

Terceirizadas, Centered: A Critical Analysis of Outsourcing and Gender and Racial Hierarchies in Brazil

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ABSTRACT: This article presents a critical reading of the Brazilian Supreme Court decision in *Arguição de Descumprimento de Preceito Fundamental* (“ADPF”) 324—the case in which the prohibition of outsourcing was declared unconstitutional. In this decision, the majority opinion is underpinned by a neoliberal logic and relies on an argument that abuses that might occur in outsourcing are mere distortions. The minority opinion would allow the outsourcing of only “non-core” activities (which, in Brazil, correspond mostly to care-related work). Building on fem/race and class crit methods—that is, reflecting about the law by looking to the bottom, centering black female outsourced workers (“terceirizadas”)—the paper claims that both the majority and the dissenting opinions pose serious problems. Regarding the majority opinion, first, I use *terceirizadas* as a focal point to challenge the court’s neoliberal logic. Using *terceirizadas* as a point of departure shows that the neoliberal adoption of a universal individual is an abstraction that conceals how power relations operate on the ground and, in doing so, legitimates and perpetuates oppression. Second, the decision adopts a formal equality approach, which obscures how outsourcing is a fruit of, permeated by, and perpetuated by subordination. Regarding the dissenting position, the maintenance of the distinction between core and non-core activities derives from a non-intersectional look at the problem. It assumes a universal “worker,” missing the gender and racial aspects that create the possibility of different treatment in the first place. The paper then advances a possible path for the future, proposing a provisional antisubordination-based argument to argue for the unconstitutionality of outsourcing in Brazil.

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Introduction

“For example, a company can opt for having an in-house legal department or hiring an external law firm. I think it is perfectly legitimate that a law firm specialized in tax law might hire a legal opinion from another law firm specialized in tax law, even if this is its core business. I also think—another outsourcing example—that a construction company can directly employ an engineer or can hire a firm that makes the calculation in its construction jobs.”¹

Justice Barroso, ADPF 324

“Women do the hardest work and men the lightest. All service-providers take the most precarious poor black women.”²

Silvana Araújo da Silva

The first statement in the epigraph is from a Justice’s opinion in the lawsuit analyzing the constitutionality of outsourcing in Brazil. The second statement is from Silvana Araújo da Silva, the leader of University of São Paulo’s outsourced workers’ strike. The Justice is talking about hypothetical tax lawyers and engineers being outsourced. Silvana is talking about the actual outsourced women—or, *terceirizadas*—and their realities. He is the law. She is the life. And they are far apart. This paper aims to bridge the gap that currently exists between law and life in outsourcing in Brazil.

Outsourcing is the business practice in which a company (“service-taker”) hires a third-party company to provide services (“service-provider”). In this arrangement, the service-providing agent (“outsourced worker”) is employed by the service-provider but works for the service-taker.

¹ S.T.F., Arguição de Descumprimento de Preceito Fundamental No. 324, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, Diário da Justiça Eletrônico [D.J.e], 09.06.2019, 1, 17. All quotes have been translated by the author. ADPF is the Portuguese acronym for “Arguição de Descumprimento de Preceito Fundamental,” or “Claim of Non Compliance with Fundamental Precept,” a kind of constitutional lawsuit directed at challenging norms or acts said to disrespect core values of the Brazilian Constitution.

² Patricia Maeda, *A terceirização tem rosto de mulher*, JUSTIFICANDO: MENTES INQUIETAS PENSAM DIREITO (Nov. 23, 2016), <http://justificando.com/2016/11/23/terceirizacao-tem-rosto-de-mulher> [https://perma.cc/4C8Q-ZNHL]. Translation of “A maioria é mulher, onde eu trabalho hoje somos em 16 trabalhadores e somente 6 são homens. A maioria é negra, na verdade onde eu trabalho não tem mulheres brancas. Em todos os meus trabalhos tinha uma ou outra branca ‘perdida,’ o resto só negras.” All quotes have been translated by the author.

Since the 1990s, Brazil has been going through a process of “flexibilization” of labor regulations.³ Part of this process was the jurisprudential construction of the idea that although outsourcing was not explicitly allowed by labor law, it could be a valid work contract in some cases involving activities unrelated to the core business of a company, such as security and cleaning. Activities related to the core business of a company, on the other hand, could not be outsourced.⁴

In 2017, the neo-liberal agenda came to the forefront of Brazil’s political landscape. Because of the economic crisis that took place in 2014, Michel Temer—who stepped in after the parliamentary coup that unseated President Dilma Rousseff—proposed a series of austerity measures. The measures included cuts to education and health spending, the dismantling of social security, and the advancing of labor law reform aimed at “modernizing” the Brazilian economy. Central to this reform was the idea of flexibilization, which included the goal of legalizing outsourcing in all activities.⁵

One of the central moves in this direction came from the Brazilian Supreme Court ruling in ADPF 324, a lawsuit that challenged the constitutionality of the doctrine adopted by labor courts prohibiting the outsourcing of core activities—activities that are central to a company’s business.⁶ The majority of the court, composed by seven Justices, held that prohibiting outsourcing of core activities was unconstitutional and that outsourcing of all activities should be allowed.

The majority’s reasoning was, in general lines, that outsourcing would prevent unemployment, allowing people to participate fully in the labor market, and help Brazilian companies become more competitive due to cost reductions in manpower. The court set aside arguments that outsourcing

³ I use the term flexibilization in quotes advisedly, as it can mean a lot of things. On one hand, it can refer to modern and more efficient contract relations. On the other, it can mean a regulation that leads to a more precarious workforce. Sandra Fredman develops this thought in *Precarious Norms for Precarious Workers*, in *PRECAARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 177* (Judy Fudge & Rosemary Owens eds., 2006).

⁴ Jedidiah Kroncke, *The (Once) Radical Continuities of Brazil Labor Regulation*, in *THE SOURCES OF LABOUR LAW 174* (Tamás Gyulavári, & Emanuele Menegatti eds., 2019).

⁵ For a critical overview of the history of Brazilian labor law and the conservative reforms, see Jedidiah Kroncke, *Precariousness as Growth: Meritocracy, Human Capital Formation, and Workplace Regulation in Brazil, China and India*, 9 L. & DEV. REV. 321, 345 (2016); and João Renda Leal Fernandes, *Labor Law, CLT and the 2017 Brazilian Labor Reform*, 5 PANORAMA OF BRAZILIAN L. 210 (2017).

⁶ Alisson Droppa & Magda Barros Biavaschi, *Superior Labor Court and Outsourcing in Brazil: Dynamics of Its Decisions for Period 2000-2013*, 3 LAB. SCI. J. 61 (2014).

would violate workers' rights because the Justices believed that harms would arise from the abusive use of the contract, not from the contract itself. Four Justices dissented. They argued that core activities could not be outsourced, because this would violate a series of workers' rights protected under the Brazilian Constitution. However, the constitutionality of non-core activities was left untouched.⁷

This paper presents a critical analysis of the Brazilian Supreme Court decision in ADPF 324. In Part I, I explain what I mean by critical analysis. In this paper, critical analysis refers to the adoption of a method that reflects on the law through consideration of the concrete power relations that inform and are informed by it. This method involves a radical analysis of the law, attentive to how its assumptions and categories are permeated by inequalities, even if they appear neutral at first glance. In Part II, I summarize the majority and the dissenting opinions' arguments, and Part III is devoted to the critical analysis. Regarding the majority opinion, first, I use *terceirizadas* as a focal point to challenge the court's neoliberal logic and its assumptions. Having *terceirizadas* as a point of departure shows that the neoliberal adoption of a universal individual is an abstraction that conceals how power relations operate on the ground and, in doing so, legitimates and perpetuates oppression. Second, the decision adopts a formal equality approach, which obscures how outsourcing is a fruit of, permeated by, and perpetuated by subordination. Regarding the dissenting position, the maintenance of the distinction between core and non-core activities derives from a non-intersectional look at the problem. It assumes a universal "worker," missing the gender and racial aspects that create the differences that justify the possibility of different treatment and how the division proposed contributes to the perpetuation of the status of *terceirizadas*. Part IV advances a possible path for the future, proposing a provisional antsubordination-based argument to argue for the unconstitutionality of outsourcing in Brazil.

The analysis proposed here is dedicated to law and legal reasoning, and the limitations of this framework are briefly discussed in the concluding remarks, which delineate how workers' awareness and grassroots mobilizations may compensate for the limitations of law's emancipatory potential. *Terceirizadas* are aware of the problems and fighting for their rights.

