazilian context. Unlike European systems, the Brazilian labor judicial system does not require or interpose any procedure before an employment conflict becomes a judicial one. In 2000, a Bill was passed requiring that a complaint be first considered by a Previous Conciliation Committee.[2] Before then, there were no formal procedures either in the trade union (as in Great Britain) or in the works council (as in Germany) that could solve the labor conflict and prevent it from becoming a judicial one. All such conflicts would end up in the labor courts, which are organized similar to the German's structure, as shown in Table 4. (Even so, conciliation practices are so tied up with the judicial procedure that, even though there is no legal prohibition, arbitration is very rare in the Brazilian system.) Before the creation of the Previous Conciliation Committee, there were two different points for an attempt to conciliate: the pre-trial conciliation and the after-hearings conciliation. Consideration of a Previous Conciliation Committee, now required by law as a formal condition for a judicial complaint, is a new conciliatory phase, implemented either in the enterprise or by the union; but the full effects of this procedure are yet to be known.

2. Act 9958, January 2000.

Table 4
"The Resolution of Dispute Over Rights"
Main Stages in Brazil (Post 2000)



If the conciliation is not successful, the matter proceeds to the labor judge, whose decision can be challenged through an appeal to the Regional Tribunal of Labor either on grounds of fact or of law. Further appeal, to the Superior Tribunal of Labor, can only be made on a legal basis and its deliberation is done from the perspective of establishing a homogeneous national jurisprudence. The Supreme Federal Tribunal has jurisdiction only when the dispute touches a constitutional matter. As it can be seen, until very recently a labor conflict could be solved at various and different stages of a judicial procedure but had almost no chance to be settled before it came to court.

Even though new conciliatory mechanisms have been established in order to create a less conflictive environment, litigation is still on the rise. These figures tend to support Schneider's hypothesis: "individual voice via court or tribunal complaints are becoming more important for employees when compared with collective voice via union bargaining or strike action."[3] It is important to understand the causes for this expansion.

3. *See* Schneider, *supra* note 1, at 262.

II. CAUSE

Schneider's paper discusses four possible reasons for the growth of litigation: (1) unemployment; (2) legal regulation; (3) change in the employment relationship; and (4) weakening of collective voice. We shall look at each of them separately.

A. Unemployment

Comparing the rate of unemployment and the number of completed labor court cases in Germany, Schneider argues, "when more workers are considered redundant or are dismissed on behavioral grounds, more workers will invoke a court or tribunal."[4] This relation can be expressed in even more rigorous terms, i.e. "rising inflows into unemployment will lead to a more than proportionate rise in litigation."[5]

There are a few problems with this equation. First, one needs to attend to the intake of complaints, not completed cases, due to the time lag between complaint and disposition. It may be that the German courts dispose of cases so quickly that this statistical concern is not serious; but, from a Brazilian perspective, when one considers this comparison, the results do not confirm the explanation. Table 5 compares the number of cases presented to the labor courts with the unemployment rates in the 90s.

4. *See* Schneider, *supra* note 1, at 270.
5. *See* Schneider, *supra* note 1, at 270, n.22.

Table 5
Cases Received and Unemployment Rates
1993-2000

Year	Cases Received	Unemployment Rates
1990	1,233,410	10.3
1991	1,496,829	11.7
1992	1,517,916	15.2
1993	1,535,601	14.6
1994	1,624,654	14.2
1995	1,826,372	13.2
1996	1,941,070	15.1
1997	1,981,562	16.0
1998	1,958,594	18.2
1999	1,877,022	19.3
2000	1,722,780	17.6

Source: Sites *available at* http://www.globalpolicynetwork.org/data/brazil/brasil-dado.pdf and http://www.tst.gov.br (visited February, 2002).

As Table 5 indicates, the number of cases received by a labor judge increases year after year until 1997, when it turns around and starts to decline. If the correlation with unemployment was sound, the second column should present the same outline. But, this is not what happened. In fact, between 1993 and 1995, the unemployment rate decreased while labor complaints rose; and, between 1997 and 1999, while the unemployment rate was increasing, there was a decline in the number of cases presented to labor judges.