On Methodology

This paper proposes an analysis of the decision from a critical perspective. This means reflecting about law in a way that is attentive to the concrete relations that are affected by it and how it is constituted by

⁷ In this kind of lawsuit, Justices are allowed to analyze the whole norm, even if the claimant only challenged a specific part.

interlocking systems of oppression (power structures that intersect and mutually constitute one another). There are many names for this kind of exercise—such as asking the woman question or looking to the bottom—but all of them converge on a contextualized view of law having in mind its place in a hierarchical world and destabilizing legal discourse, doctrine, and practices from the ground up.⁸ This paper adopts the method of looking to the bottom, which has been conceptualized as “adopting the perspective of those who have seen and felt the falsity of the liberal promise.”⁹ To adopt the perspective of those at the bottom means to listen to their actual experiences, without referring to abstract ideals about their positions.¹⁰

This method is adopted by many branches of legal studies, such as feminist legal theory, critical race theory, class crits and so on. Of special importance, and as duly recognized in all these schools of thought, is to keep in mind that the bottom to be looked at is not uniform nor universal and, as such, the relevant questions have to pay attention to that.¹¹ With that in mind, I made the methodological decision not to adopt a single lens of analysis—feminist or race-based or class-based. Instead, I group those lenses together under the umbrella term “critical,” which is broader and encompasses more clearly the exercise of mixing all the branches up in an intersectional analysis of the law.

With time, this method becomes a way of life—the lens through which you look at everything around you, even when you are not (consciously) searching for anything. In these cases, you just stumble upon issues that then become impossible to ignore. This was the process that gave rise to this paper. One day I decided to look at decisions on outsourcing issued by the Brazilian Supreme Court and was practically run over by what I read, from both the economy-driven and the labor rights-driven opinions. I could not find even a brief mention of outsourced women. That was shocking, considering how widespread the notion is that black women are the ones who suffer the most from outsourcing in Brazil.¹²

How women are affected by outsourcing is, of course, not homogeneous. The focal point of this paper is a specific group: the “*terceirizadas*.” I could have translated the term, but *terceirizadas* (plural) or *terceirizada* (singular)

⁸ See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

⁹ Matsuda, *supra* note 8, at 324.

¹⁰ *Id.* at 325.

¹¹ To borrow from Mari Matsuda, “When I see something that looks racist, I ask, ‘Where is the patriarchy in this?’ When I see something that looks sexist, ‘Where is the heterosexism in this?’” MARI J. MATSUDA, *Standing Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 61, 64-65 (Beacon Press, 1996).

¹² See Maeda, *supra* note 2.

cannot be translated effectively, especially to English.¹³ It is a feminine word. But, more than that, the term carries a great deal of other social meanings related to who *terceirizadas* are, the place they occupy in society and the forces and social relations in which they are inserted.¹⁴ The name represents an intersection: *terceirizadas* are the (usually) black, poor, low-skilled, uneducated, sometimes migrant women who work in unvalued, underpaid positions, such as cleaning, maintenance, sewing, and care-taking jobs—very different from your average engineer or tax lawyer.¹⁵ More importantly, *terceirizadas* are women who are not satisfied with their situation and fight and resist, be it by striking or be it by being interviewed by scholars, even if this means doing it in secret, risking their jobs. This is, therefore, a dynamic, dialectical, and non-fixed group, always subject to change.¹⁶

It makes very little sense to talk about outsourcing from the perspective of a hypothetical tax lawyer who hasn't even been outsourced yet. So, in what follows, the paper advances an analysis of the decision from the perspective of the *terceirizadas*. That demands, of course, consideration of their lived reality, which I have done through the reading of many academic and non-academic works—in the fields of social sciences, economics, education, social assistance, and law—that have exposed the concrete problems of outsourcing using data and, more importantly, interviews with *terceirizadas*.

The works that served as points of departure are mostly dissertations and theses, but there are also non-academic works. The vast majority of these works were written by female students who interviewed *terceirizadas* from their own universities. Unfortunately, we have mainly fictitious names or no

¹³ For reflection on what is lost in translation, see Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 5-7 (Drucilla Cornell, Michel Rosenfeld, & David Gray Carlson eds., 1992).

¹⁴ Judy Fudge & Brenda Cossman, *Introduction: Privatization, Law, and the Challenge to Feminism*, in PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM 3, 9 (Judy Fudge & Brenda Cossman eds., 2002).

¹⁵ Sandra Garbin, *Trabalho feminino e terceirização: um estudo de caso* 33 (July 26, 2014) (B.A. Monography, Universidade Federal de Santa Catarina) (on file with Repositório Institucional da Universidade Federal de Santa Catarina); Rachel Loureiro Andreta, *O Trabalho Terceirizado No Brasil: Uma Representação Da Precarização? Da Caracterização Geral À Especificidade Do Setor De Limpeza Em Santa Maria/RS No Contexto Dos Anos 2000* (Mar. 30, 2016) (M.A. Dissertation, Universidade Federal de Santa Maria) (on file with Manancial - Repositório Digital da Universidade Federal de Santa Maria); Jessica de Martins Sampaio & Ana Carolina Guerra, *Gênero Nos Discursos Das Trabalhadoras Terceirizadas Da Universidade Federal De Alfenas – Campus Varginha*, V CONGRESSO BRASILEIRO DE ESTUDOS ORGANIZACIONAIS 11 (2018).

¹⁶ Alaa Hajyahia, *Unveiling the Real Problem: Not Islam, Nor the Veil*, RAPOPORT CENTER'S WORKING PAPER SERIES (forthcoming 2023) (manuscript at 14, 20) (on file with author).

names at all, as most of the women did not want to expose themselves. Interviews were carried out in secret, sometimes in bathrooms or other discreet places. One of the non-fictitious names that is known is Silvana Araújo da Silva's, who was the leader of the *terceirizadas*' strike that took place at the University of São Paulo in 2005. The quotes that start each section are from an interview conducted with her for a legal blog.¹⁷

Outsourcing and ADPF 324

Legal Background and the Lawsuit

In 2014, the Brazilian Agribusiness Association¹⁸ filed ADPF 324, a lawsuit challenging a set of decisions on outsourcing from the Superior Labor Court. The claimant argued that the understanding adopted by the Brazilian Superior Labor Court—which holds, among other things, that outsourcing is only allowed for cleaning, maintenance, and other “non-core” services, whereas illegal in core business-related activities—is imprecise and prevents predictability as to which services can be outsourced. The claimant also argued for the impossibility of outsourcing core activities imposed a great burden, limiting the industry's capacity of free management and the sector's international competitiveness.¹⁹

In this context, the claimant argued that the doctrine violated (i) the principle of legality, as the text of the Constitution does not explicitly prevent outsourcing (art. 5th, II, CF), (ii) economic agents' freedom of contract and formulation of rational production strategies (no provision cited), (iii) free initiative to participate in the market (art. 1st, IV and 170, CF), (iii) the principle of free competition (art. 170, IV, CF), (v) the appreciation of human work (art. 1st, IV, CF), (vi) equal treatment between competitors (art. 5th, I, CF) and (vii) the state's responsibilities as regulator of the economy (art. 174, CF).²⁰

¹⁷ Maeda, *supra* note 2.

¹⁸ More information about the Brazilian Agribusiness Association can be found at <https://abag.com.br/institucional-abag-historia> [<https://perma.cc/B7L4-SQFH>].

¹⁹ S.T.F., Arguição de Descumprimento de Preceito Fundamental No. 324, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, Diário da Justiça Eletrônico [D.J.e], 09.06.2019, 1, 6.

²⁰ *Id.* at 8. In response, the Superior Labor Court argues for a series of formal impediments for the lawsuit. Substantively, it states that the outsourcing of non-core activities is allowed by the interpretation of statutes n. 6019/1974 and 7102/1983. The prohibition of core activities outsourcing arises from the fact that, unlike in the exception cases, there is no express legal authorization. The Union General Attorney has manifested against the claim, for both formal and substantive reasons. Regarding the merits, it is argued that the Superior Labor Court has only established limits to

The Majority Opinion

The majority opinion was delivered by Justice Barroso.²¹ The decision established the following thesis: “1. The outsourcing of every activity, be it related or not to the core business of the company, is lawful and such a contract cannot be considered a traditional employment contract. In outsourcing, the service-taker must: (i) verify the suitability and the economic capacity of the service-provider; (ii) if the service-provider fails to comply with labor laws, the service-taker will respond subsidiarily, as per art. 31 of statute 8212/1993.”²² The arguments are complex, but for the purposes of this paper a brief summary suffices.²³

The opinion first provides a historical summary in order to explain the value of outsourcing in the modern-day economy.²⁴ Then, the Justice states that outsourcing is more than a way of reducing labor costs. By suggesting a range of other reasons that might motivate the strategy, the opinion concludes that “outsourcing should not be associated necessarily with the reduction of costs.”²⁵ Secondly, the Justice argues that “(W)hat creates precarious working conditions is not outsourcing per se, but its abusive exercise.”²⁶ In order to sustain this argument, the Justice presents data provided by one of the *Amici* favorable to the claim to respond to arguments such as that outsourcing leads to more non-compliance with labor

the practice of outsourcing, in consonance with the appreciation of work and employment relationship and the principle of human dignity. The public prosecutor’s office, on its turn, has reiterated the formal vices and argued that the outsourcing of core activities is incompatible with labor protections provided for in the Brazilian Constitution. *Id.* at 5-8.

²¹ Justice Barroso was followed by Justices Luiz Fux, Alexandre de Moraes, Celso de Melo, Carmen Lucia, Gilmar Mendes, and Dias Toffoli. In Brazil, the case is decided by majority, but Justices usually write individual opinions. In this context, it isn’t feasible to make a general assessment of the decision, and it is virtually impossible to have a sole *ratio decidendi*. My analysis will focus on the individual opinion that was selected as the main opinion, which, from my perspective, includes arguments that have been adopted by other Justices and, as such, is representative of the majority opinion.

²² S.T.F., *Arguição de Descumprimento de Preceito Fundamental No. 324*, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, *Diário da Justiça Eletrônico [D.J.e]*, 09.06.2019, 1, 13.

²³ For the purposes of this analysis, I will restrict myself to the substantive arguments. It is enough to know that procedural arguments against the lawsuit were denied.

²⁴ S.T.F., *Arguição de Descumprimento de Preceito Fundamental No. 324*, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, *Diário da Justiça Eletrônico [D.J.e]*, 09.06.2019, 1, 47-53.

²⁵ *Id.* at 53.

²⁶ *Id.* at 57.

rights, that outsourced workers are subjected to adverse working conditions, that wages and benefits are inferior to those of non-outsourced workers, and that outsourcing inhibits unionization. As his argument focuses on the incorrect application of the law, he suggests means of mitigating the situation, such as making the service-taker responsible for harms in some cases.²⁷ The position of the Justice is that nothing is wrong with outsourcing *per se* and that a differentiation can be made between outsourced and non-outsourced workers as long as both are rightfully treated in their own spaces.

The Justice then turns to legal arguments. In sum, he argues that the outsourcing of all activities is supported by the principles of free initiative, free competition, legality, legal certainty, and equal treatment.²⁸ Regarding the first two, the Justice contends that outsourcing core activities is a business strategy aimed at economic efficiency, which is duly protected by the Constitution. Regarding legality and legal certainty, he argues that no statute or constitutional provision prohibit outsourcing and that, under existing doctrine, it is not possible to foresee what will be considered *ex post* an act of illegal outsourcing. This lack of predictability also leads to violations of equal treatment between companies. Lastly, the Justice states that if outsourcing is in fact inherently damaging to workers, there is no logic in prohibiting it for core activities and allowing it for non-core activities.

The Dissenting Opinions

Four Justices dissented.²⁹ The dissenters denied the violations of the principle of legality, as the Superior Labor Court had developed the doctrine based on the interpretation of constitutional provisions, in consonance with the general rule that guided work relations in Brazil.³⁰ The dissenters also reject the argument positing violation of free initiative and free competition. The Justices, in general, argue that free initiative and free competition must

²⁷ *Id.* at 54-59. The *Amici* in favor of the claimant were 1) a Confederação Nacional da Indústria - CNI, 2) a Central Brasileira do Setor de Serviços - CEBRASSE, 3) a Confederação Nacional de Serviços, 4) a Associação Brasileira de Telesserviços - ABT, 5) o Sindicato dos Empregados em Empresas Prestadoras de Serviço a Terceiros, Colocação e Administração de Mão de obra, Trabalho Temporário, Leitura de Medidores e Entrega de Avisos do Estado de São Paulo – SINDEEPRES. The *Amici* that opposed the claimant’s position were 1) a Associação Nacional dos Procuradores do Trabalho ANPT e, conjuntamente, 2) a Central Única dos Trabalhadores - CUT, a Força Sindical - FS, a Central dos Trabalhadores e Trabalhadoras do Brasil - CTB e a Nova Central Sindical dos Trabalhadores – NCST.

²⁸ *Id.* at 60.

²⁹ Justices Rosa Weber, Edson Fachin, Marco Aurélio, and Ricardo Lewandowski.

³⁰ S.T.F., Arguição de Descumprimento de Preceito Fundamental No. 324, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, Diário da Justiça Eletrônico [D.J.e], 09.06.2019, 1, 191.

be limited by a series of constitutionally and statutorily protected rights. In general, the social value of work (provided for in art. 1st, IV and 170, caput, CF) and the social and individual rights of workers (provided for in art. 7th and items xxx) serve to mitigate the imbalance of power between employer and employee that animates those protections.³¹

The arguments for illegality are sustained by the presentation of facts regarding the condition of outsourced workers derived from different sources than those used by Justice Barroso. The dissenting justices use data to show the growth of this type of contract in the years that preceded the decision, as well as the discrepancy of wages, hours worked, levels of job turnover, and accidents between outsourced and non-outsourced workers, and the difficulty of unionization, collective organization, and collection of damages from service-providers. The dissenters argue that outsourcing coincides with the least valued positions in the labor market and is often associated with work analogous to enslavement.³²

The prohibition of outsourcing would, however, not be unlimited. The minority Justices adopt the view, sustained by the lower courts, that non-core activities can be outsourced. The distinction relies on the idea that certain activities are part of the purpose for which a company was created while others are accessories to that.³³

Terceirizadas, Centered: A Critical Analysis of ADPF 324

In this section, I criticize some of the arguments advanced by both the majority and the dissenters from the perspective of the *terceirizadas*. This way of reflecting about the decision brings a few issues to the forefront. With regard to the majority opinion, in general lines, the problems arise from the adoption of both a neoliberal market-based logic and a formal equality approach, which are underlied by abstractions that conceal how *terceirizadas* experience outsourcing and, in turn, show how both outsourcing and the decision per se operate as tools for subordination. Notice that I do not take on all of the arguments presented in the decisions. This paper is not interested in the substantive arguments about legality and competition. The focus here is on the market-based logic adopted—which, at the end of the day, is what underpins the approach focusing on the place outsourcing has in the economy—and on the way outsourcing and the relations involved in it are conceptualized. Regarding the minority opinion, the focus is on how the Justices disregard the effects interlocking structures of oppression and the consequences this has on the constitution of the law. Namely, on the line drawn between core and non-core activities.

³¹ *Id.* at 242.

³² *Id.* at 243, 284.

³³ *Id.* at 56-57.

The Majority

Market-Based Logic: On Law, Neutrality, Power and Ideology

Patrícia: “Silvana, to start our interview, I would like to know a little about your professional trajectory.”

Silvana: “I started working selling tapioca in family houses when I was 14 to help my aunt and buy clothes for me and my sister to have something to wear. What struck me most about entering the job market was the need to be formally registered.”³⁴

Silvana Araújo da Silva

“How do I see . . . Labor Law in the current context? It is inevitable that, in this reality that I have just described, Labor Law in all open economy countries undergo extensive and very profound transformations. It's not about - and I wanted to make it clear - ideological choices or philosophical preferences. It is really the course of history³⁵ . . . And, therefore, the Constitution neither implicitly nor explicitly prohibits outsourcing. This is an ideological projection of those who interpret it with an old bias, with all due respect to those who think differently.”³⁶

Justice Barroso

The first main feature of the decision that I will highlight and call into question is its ideological character, concealed by its insistence on neutrality—expressed in the quotation above. As the above statement from the Justice shows, the arguments adopted should, according to him, be seen as non-ideological. The reality, however, is that the decision is, in fact, ideological: it adopts a neoliberal perspective that is then translated into the law through open-ended constitutional rights and principles.

The passage from “what is” to “what ought to be” is a common exercise in legal practice. However, both the description of the world that happens in the former stage and the proposal advanced in the latter stage are permeated by normative assumptions. In simpler terms, both stages involve choices about which facts are important, which principles are important, and, finally, what should be done.

Normativity is not necessarily a problem: in fact, normativity is the rule when arguing about the law. What is interesting, however, is its negation. The non-recognition of the existence of a choice—among other possible

³⁴ See Maeda, *supra* note 2.

³⁵ S.T.F., Arguição de Descumprimento de Preceito Fundamental No. 324, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, Diário da Justiça Eletrônico [D.J.e], 09.06.2019, 1, 20.

³⁶ *Id.* at 27.

choices—is a feature of the neoliberal logic adopted. It passes—in society, and, in this specific case, in the law—as “the end of history,” the consequence of natural human behavior and what serves humans best. In this context, an analysis like the one presented in this paper is seen as partial—or, a choice—while neoliberalism is seen as the neutral baseline against which to measure.

The problem with the naturalization of this perspective is that it conceals what is being given less weight or altogether disregarded. Here, I focus on one of those elisions: how neoliberalism and its assumptions universalize conditions and experiences, when, in fact, different groups experience the market in very different ways. Outsourcing in Brazil and the experiences of *terceirizadas* are good points of departure to expose the problems that arise from the neoliberalism’s assumptions—mainly, that individuals are equally positioned, and that unconditional autonomy is a reality. This in turn shows how the decision, which is underpinned by those false assumptions, serves to perpetuate the inequalities that shape the points of departure and of arrival.

The paradigmatic example adopted by the Justice, when talking about outsourcing, is that of a tax lawyer. In Brazil, tax lawyers occupy a place that indeed corresponds to the subject that underscores neoliberal assumptions—a free individual, able to make rational choices according to his preferences and able to achieve good results when good choices are made. *Terceirizadas* are, in this context, basically the opposite of the individual that serves as a baseline for the measure of the pros of outsourcing.