B. Legal Regulation

A second possible reason for the litigation rise is the role of legal regulation for "the extent to which rights are granted to workers are also potential drivers of litigation."[6] It would seem that stronger rights have a positive effect on litigation and weaker rights have a negative one. Alas, there is no empirical evidence of such in Brazil.

6. *See* Schneider, *supra* note 1, at 271.

If one takes the Brazilian legal regulation of unfair dismissals, it is possible to pinpoint three different phases, one after the other, contributing to weaken the protection against dismissal. In the first period, from the publication of the Labor Code (1943) to Act 5107 (1966), an employee with 10 years service was fully protected against unfair dismissal. That is, he couldn't be dismissed unless he committed a significant fault recognized in a judiciary procedure. Employees with less than 10 years' service were entitled to receive an indemnification corresponding to one-month salary for each year or fraction above six months of work. The second period began with the approval of Act 5107, which introduced, without abandoning the old one, a new dismissal protection system called the Fund for Time Service Guarantee (FGTS). Throughout the employment relationship, the employer was supposed to contribute monthly to a dismissal fund of about 8% of the employee's wages, which could be withdrawn by the employee once he was dismissed, with an additional indemnification paid by the employer corresponding to 10% of the fund's total savings. The third phase began with the Federal Constitution of 1988, which outlawed the first dismissal protection system and raised to 40% the additional indemnification of the FGTS.

Despite the fact that the first period had the highest dismissal cost, litigation wasn't that intense: It took 24 years to process some 3 million cases before the Labor Justice. After 1966, since almost every hiring procedure was done under the FGTS policy, dismissal protection became more flexible and less expensive. Although one would expect fewer complaints, in 5 years, from 1966 to 1970, the Labor Justice had already processed three quarters of the total amount of cases occurring in the first period. On the other hand, more intense litigation corresponds to the rise in dismissal cost established in 1988, by the Federal Constitution. Thus, if the second situation does correspond to Schneider's hypothesis, the first one goes against it. Whence his sound caution, "[T]he theoretical links between regulation and litigation are intricate. For one, given the various filters in the pyramid of conflicts, more workers' rights will not necessarily entail an increase in litigation. Anticipating the enhanced prospects of workers' success in court or tribunal, employers may tend to abide by the law in the first place or may be more willing to concede certain stakes in conciliation."[7]

7. *See* Schneider, *supra* note 1, at 272.

C. Change in the Employment Relationship

"Flexible employment, restructuring towards the service economy, and new forms of remuneration all make the employment relationship less standardized in most industrial countries. This transformation is likely to broaden the scope for individual conflicts."[8] Indeed, current labor relations have undergone a series of transformations at different levels, a fact widely reported in related literature.[9] Among the personal consequences of capitalism, a new flexible individual is emerging who may have more control over his/her work time and workplace, but who does not have an analogous control over the labor process itself. Such change sets a new frame for old labor issues: how to measure the amount of time worked by the employee and how to evaluate its quality. A more flexible execution of the labor contract blurs its structure, giving rise to a whole set of questions not easily answered as they pose new problems. As it is natural to call upon tribunals to reach answers, an amplification of litigation becomes a necessary consequence. To establish this connection definitively would require a close examination of the contents of the employees' complaints.

D. Weakening of Collective Voice

The "representation gap" between workers and unions is indicative of a weakened collective voice at the workplace and may well influence the demand for litigation. In fact, "[i]n the absence of collective voice, workers are more likely to invoke individual voice, such as an employment tribunal, when disputes over rights arise."[10] It is indeed true that unions have undergone a series of changes related to labor transformations and are losing affiliated workers. The Supiot Report made for the European Commission remarks that the weakening of collective representation structures corresponds to a

8. *See* Schneider, *supra* note 1, at 272.