Terceirizadas are poor and struggling. They have low education levels. They started to work early, often while in early childhood, in the domestic environment (like Silvana, quoted above). They are peripheral and, in many cases, migrants or refugees. Early and single motherhood is a common reality.³⁷ In these conditions, *terceirizadas* often discuss how a lack of opportunity played a big part in their choices. Socio-economic conditions—which in Brazil are constituted by interlocking forces, such as race, gender, and region—play an important role in the opportunities that people are presented with.

In this context, outsourcing of non-core activities (caretaking, cooking, cleaning) appears to *terceirizadas* as the work that is expected with their place in society. This kind of work—domestic-like work—has been crystalized as women’s work, whether they like it or not. Since Brazil’s colonial days, women with the profile of the *terceirizadas* have been seen as

³⁷ Andreta, *supra* note 15, at 158-62; Martins Sampaio & Guerra, *supra* note 15, at 11; Teresa Kleba Lisboa, *Um olhar por baixo do tapete: mulheres terceirizadas*, 4 MULHER E TRABALHO 161, 163 (2004); Elizângela Cardoso De Araújo Silva, *As mulheres e as muralhas do patriarcado e do capitalismo: terceirização e precarização do trabalho no sistema do capital* 105 (Aug. 31, 2012) (M.A. Dissertation, Universidade Federal do Rio Grande do Norte) (on file with Repositório Institucional Universidade da Federal do Rio Grande do Norte).

perfect for this job, and this job only.³⁸ This is bolstered by the fact that, as of 2018, black women occupied 65% of domestic work posts³⁹ and still disproportionately perform domestic work in their own homes.⁴⁰ *Terceirizadas* get into precarious jobs not by chance, but because of social structures that lead them there.

By looking at the decision from the focal point of the *terceirizadas*, some things come to mind. First, their very existence challenges the choice of individuals whose experience serves as a basis for evaluating outsourcing. Outsourced tax lawyers might exist, but so do *terceirizadas*. Secondly, centering their experience shows that the assumption of one universalizing experience obscures their realities. Third, had those realities been considered, the legal problem addressed by the court would have, to say the least, been complicated. Finally, by ignoring how different groups experience the market in different ways, the system perpetuates itself.

In sum, by adopting—in a hidden way—a neoliberal perspective that is blind to differences that exist in the real world, differences are concealed and serve as a subordinating tool. The case seems, at first glance, to be about a specific legal problem: should outsourcing be allowed? However, it is in fact about the structures of power that serve as the foundation to the rule. Power is expressed in many layers. One formulation of this problem is advanced by Guinier and Torres, when discussing how power operates in different dimensions. The first dimension is related to direct rules that dictate force or competition. The second refers to how the “underlying rules and structures that play to the strengths of the winners were created.”⁴¹ The third refers to the narratives that legitimize the power relation that is created.⁴² The decision is a perfect example of this dynamic. Outsourcing is the rule. Neoliberalism is what sets the stage for the rule. And the court legitimates the maintenance of neoliberalism by treating it as a natural phenomenon.

³⁸ Louisa Acciari, *Practicing Intersectionality: Brazilian Domestic Workers’ Strategies of Building Alliances and Mobilizing Identity*, 56 *LATIN AM. RSCH. REV.* 67, 68 (2021).

³⁹ Trabalho Doméstico no Brasil (infographic), in DEPARTAMENTO INTERSINDICAL DE ESTATÍSTICAS E ESTUDOS SOCIOECONÔMICOS (2022), <https://www.dieese.org.br/infografico/2022/trabalhoDomestico.html> [<https://perma.cc/4CM9-DZ6L>].

⁴⁰ Women of all races occupy 92% of the posts. LUANA PINHEIRO, FERNANDA LIRA, MARCELA REZENDE, & NATÁLIA FONTOURA, OS DESAFIOS DO PASSADO NO TRABALHO DOMÉSTICO DO SÉCULO XXI: REFLEXÕES PARA O CASO BRASILEIRO A PARTIR DOS DADOS DA PNAD CONTÍNUA 29 (Instituto de Pesquisa Econômica Aplicada, 2019), https://repositorio.ipea.gov.br/bitstream/11058/9538/1/td_2528.pdf [<https://perma.cc/8WK8-MK54>].

⁴¹ LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY* 110 (Harvard University Press, 2002).

⁴² *Id.*

The decision is an example of how neoliberalism goes far beyond the traditional definition of the term, which mainly attributes to it a series of economic policies, such as privatization, deregulation of capital and cuts in labor rights (although it does that as well). Neoliberalism is a moral-political project that perpetuates itself through institutions and legitimating narratives that protect traditional hierarchies.⁴³

The argument that I make here is not that the Justice has something personal against *terceirizadas*. Instead, the decision is a symptom of a larger problem in Brazilian society and helps perpetuate it. It does so both by, on the micro level, keeping certain groups in determined places, and by, on a larger scale, keeping the power to set rules in the hands of some other groups. To use Guinier and Torres' analogy, *terceirizadas* are the miner's canary: just as the intoxicated birds expose the toxicity of mines, they expose the toxicity of a system of inequalities.⁴⁴

The Formal Equality Approach

The decision puts forward two different equality-based arguments to justify the possibility of outsourcing. First, it equates core and non-core workers, arguing that they are the same, and that therefore there is no reason to prohibit the former and allow the latter. Both activities should therefore be treated equally. Second, it equates outsourced and non-outsourced workers. As both categories are similarly situated—to the extent both have the same rights—there is no problem in separating them. They are separate but equal in the spaces they occupy, and, in this case, any kind wrongdoing arises from abuses, not from outsourcing per se.

These equality-based arguments are underpinned by a formal conception of equality—one that dictates that similarly situated individuals should be treated similarly, while differently situated individuals should be treated differently. For many years now, this conception of equality has been criticized by many authors, mostly for being oblivious about how inequalities operate on the ground. That is, in ways that have more to do with hierarchy and subordination than with actual differences in treatment. An alternative to the formal equality approach is the antisubordination approach, which focuses precisely on what is missing in formal equality—consideration of legal problems by looking to the bottom. This approach focuses on how subordination constructs social relations, permeates the law, and is perpetuated by certain outcomes.⁴⁵

⁴³ WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* 13 (Columbia University Press, 2019).

⁴⁴ See generally GUINIER & TORRES, *supra* note 41.

⁴⁵ See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976); CATHARINE A. MACKINNON, *Difference and Dominance:*

By adopting an antisubordination perspective to the case of outsourcing in Brazil, many problems with the equality arguments presented by the Justice come to the forefront. Most notably, (i) precarious work can only exist because workers already live in precarity, (ii) the way in which the wrongdoing suffered by *terceirizadas* happens because outsourcing in Brazil is constituted by the *terceirizada* and vice versa; therefore, present problems that arise in outsourcing are intrinsically related to who the *terceirizada* is, (iii) the fact that those wrongdoings affect *terceirizadas* differently because of the subordinate place they occupy in the Brazilian society, and (iv) the fact that outsourcing, in the way it is structured in Brazil today, is inherently subordinatory. Those problems, as will be argued, are not distortions of a system that would otherwise work well. They are the fruit of the perfect operation of the system.

Input: Outsourcing Can Only Exist because *Terceirizadas* Already Live Precarious Lives

*Silvana: "In all outsourced companies they take the most precarious, poor and black women."*⁴⁶

Silva Araújo da Silva

*"Underlying this discussion is a duality that has already been present in previous debates on labor issues, which contrasts, in my view, with a protectionist/paternalistic vision, on the one hand, and an emancipatory and liberating vision, on the other hand, which seeks to strengthen the negotiation and the freedom to contract."*⁴⁷

Justice Barroso

The quotations above introduce a mismatch of perceptions that says much about how the social relations that underlie the outsourcing contract happen in reality. On the one hand, there is the perception that outsourcing is an option, among many others, and that workers are unconstrained and should have the freedom to engage in this new possibility. On the other hand,

On Sex Discrimination, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (Harvard University Press, 1987); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1991-92); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

⁴⁶ See Maeda, *supra* note 2.

⁴⁷ S.T.F., Arguição de Descumprimento de Preceito Fundamental No. 324, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, Diário da Justiça Eletrônico [D.J.e], 09.06.2019, 1, 22.

Silvana shows how this choice is constrained. I have already pointed out this mismatch in the previous section. However, it is possible to go one step further in the analysis when thinking about how subordination operates in outsourcing. Outsourcing is not an unconstrained choice for *terceirizadas*. It is in fact enabled by a lack of the sort of freedom presupposed by the Justice. What is left out of the equation in the decision is the fact that *terceirizadas* are not coincidentally black and poor. They are *terceirizadas* because of that. Precarious jobs can only exist because there are people who are already living in precarity. If all individuals lived in decent conditions, there would be no demand for these kinds of jobs in the first place.

Abuses

*“It is noted, therefore, based on the above considerations, that what makes the employment relationship precarious is not outsourcing, but its abusive exercise. The solution, therefore, does not lie in banning it, but in defining a legal regime that avoids abuses.”*⁴⁸

Justice Barroso

Wrongdoings are inherent to the figure of the *Terceirizadas*, not abuses of the contract.

Patricia: “What are the consequences of this composition of the category?”

Silvana: “Women do the heaviest work and men do the lightest (...) Today in my service I know a white woman who has no course or schooling and who applied to work in cleaning and was hired to work in the concierge, which is a light job and earns more. Rarely is a qualified black woman hired to work in the concierge. I have the qualification myself and I always wanted this job, but they never hired me because they didn't have the ‘profile.’”

Silvana Araújo da Silva

Terceirizadas are affected by multiple interlocking systems of oppression that constitute the way they are treated, and, as such, many of the kinds of abuses they suffer in the workplace are constituted by those forces. The abuses are, of course, also a fruit of the employer's failure to comply with labor law. But they come in a fashion that is tailor-made to *terceirizadas*, not by coincidence, but precisely because of the intersection of gender, race, and class inequalities in which they lie.

An often-reported abuse consists of delays in payment or the absence of payment.⁴⁹ Considering the value placed on *terceirizadas*, this is not a

⁴⁸ *Id.* at 57.

⁴⁹ Adriana Gomes Zimmermann, *A Precarização Tem Gênero E Raça: Um Estudo Sobre A Terceirização Na UFRGS* 59 (2017) (B.A. Monography,

“different treatment problem” (*terceirizadas* are not paid, tax lawyers are paid, and this is a “coincidence”). Socially speaking, it just “seems” more acceptable for service-providers not to pay *terceirizadas* because their work is socially constructed as work that should not be paid at all. Cleaning, maintenance, and care work are kinds of work that are historically constructed as unpaid.

There is a continuity between domestic labor performed by women and the non-domestic labor they perform. The line between them is almost non-existent. When we talk about the *terceirizada* we are not only talking about the gendered meanings of such work, but also about how it intersects with the way that work performed by black people in general has been constructed as work for which you do not have to pay. It is not that *terceirizadas* suffer from both in separate layers. They suffer from both together and intersected.⁵⁰ As such, this issue is not the bad application of a rule, but the reproduction of a social model that considers it acceptable to exploit “women’s work.” In Brazilian society it is just “more acceptable” not to pay *terceirizadas* than not to pay tax lawyers. This can be read as an abuse of contract; outsourcing is good in general, but workers do not get paid because of racism and gender inequalities. However, as stated above, it is not really possible to make a clear distinction between work and worker in outsourcing in Brazil: *terceirizadas* constitute outsourcing and vice-versa. Without *terceirizadas* there would be no outsourcing, at least in the model we have today.

When *terceirizadas* are indeed paid, they are paid little. Data shows that, while men who are outsourced usually occupy posts with an intermediate level of compensation, *terceirizadas* occupy posts of low remuneration.⁵¹ Here, a brief comment is in order. In his vote, when addressing the issue of how outsourced workers earn less money, the Justice stated that the lowest percentage (presented here as well) should not be taken as being related to outsourcing, as there were other factors at play, such as gender and race, that affected the income rate. The Justice uses this argument

Universidade Federal do Rio Grande do Sul) (on file with Lume Repositório Digital da Universidade Federal do Rio Grande do Sul); Nicolas Benkler Willy, *Terceirização Dos Serviços De Limpeza E Conservação: A Vida Proibida De Ser Vivida*, in RESISTÊNCIA III: O DIREITO DO TRABALHO DIZ NÃO À TERCEIRIZAÇÃO 418 (Jorge Luiz Souto Maior & Valdete Souto Severo eds., 2019).

⁵⁰ Crenshaw, *supra* note 45, at 140.

⁵¹ Patrícia Pelatieri, Regina Coeli Camargos, Antonio Ibarra, & Adriana Marcolino, *Terceirização e Precarização das Condições de Trabalho: Condições de Trabalho e Remuneração em atividades tipicamente terceirizadas e contratantes*, in TERCEIRIZAÇÃO DO TRABALHO NO BRASIL: NOVAS E DISTINTAS PERSPECTIVAS PARA O DEBATE 11, 16-17 (André Gambier Campos ed., 2018), https://www.ipea.gov.br/portal/images/stories/PDFs/livros/livros/180215_terceirizacao_do_trabalho_no_brasil_novas_e_distintas_perspectivas_para_o_debate.pdf [<https://perma.cc/WS64-HZL9>].

to defend outsourcing as less problematic. He clearly disregards the fact that the people most affected by outsourcing—that is, the *terceirizadas*—are precisely that: gendered and racialized outsourced workers. He excludes those workers from his equation, working with an abstract outsourced worker who is not affected by any other social markers.⁵² The bottom line is: his argument is perfect to defend the point that I make here. Outsourcing, gender, and race, at least in the way they present themselves today, are entangled. It is no coincidence that outsourcing's relation to lower pay is influenced by gender and race. Outsourcing in Brazil has a black female face.⁵³

Another aspect to be considered is the fact that outsourcing is continuously being linked to the precariousness that leads to physical and mental health hazards.⁵⁴ In cleaning work or caretaking work in hospitals, this often materializes in contamination from exposure to chemicals and pathogens. This could be seen as a bad application of the rule. But it can also be seen as deriving from the fact that *terceirizadas* are considered the “cheapest meat on the market,” because of the place they occupy in Brazilian society.⁵⁵ Interlocked systems of oppression shape this idea that women's bodies are just there, at other people's disposal, and not as valuable as others.⁵⁶

Terceirizadas also suffer different consequences because of their subordinate status: there are issues that happen to *terceirizadas* because of their overrepresentation in outsourcing, which shows the disparate impact the regime has on them. Double shift (or, the accumulation of paid work and unpaid work in the domestic environment) for instance, is something that happens to women in every sector, with outsourced and not outsourced workers.⁵⁷ However, in general, outsourced workers work more hours than

⁵² S.T.F., Arguição de Descumprimento de Preceito Fundamental No. 324, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, Diário da Justiça Eletrônico [D.J.e], 09.06.2019, 1, 55. Justice Fux made a similar argument, regarding turnover rates (*Id.* at 156).

⁵³ Maeda, *supra* note 2.

⁵⁴ Marina Bernardo Mandarini, Amanda Martins Alves, & Marina Greggi Sticca, *Terceirização e impactos para a saúde e trabalho: uma revisão sistemática da literatura*, 16 REVISTA PSICOLOGIA: ORGANIZAÇÕES E TRABALHO 143, 147 (2016).

⁵⁵ Barobosa et al., *Mulheres negras e terceirização: a carne mais barata do Mercado*, in RESISTÊNCIA III: O DIREITO DO TRABALHO DIZ NÃO À TERCEIRIZAÇÃO 669 (Jorge Luiz Souto Maior & Valdete Souto Severo eds., 2019).

⁵⁶ This is an inheritance of the enslavement system. Daniel Angyalossy Alfonso & Bruno Gilga Sperb Rocha, *Terceirização E Racismo: O Legado Da Escravidão*, in RESISTÊNCIA III: O DIREITO DO TRABALHO DIZ NÃO À TERCEIRIZAÇÃO 685 (Jorge Luiz Souto Maior & Valdete Souto Severo eds., 2019).

⁵⁷ Marília Loschi, *Tarefas domésticas impõem carga de trabalho maior para mulheres*, AGÊNCIA IBGE NOTÍCIAS (Jan. 24, 2018),

non-outsourced workers, which makes *terceirizadas* suffer the most from the double-shift phenomenon. This is not only a statistic. It is something widely reported by them.⁵⁸

It is the same for aesthetical harassment—that is, harassment that focuses on how someone looks. Some women are considered better suited for some kinds of work, according to how they look like. Black women in general suffer aesthetical discrimination, because they do not meet aesthetical requirements shaped by ideals of white femininity. As they are overrepresented in outsourcing, this is something disproportionately present.⁵⁹ The issue appears to be differential treatment, but it is not. It is a subordination issue, as the differential treatment only occurs because of interlocking systems of oppression that shape experiences. Lastly, all kinds of harassment in the workplace occur because of hierarchical structures. However, with *terceirizadas*, the harassment is not only an excessive way of telling them that they did something wrong. It is very often a way of keeping them down—of humiliating and subordinating.⁶⁰ “*They treat us with inferiority.*”⁶¹

By ignoring how outsourcing works in real life, the decision keeps the differentiation between the abstract outsourced tax lawyer and *terceirizadas* alive, even if it purports to do the opposite. This is a rhetorical change that materializes what has been called the dynamic of “preservation through transformation.”⁶² The law changes so that inequality may stay the same (and stronger). This equation has a legitimating effect: it gives the impression that an irrational distinction is being dismantled and that therefore *terceirizadas* are going to be treated the same as everybody else. However, it is important to make clear that, if anything, they will still be treated worse—with the “bonus” for companies that some other already disadvantaged workers will be treated more like them. The equalization of workers in law, in the decision, only serves the purpose of dragging everybody down

<https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-denoticias/noticias/18568-tarefas-domesticas-impoem-carga-de-trabalho-maior-para-mulheres>.

⁵⁸ Rogerio Mendes de Lima & Elisa Costa de Carvalho, *Destinos Traçados? Gênero, Raça, Precarização E Resistência Entre Merendeiras No Rio De Janeiro*, 15 REVISTA DA ABET 114 (2016); Garbin, *supra* note 15; Martins Sampaio & Guerra, *supra* note 15; Silva, *supra* note 37, at 96, 108; Willy, *supra* note 49, at 418.