9. RICHARD SENNETT, A CORROSÃO DO CARÁTER: AS CONSEQÜÊNCIAS PESSOAIS DO TRABALHO NO NOVO CAPITALISMO (1999); DAVID HARVEY, CONDIÇÃO PÓS-MODERNA: UMA PESQUISA SOBRE AS ORIGENS DA MUDANÇA CULTURAL (1999); Claus Offe, *Trabalho Como Categoria Sociológica Fundamental?*, *in* 1 TRABALHO E SOCIEDADE (1989); ANTOINE JEAMMAUD ET AL., TRABALHO, CIDADANIA & MAGISTRATURA (2000); ANTÔNIO RODRIGUES DE FREITAS JÚNIOR, DIREITO DO TRABALHO NA ERA DO DESEMPREGO: INSTRUMENTOS JURÍDICOS EM POLÍTICAS PÚBLICAS DE FOMENTO À OCUPAÇÃO (1999); RICARDO ANTUNES, ADEUS AO TRABALHO? ENSAIO SOBRE AS METAMORFOSES E A CENTRALIDADE DO MUNDO DO TRABALHO (1997); MÁRCIO POCHMANN, O EMPREGO NA GLOBALIZAÇÃO: A NOVA DIVISÃO INTERNACIONAL DO TRABALHO E OS CAMINHOS QUE O BRASIL ESCOLHEU (2001).

10. *See* Schneider, *supra* note 1, at 273.

major quantitative decrease in union affiliation.[11] This reality is not unknown to Great Britain, where general union affiliation has fallen from 13.5 million in 1979, to 8.2 million in 1994, and in unions associated to the Trade Union Congress, the reduction has gone from 12.2 million in 1979, to 6.9 million in 1994. Is this a universal phenomena or just a European circumstance?

In Brazil, as Table 6 shows, although union affiliation has stayed stable over the last so many years, the number of work hours spent on strikes for every occupied person went down from 29.5 hours in 1991, to an average of 5.5 hours between 1994 and 1996.[12]

Table 6
Union Affiliation
1992-1999

Year	Index
1992	16.7
1993	n/a
1994	n/a
1995	16.2
1996	16.6
1997	n/a
1998	15.9
1999	16.1

Source: http://www.globalpolicynetwork.org/data/brazil/brasil-dado. pdf (visited February, 2002).

Union affiliation stability through the 90s can be explained by the peculiarities of the Brazilian system that outlaws pluralistic representation and provides funds through a compulsory payment made by every worker represented by the union. Those mechanisms have protected unions from losing most of their importance as workers' representatives. But they were not immune to labor change and the new work environment providing more flexible regulation. In fact, the decrease of work hours spent on strikes confirms the

11. ALAIN SUPIOT, AU-DELÀ DE L'EMPLOI, TRANSFORMATIONS DU TRAVAIL ET DEVENIR DU DROIT DU TRAVAIL EN EUROPE, RAPPORT POUR LA COMMISSION EUROPÉENNE 163 (1999).

12. *Cf*. Adalberto Cardoso Moreira, *available at* http://www.sindicato.com.br/artigos/sindicat.htm (visited February, 2002).

deterioration of union bargaining power, an inhibited union movement. Nevertheless, as it can be seen in Table 7, unions have been signing more collective agreements every year. Such figures present a paradox: How can undermined unions be signing more collective agreements? A possible answer can be conceived looking at their content: Unions may be reproducing legal rights in collective agreements in order to ensure their application.

Table 7
Collective Agreements
1997-2000

Year	**Agreements Signed**
1997	9,826
1998	15,456
1999	16,713
2000	18,080

Source: http://www.mtb.gov.br (visited February, 2002).

But how does this relate to litigation? Workers and unions might be using litigation as a way to implement rights obtained through collective agreements. I.e., litigation is being used as a substitute for the strike. In this case, litigation would not be the result of an individual voice, but the legal manifestation of a new collective strategy. However, this is pure speculation; good empirical evidence, e.g. a study of the pattern of worker complaints, is lacking.