⁵⁹ Zimmermann, *supra* note 49, at 79.

⁶⁰ Maeda, *supra* note 2; Zimmermann, *supra* note 49, at 60; Lisboa, *supra* note 37, at 163.

⁶¹ Beatriz Gabriele De Castro Silva Irber, *Trabalhadoras Terceirizadas De Limpeza E Conservação Da UNB: Relatos De Violências, Invisibilidade E Precarização* (July 11, 2016) (B.A. Monography, Universidade de Brasília) (on file with Universidade de Brasília).

⁶² Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1996-97).

(perhaps even the tax lawyer). This is a symptom of equality perspectives that are not imbued with antistatutory goals. Formal equality can be achieved even if in the process of treating likes alike, everybody ends up being treated worse.⁶³

Although the decision treats outsourcing as something gender- and race-neutral, it is safe to say that when we talk about the real outsourced workers, we are talking about *terceirizadas*. Outsourcing is composed mainly of undervalued pink-collar jobs, which are, of course, overtly populated by women in general and in which black women are overrepresented.⁶⁴ So, although the paradigmatic outsourced worker adopted in the decision is the tax lawyer, whatever equivalence is being made between regular employees and outsourced workers is talking about *terceirizadas*. The way they experience wrongdoing, then, is something inherent to their outsourcing.

Wrongdoings are Inherent to the Structure of the Contract and not Mere Abuses

Patrícia: “What about the relationship with workers directly hired by USP, the so-called effective employees?”

Silvana: “At USP, we could never speak to any permanent worker or student. Those in charge forbade it. But it had everything. There were staff who treated us as invisible, students too. But this is not only at USP. We are invisible everywhere.”⁶⁵

The structure that makes outsourcing possible in Brazil is inherently subordinatory. In the decision, another argument that is used to sustain the possibility of outsourcing is the view that whatever problems that arise from outsourcing happen because of abuse. In this section, I present a tentative argument about the inherently de-humanizing structure of the outsourcing contract. Looking to the bottom and listening to *terceirizadas* enables to see that many of the problems suffered by *terceirizadas* occur not because the rules are applied incorrectly, but because the rules are applied precisely how they need to be applied in order to work. On a micro level, *terceirizadas* have to become dehumanized for the outsourcing contract to operate.

The general rule about employment in Brazil is regulated by the Labor Law Code, which defines, in its art. 3rd, the elements that constitute an employment relationship. The provision states that an employee is, “any

⁶³ Adilson Moreira, *Pensando Como Um Negro: Ensaios de Hermenêutica Jurídica*, 18 REVISTA DE DIREITO BRASILEIRA 393 (2017).

⁶⁴ *Sistema PED – Pesquisa de Emprego e Desemprego, Inserção da População Negra nos Mercados de Trabalho Metropolitanos*, DIEESE (Nov. 2017), <https://www.dieese.org.br/analisedped/negros.html> [<https://perma.cc/XE3A-B42F>].

⁶⁵ See Maeda, *supra* note 2.

individual who provides services of a non-occasional nature to an employer, under his dependence and for a salary.” From the systematic reading of this article with other provisions of the code, a doctrinal understanding on the concept of employment has emerged. The employment relationship arises from a contract in which (i) an individual is obliged to perform work that only he or she can perform (i.e. workers are not fungible); (ii) work is essential to the achievement of the purposes of the company; (iii) the relationship between employee and employer implicates subordination (that is, employee responds directly to the employer); and (iv) employee receives wages in return (i.e. the relationship should have an onerous character).

For decades, outsourcing has emerged as an alternative to this type of contract and has been consolidated with the decision in ADPF 324. One strong argument against the possibility of outsourcing has been, since its beginning, the constitutional prohibition of different treatment between workers. Why would two people who work for the same employer be treated differently? In order to differentiate the two workers, as a way of enabling the different legal treatment, an argument has surfaced: the principles that guide the traditional relationship between employer and employee—that is, personality (i.e. labor can only be performed by a specific person), non-eventuality (i.e. work has to be performed continuously), direct subordination (i.e. worker responds directly to employer), onerous character (i.e. worker is paid by the employer)—cannot be present in the relationship between the service-taker and the outsourced worker. Otherwise, the contract could be considered a traditional employment relationship, independently of the model formally adopted.

What underlies the criteria is the need for differentiation. But, keeping in mind the concrete situation of *terceirizadas*, differentiation becomes subordination. At least some of the criteria necessary for the configuration of a non-traditional employment contract are then intimately related to oppressions *terceirizadas* suffer in the workplace. This means that these issues arise not because of incorrect application of the rule, but because of the correct application of the rule. There are forms of abuse that *terceirizadas* only suffer because of how interlocking systems of oppression shape their experiences as *terceirizadas*, on the one hand, and the very way outsourcing is structured, on the other. Outsourcing provides no way out. Inequalities are intrinsic to it, so there could not possibly exist a non-abusive use of this type of contract for *terceirizadas*.

The traditional employment contract is *intuitu personae* – that is, it is formed with a specific person who could not just be replaced by another. The possibility of outsourcing then demands that *terceirizadas* be replaceable. They have to be seen and treated by persons around them more like a service than like a person. From where I stand, the aim of depersonalization lies behind a series of policies, such as segregation and silencing, which are interrelated.

These policies are bad in and of themselves, but they also lead to atomization, isolation, and invisibility. Many *terceirizadas* report being physically segregated from non-outsourced workers and from other *terceirizadas*. They are segregated from non-outsourced workers because they are not allowed to occupy the same spaces. For instance, they cannot use the same cafeterias and resting places. They are also segregated from other *terceirizadas*. There is a lack of common spaces that would enable bonding. Also, *terceirizadas* work in more than one place and, as such, are unable to create a fixed community.⁶⁶ This is an issue that arises from the eventuality requirement as well.

Terceirizadas also report that they are not allowed to talk to people around them. They are prohibited to talk, for instance, with students of universities they “provide services” for, employees, and among themselves.⁶⁷ This silencing is already bad enough in itself, of course. But it is worth remembering that silencing is a constant in women’s lives. From the most obvious ways, such as these ones, to the most obscured. Silencing is a practice permeated and shaped by structural inequalities.

Silencing and segregation—two sides of the same coin—of course lead to isolation and atomization. *Terceirizadas* cannot share experiences.⁶⁸ This leads them to think that their problems are individual and not political. In this sense, outsourcing reproduces the public/private split that has long oppressed many women. Outsourcing is work, and this creates the sense that people are occupying the public sphere. But, instead, *terceirizadas* are occupying the private sphere. In this case, the private sphere is their own minds.⁶⁹

The non-personalization becomes, at the end of the day, dehumanization. This is clear in *terceirizadas*’ reports on being invisible. Of being noticed only when the service is lacking.⁷⁰ The *terceirizada* somewhat becomes the service. “*People in the administration don’t call us by name, they belittle terceirizadas as if they did not have names.*”⁷¹ To dehumanize is the only way outsourcing can operate without self-destructing. This is intrinsic to its existence and supported by the majority opinion.

Lastly, it is necessary to make a brief remark on the indirect subordination requirement. Service-takers are not allowed to directly

⁶⁶ Zimmermann, *supra* note 49, at 78; Andreta, *supra* note 15, at 149, 187; Lisboa, *supra* note 37, at 164. Lisboa quotes a woman who states, “I feel thrown from one place to the other, listening: ‘you can’t stay here, leave because it is embarrassing to have cleaning people here.’”

⁶⁷ Zimmermann, *supra* note 49, at 60.

⁶⁸ Andreta, *supra* note 15, at 44.

⁶⁹ “Oh, it is very strange. Because you don’t have anyone to talk to, only you and you . . .” Andreta, *supra* note 15, at 188.

⁷⁰ Andreta, *supra* note 15, at 182; Irber, *supra* note 61, at 43.

⁷¹ Irber, *supra* note 61, at 44.

subordinate *terceirizadas*, but, from their perspective, the service-taker's workplace is far from letting them be free of control. The orders may not be direct, but there are many indirect ways in which such control can be accomplished—for instance, by looks, by mistrust, by not calling *terceirizadas* by their names. “When there is no visible power structure, the invisible structures rules,” and these invisible structures can be more pervasive than the ones out in the open.⁷²

In conclusion, the subordinatory character of outsourcing, from my perspective, can be seen in the very structure of outsourcing in Brazil and how it interacts with real structural inequalities. The general rule in Brazil is that employment bonds demand non-eventual work, direct subordination, and personality. For outsourcing not to be configured as an employment contract with the service-taker, there must be eventuality, non-direct subordination, and impersonality. This means that many issues that ensue are inherent to this rule. To be considered a person is incompatible with outsourcing.

The Dissent

Patricia: “What about black women?”

Silvana: “The majority are women, where I work today there are 16 workers and only 6 are men. Most are black, in fact where I work there are no white women. In all the places I’ve worked there was one white or another “lost” in there, the rest, only black women.”⁷³

Silvana Araújo da Silva

Whether starting from the impacts on the lives of workers, or from the perspective of business performance, there is a consensus that outsourcing is a strategy for concentrating organizations on their main activities, with the outsourcing of those ancillary or non-final activities.⁷⁴

Justice Rosa Weber

If the problem with the majority opinion is that it universalizes the experience of an abstract ideal worker, disregarding the many material differences that exist between this figure and *terceirizadas*, the problem with the minority opinion is that it disregards that “worker” is not a universal

⁷² Katherine V.W. Stone, *The New Face of Employment Discrimination, in* PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 243, 250 (Judy Fudge & Rosemary Owens eds., 2006).

⁷³ See Maeda, *supra* note 2.

⁷⁴ S.T.F., Arguição de Descumprimento de Preceito Fundamental No. 324, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, Diário da Justiça Eletrônico [D.J.e], 09.06.2019, 1, 324, 219.

category: it is constituted by other social markers like gender, race, and class differences, which act synergistically in constructing the law. In other words, while the majority opinion equates workers that are not equal, the minority differentiates workers that should be considered equals. In both cases, subordination is the animating factor.

The dissenters have tried to maintain labor law protections for workers who perform core activities. However, the possibility of outsourcing non-core activities was left untouched. This, from my perspective, reflects traditional gendered dichotomies that permeate labor law logic.

On a broader level, this reflects a non-intersectional reading of the constitution. The dissenters approached the issue from the bottom—the place of “workers.” But they adopted “worker” as a universal category, which, in a society of white and male supremacy, reflects the experience of the white male worker. The understanding of “worker” as a universal category does not reflect the reality: there is no universal worker, because work is experienced differently depending on the intersection in which social groups are located. When mobilized in this manner, the category ends up concealing intragroup differences and is unable to deal with problems that affect particular groups of workers.⁷⁵ As stated above, *terceirizadas* have a clear profile and the kinds of work they perform are related to the place they occupy in the Brazilian society. This place is not the same as the place white male workers or white female workers or black male workers occupy.

In the specific case at hand, the use of the category “worker” as detached from gender and race obscures the problems that permeate the distinction between core and non-core activities. An intersectional analysis, on the other hand, would be able to access the fact that the distinction can be related to the gendered and racialized idea prevalent in Brazil and elsewhere that non-core activities are not as much work as core activities.⁷⁶

It is not new to state that labor law in general has excluded women from its protection by drawing a line between what is considered labor and what is not. This line rests on dichotomies, such as public/private, work/family, paid/unpaid, which have historically corresponded to men;s and

⁷⁵ Angela Harris, *From Precarity to Positive Freedom*, 44 SW. L. REV. 621, 626 (2015).

⁷⁶ This way of reflecting about the world has been developed, in the Brazilian context, by Lélia Gonzalez in the 1980s. See Lélia Gonzalez, *Racismo e Sexismo na Cultura Brasileira*, REVISTA DE CIÊNCIAS SOCIAIS HOJE, ANPOCS, 223 (1984). This framework has developed in parallel in many different contexts (for instance, in the US, it has been conceptualized as intersectionality by Crenshaw, *supra* note 45). MacKinnon and Crenshaw have recently proposed a doctrinal incorporation of the framework. Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J.F. 343 (2019).

women's social roles, respectively.⁷⁷ Historically and continuing through today, paid work, performed in public, and unpaid work, performed at home, have been seen as two different domains of social activity. This idea is behind the normative and regulatory responses that are given to the two: the first activity is regulated by labor law; the second, by social ideals about what familial relations should look like.⁷⁸

Outsourcing is, of course, a type of contract that is undoubtedly considered labor and, therefore, has been regulated by labor law in Brazil. However, the more general discussion about the division between female and male work also translates to the division between core and non-core activities. Non-core activities coincide largely with the unpaid work performed at home, and this underlies the idea that there is no problem in offering different regulatory responses depending on the kind of work performed. Just as performing domestic cleaning and unpaid care work in the home is seen as not much of a contribution to capitalist production, cleaning and caretaking in the public realm is seen as something secondary.⁷⁹

Core and non-core activities have been historically regulated differently, even if both were covered by the umbrella of labor law. This is a conceptual framing, an intellectual contrivance that, in the case at hand, mimics social ideals about female work and does not correspond to the material reality. I wonder how long a company could go on functioning without *terceirizadas* doing the maintenance work. The answer to this rhetoric question would be “not that long,” as this kind of work is just as necessary for the reproduction of capitalism as other kinds of work.⁸⁰ In Brazil, the same pattern of thinking can also be traced in the way domestic work has been historically regulated. It was only in 2015 that domestic workers properly acquired labor rights that had been conceded to other workers for decades.⁸¹

⁷⁷ Judy Fudge, *From Women and Labour Law to Putting Gender and Law to Work*, in *THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY* 321, 329 (Margaret Davies & Vanessa E. Munro eds., 2013).

⁷⁸ For considerations on the conceptual difference between paid and unpaid work, see Joanne Conaghan, *Gender and the Labour of Law*, in *PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW* 271, 286 (Hugh Collins, Gillian Lester, & Virginia Mantouvalou eds., 2019).

⁷⁹ For feminists that dispute this view, showing the place domestic work has a productive character in the reproduction of capitalism, see Silvia Federici, *REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION, AND FEMINIST STRUGGLE* (PM Press, 2012).

⁸⁰ Nancy Fraser, *Contradictions of Capital and Care*, 100 *NEW LEFT REV.* 99 (2016).

⁸¹ The constitutional amendment that equated domestic work to other kinds of work was a great achievement of domestic worker's movements. It was signed by President Dilma Rousseff in 2015. In the US, the same pattern can be traced:

The argument being made here is not a causality one. It is impossible to say that the line is drawn because of these social ideals and, even less, that it is drawn solely based on these social ideals. Instead, I am arguing that the line corresponds to the divisions historically made and reproduces them. In this sense, even if men are also affected by the distinction – for instance, by occupying post in security, a service also considered non-core – the fact that maintenance is considered not essential is still symptomatic.⁸² This split is artificial and ideological. It operates under the same logic as the public/private divide, at least in the services that lie in the bottom.

Underlying their position is a different treatment logic: core and non-core activities are different, so there is a logical rationality for treating them differently. But the dissenters disregard that legal lines, such as this one, are artificial and reproduced by inequalities.⁸³ In this context, the maintenance of the distinction would not only lead to material economic consequences, but would also legitimate the hierarchies of race, gender, and class that permeate it.⁸⁴

Finally, the minority's position disregards the outputs of allowing outsourcing of non-core activities. Outsourcing of non-core activities is a tool for perpetuating inequalities—at least for *terceirizadas*—and, as such, is not as emancipatory as the Justice's vote tries to lead one to believe. It creates what has been called “precarity,” conceptualized by classcrit scholars as “the increasing vulnerability of workers, even those above the official poverty line, to disaster.”⁸⁵ The low wages they receive make them stay poor.

domestic and farm workers have been excluded from social security, having a disproportionate impact on black workers in general (I thank Professor Reva Siegel for this observation). See Louisa Acciari, *Practicing Intersectionality: Brazilian Domestic Workers' Strategies of Building Alliances and Mobilizing Identity*, 56 *LATIN AM. RSCH. REV.* 67, 71 (2021); *Congresso promulga hoje PEC das Domésticas*, CÂMARA DOS DEPUTADOS (Apr. 2, 2013), <https://www.camara.leg.br/noticias/399539-congresso-promulga-hoje-pec-das-domesticas> [<https://perma.cc/FP3X-GUGS>]; *Bolsonaro já se gabou por ter votado contra todos os direitos das domésticas*, FORUM (Oct. 3, 2018), <https://revistaforum.com.br/direitos/2018/10/3/bolsonaro-ja-se-gabou-por-ter-votado-contra-todos-os-direitos-das-domesticas-34808.html> [<https://perma.cc/QK3Q-5CE7>]; *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Lab.* (2021) (testimony of Rebecca Dixon, Executive Director, National Employment Law Center).

⁸² See Susan Moller Okin, *WOMEN IN WESTERN POLITICAL THOUGHT* (Princeton University Press, 2013).

⁸³ MACKINNON, *supra* note 45.

⁸⁴ Justin Desautels-Stein, Angela P. Harris, Martha McCluskey, Athena Mutua, James Pope, & Ann Tweedy, *ClassCrits Mission Statement*, 43 *SW. L. REV.* 651, 652 (2014).

⁸⁵ Harris, *supra* note 75, at 630.

Outsourced posts give *terceirizadas* no advancement opportunities. These jobs don't teach any skills other than those that *terceirizadas* already had before entering the job. They report having no time for schooling and, therefore, for building a new path. Besides keeping women in a place socially ascribed to them—for being women—the possibility of outsourcing specifically non-core activities transmits to the society the (old) idea that work usually performed by women is less valuable. That is, the permission of outsourcing of non-core activities perpetuates a vicious cycle: it keeps outsourcing of non-core activities and *terceirizadas* as mutually constitutive of one another. Labor law, like any kind of law, is not only instrumental. Norms are ideological and discursive and, as such, can “develop a life of their own that is quasi-independent of actually existing social relations.”⁸⁶ Outsourcing not only reproduces material inequalities, it also perpetuates the idea that work performed by women has less value.