As Schneider recognizes, and I have tried to demonstrate, "the link between the various factors discussed and the demand for employment litigation are far from deterministic."[13] In fact, all four different possible reasons related to the growth of litigation are circumstantial and do not permit the establishment of a direct relation between them. Nonetheless, the importance of understanding the ways these legal systems work remains. Set out below is a map of the similarities between Brazil and the English and German systems.

13. *See* Schneider, *supra* note 1, at 274.

III. UNDERSTANDING DIFFERENT RESOLUTION SYSTEMS FOR LABOR CONFLICTS

Three features of industrial justice that Schneider discusses provide important points of comparison: (1) the construction of fairness; (2) the importance of legalism; and, (3) the question of reemployment. We shall look at each of them separately.

A. The Construction of Fairness

The Brazilian judicial labor system is characterized by ease of access, informality, speed, and low cost. Thus, one can assume that the Brazilian judicial labor system is highly accessible for claimants: They can bring the case on their own, for the reason that legal representation before a court or tribunal is not obligatory. Many have argued that because the Federal Constitution (1988) declared lawyers to be essential for the administration of Justice, such individual access had been revoked. The question was presented to the Superior Tribunal of Labor, which stated in 1993, that the *jus postulandi*[14] was not contrary to the Federal Constitution. The possibility for the personal presentation of one's own case ensures a perception of accessibility, no stranger to the construction of fairness. The employee has the direct right to be heard in the judicial system and, in doing so, may directly contribute to the decision in his or her case.

So, too, like the British and German systems, the Brazilian judicial labor system had lay judges sitting along side professional ones throughout its whole structure. They were nominated by trade unions and employer's organizations for three-year terms to take part in all three instances. The justification for their presence was the same as for the German and Britain systems: Their role was "to bring their 'knowledge of human nature and industrial practice,' to communicate in plain words the complicated legal matter to participants, and to enhance the perceived fairness of the hearing, thus ensuring acceptance with the outcome of the case."[15] As the practice did not confirm this purpose, their presence became very controversial. In fact, the professional member of the panel was so hegemonic that the lay judges seemed superfluous in the decision-making process. Besides that, they represented an enormous cost to the federal budget, due to the fact that their payment was provided by

14. The *jus postulandi* corresponds to the possibility for oneself to be before a court without any legal aid.
15. *See* Schneider, *supra* note 1, at 275.

the State. The critics were so strong that the Brazilian Congress approved the 24th Constitutional Amendment in December 1999, abolishing the tripartite composition in the judicial system. It did not proscribe the tripartite principle, however, which is still present in the structure of the Labor Ministry. In addition, one month later, Congress approved Act 9958, creating the Previous Conciliation Committee, allowing employees and employers to solve their disputes without State interference. In a certain way, the Previous Conciliation Committee renews the old structure, but outside the State apparatus. It is possible to argue that fairness did not come from the presence of lay judges in the judicial system, but from the participation of equals in the dispute resolution process.

B. The Importance of Legalism

Brazilian tribunals have produced a large body of case law over the years, which is not only cited in petitions and decisions, but also used as a resource for the guidance of management. In fact, labor litigation has become so complex that, although claimants can represent themselves, no one actually does. When such happens, claimants are directed to union legal services where they receive legal counseling and representation, if necessary. On the other hand, the Superior Tribunal of Labor consolidates its decisions in Statements, which indicate the way a complaint will be resolved if it reaches the tribunal. Even though Labor Judges and Regional Tribunals of Labor are not compelled to follow a Statement, failure to do so provides a ground for appeal. Before a Statement is adopted, the Superior Tribunal of Labor can issue a Jurisprudence Guideline, which signals the content of a future Statement. Such Guidelines are not binding, but their application is strongly recommended as they indicate the direction tribunal decisions should go. So far, the Superior Tribunal of Labor has issued 363 Statements and 322 Jurisprudence Guidelines, along with 119 Normative Precedents concerning collective agreements. This constitutes a very complex litigation system in which a full and adequate comprehension of the case law requires legal assistance.

As in British and German labor law, Brazil relies on case law to refine legal reasoning and to promote uniformity in application, but some judges have gone as far as to propose that uniformity be achieved not only by the issuance of Statements, but by denying the availability of an appeal when a Statement is followed by a lower tribunal. In both cases, the strengthening of the impact of "legalism"

would be achieved by attempting to colonize social relations.[16] In reality, they ignore the complexity of life and, especially, of a labor contract. What would then be the importance of case law? It should be, in effect, the way the legal system adapts its judicial policy as a changing social reality, to indicate how certain conflicts may be resolved once submitted to an adjudicatory process that cannot be totally comprehended by judicial antecedent.

C. The Question of Reemployment

Although there are no statistics indicating the level of reemployment as a result of judicial complaints, Brazilian's reality does not differ from the one described by Schneider: Compensation is the usual remedy for successful applicants. It may be so because reinstatement is the main remedy provided by the law for unfair dismissals only when there is a concurrent protection at stake. That is, when it is not only a matter of employment protection, but also when the dismissal affects the work security granted to union leadership, women's pregnancy, job accident's recovery, and participation on the Enterprise Safety's Commission. In all these cases, the employer's capacity of dismissal is annulled by the employment safeguard granted to the employee as a means to assure, as the case may be, union freedom, maternity, reinsertion on the employment market, and a safe work environment. Thus, limitations imposed on employer's conduct concerning his ability to dismiss an employee are very strict and always related to a co-existing protection.

On the other hand, assuming that employment relationships should be constructed on mutual trust and understanding, tribunals have been converting employment protection into financial compensation. With the exception of elected union officials, the eventual job protection granted to all other employees has been exchanged for compensation or redundancy payments. The Superior Tribunal of Labor has gone as far as issuing, back in 1985, the Statement No. 244, which acknowledges that job protection granted to pregnant employees assures the payment of wages and rights related to its term, but does not entitle one to reinstatement. Such jurisprudence rests on the assumption that industrial relations have to be cooperative, when, in truth, they may be everything but that.

16. *Cf.* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, *in* 17 LAW & SOC'Y REV. (1983).

An employment protection system can vary from a very stringent one, wherein dismissals are treated as an exception, to a very flexible one, in which there are almost no restrictions upon dismissals apart from compensatory indemnification. Choices among them are always related to political and economic decisions that receive large inputs from the labor market situation and even how it relates to the international business environment. The Brazilian system may have opted to weaken employment protection in order to encourage foreign direct investment, but has also made an option to provide workers with some kind of job security once certain particular conditions are present. The jurisprudence above reported has not only promoted an even more flexible protection system, which does not necessarily create a more cooperative work environment, but it has encouraged litigation, even as it tends to transform the judicial conflict into a space for negotiating compensation.

IV. CONCLUSION

Schneider raises four important questions:

(a) Is the increase on litigation a universal or at least a widespread phenomenon among industrialized countries?

(b) Are collective voice and individual voice substitutes or complements?

(c) Is the tripartite, tribunal-like organization of labor courts and similar institutions a dominant organizational mode?

(d) Can arbitration take on some of the workload of tribunals and courts?

They provide the framework for a wide range of possible research projects. But they represent possible investigative tracks that are either a consequence of—as it is the case for questions (a), (b) and (d)—or collateral to—as in question (c)—our original theme. They do not deal with the threshold question—is litigation on the rise—and the related question: Why is it happening? Although four different potential answers—(1) unemployment; (2) legal regulation; (3) change in the employment relationship; and, (4) weakening of collective voice—seem very likely, they are badly in need of empirical investigation. One possible explanation worth pursuing has to do with the strategic utilization of the judicial system by the employer in order to obtain labor market flexibility and by the employee in order to acquire more rights. If this were the case, individual voice, in the sense of resort to litigation, would be increasing because, on one hand, it is easier for a company to deal with a fragmented class of workers

and, on the other hand, it provides workers with some chance to achieve greater entitlements. This, too, requires empirical research of the labor disputes' contents. Such study could also lead to another conclusion. I.e., litigation rise is a consequence of more rights and easier access to justice.