Before moving on to the next section, one consideration is in order. First, it can be said, of course, that, in some cases it would not make sense to hire a full-time employee for work that is not required daily or that is required only in very specific situations. The argument proposed here tries to expose the artificiality of considering traditionally female work as not essential or different from other kinds of work. In this sense, I do not challenge that a line could eventually be drawn. Instead, I propose that this hypothetical line should not replicate and perpetuate discriminatory ideals.

Silencing on a Large Scale

Patricia: “Faced with the current movement to expand outsourcing through judicial or legislative means, in your opinion, what will be the challenges for the working class?”

Silvana: “Outsourcing is a delay because it causes workers to earn different wages for the same service and have no rights. It divides the working class between permanent and outsourced workers, and this makes the struggle difficult. But we cannot bow our heads. The path is the same, fighting not only for our rights, but also for the end of outsourcing.”⁸⁷

“Therefore, regarding the debate on labor issues that have reached the Supreme Court, I believe that the positions I have defended here are the positions in favor of workers—respect for those who think differently.”⁸⁸
Justice Barroso

⁸⁶ Fudge, *supra* note 77, at 328.

⁸⁷ See Maeda, *supra* note 2.

⁸⁸ S.T.F., Arguição de Descumprimento de Preceito Fundamental No. 324, Relator: Ministro Luís Roberto Barroso, 30.08.2018, 194, Diário da Justiça Eletrônico [D.J.e], 09.06.2019, 1, 21.

All the considerations advanced above arise from the same problem: the complete silencing of *terceirizadas* by both the majority and the dissenting opinions. This silencing reflects the general pattern in discussions about flexibilization of labor rights in developing countries that privileges quantitative data about the macroeconomics of flexibilization, while ignoring qualitative data about how workers experience precarious work.⁸⁹ But, more than that, it reflects the silencing of *terceirizadas* in their day-to-day workplace experience.

Something that stands out in the decision is its (supposed) preoccupation with social justice. Outsourcing is not defended as a means of making companies profit more. It is defended as a mechanism of making everybody better off, as it leads to more employment. The preoccupation might be genuine and honest. But, when problems are identified in the abstract, without taking into consideration the voices of those affected by a certain problem, chances are the solutions proposed will be paternalistic, instead of emancipatory.⁹⁰

In this sense, the decision also reproduces the Brazilian elite's mentality toward subordinated groups. Another tragic anecdote that took national proportion in Brazil illustrates this mindset. In 2017, a businessman was elected as São Paulo's Governor, running his campaign on the idea that he was not a politician, but a manager. In the early stages of his candidacy, his wife was interviewed and, among other things, when talking about her employees, she said: "They all lived in shacks and didn't even have teeth. I got them all a home, gave them teeth, got them a good health plan. Today they feel happy, they even think they are artists because they are my assistants." She then went on to say, "I have always felt like an Evita Perón, because I am a people person, I am part of the people' (...) "I get along very well with more humble people. Sometimes they just want a hug and a handshake. It is so little what they want."⁹¹

Once again, the argument here is not one of vilification of an individual, but a broader one, about how the elite behaves toward the people at the bottom, behavior that is rooted in silencing them. This is what leads to the idea that subordinated groups want "so little." This discourse permeates the decision to the extent that it admits that there are certain discrepancies but

⁸⁹ Kroncke, *supra* note 5, at 330.

⁹⁰ Catharine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 263 (Cass R. Sunstein & Martha Craven Nussbaum eds., 2004).

⁹¹ Silas Marti, 'Me Sinto do Povo', *diz Bia Doria, a nova primeira-dama de SP*, UOL (Oct. 9, 2016), <https://www1.folha.uol.com.br/poder/eleicoes-2016/2016/10/1821181-me-sinto-do-povo-diz-bia-doria-a-nova-primeira-dama-de-sp.shtml> [<https://perma.cc/YHP5-PKHA>].

that it is better to have a precarious job than to have no job. The solution is not an improvement of labor conditions, but a reduction of rights.

Events that happen in the world of facts do not have necessary or natural implications for the law. What counts as a relevant source of facts for a decision is in fact a normative choice by the decisionmaker, constrained by what the law, as an institution, allows them to consider.⁹² Currently, not even methodologically sound qualitative research aimed at assessing how individuals feel about outsourcing is considered relevant. And, experiences that are not validated by the “objectivity” of research, have even less place in legal reasoning. If the case of *terceirizadas* teaches anything, it is that these voices should count if one has a real commitment to equality.

On Outsourcing and Subordination: A Tentative Path for The Future

Part IV was an exercise of deconstruction. By looking to the bottom, I problematized the arguments presented in both the majority and dissenting opinions. This section, on the other hand, has a reconstructive impetus: it explores a possible path for challenging outsourcing’s constitutionality.

While both the majority and the dissenting opinions have reasoned by implicitly equating or differentiating *terceirizadas* from other workers, I have argued above that when one looks at the reality of *terceirizadas*, it is possible to see that the concrete issues they face arise not from their being treated differently than other workers, but from the subordinate status they occupy in society.

Well, can Brazilian law do something about that? The answer—perhaps too optimistic but, nevertheless plausible—is yes.⁹³ If one interprets the equality principle as inscribed in the Brazilian Constitution in a systematic way—that is, considering the legal context as a whole and trying to harmonize norms⁹⁴—or even looking at how the Brazilian Supreme Court has understood equality in other contexts, it is possible to argue that outsourcing violates the principle of equality as inscribed in the Brazilian

⁹² Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990).

⁹³ The author has defended this point elsewhere. Taís Penteado, *The Abortion Jurisprudence in Brazil: An Analysis of ADPF 54 from Feminist Equality-based Perspectives*, 19 INT’L J. CONST. L. 1664 (2021). For a more detailed analysis of Brazilian equality law, see Dimitri Dimoulis, DIREITO DE IGUALDADE: ANTIDISCRIMINAÇÃO, MINORIAS SOCIAIS, REMÉDIOS CONSTITUCIONAIS (Almedina, 2021).

⁹⁴ Dimitri Dimoulis & Soraya Lunardi, *Sacredness of the Constitutional Text and Interpretative Heresy: The Brazilian Supreme Court Decision on Same-sex Civil Unions* 15 (São Paulo L. Sch. of Fundação Getulio Vargas – Direito GV Research Paper Series – Legal Studies, Working Paper No. 91, 2014), https://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/11668/RPS_91_FIN_AL.pdf [<https://perma.cc/V7XD-9R9Y>].

Federal Constitution. To make such a claim, a specific understanding of equality is needed: one that problematizes status enforcement practices and has as its substance the goal of overcoming social hierarchies. Such a conception of equality has been theorized by many authors and goes by various names – such as substantive equality⁹⁵ or antisubordination – but the substance of the idea is, as already exposed in Part III, the dismantling of subordination.⁹⁶ If a practice arises from, or perpetuates, the subordination of a determined group, then it violates equality. Here I adopt the term antisubordination to refer to this conception of equality.

In Brazil, gender equality is protected by articles 3rd and 5th. Art. 3rd, I states that “[t]he fundamental objectives of the federative Republic of Brazil are: (...) IV - to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination.” Article 5th, in turn, prescribes that “[a]ll persons are equal before the law, without any distinction whatsoever, granting (...) the inviolability of the right (...) to equality (...) I - men and women have equal rights and duties under the terms of this Constitution.”

Art. 5th, I can be read as a formal equality requirement. Men and women should be treated equally. Art. 3rd, IV, in turn, creates a positive duty to promote equality. In both, the equality principle inscribed in the Brazilian Constitution is open-textured. More specifically, it does not really tell us immediately what equality is (or how to promote it), so, it is up to interpreters to confer its meaning.

One way of interpreting the equality principle is by looking at how the legislature has legislated in situations involving equality-related matters. Many statutes show how the antisubordination impetus is no stranger to the Brazilian legal system. Brazilian law, in many cases, is imbued with the idea that inequality’s substance is hierarchical and, as such, equality demands overcoming asymmetries of power—more so than overcoming differentiated treatment.

Examples of this are constitutional and statutory norms that regulate labor relationships and gender-related crimes. Examples include, but are not limited to, art. 7th, CF, which grants workers individual and collective rights, based on the idea that those rights are needed to balance asymmetries of power between employers and employees. Another example of the recognition of asymmetries of power is art. 8th, which grants the right to free association and unionization and prescribes that unions should be present in all work-related collective bargains.⁹⁷ The worldview that permeates those

⁹⁵ Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011).

⁹⁶ Fiss, *supra* note 45; MACKINNON, *supra* note 45; Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9 (2003).

⁹⁷ A detailed account of those norms can be found in Kroncke, *supra* note 4.

norms—which are now under attack—is that workers have their rights violated because they are workers in an unequal class-based society.

Some statutory provisions regarding gender-related harms are also imbued with the same idea: women have their rights violated not only as individuals, but as part of a subordinated group. The domestic violence statute, for instance, specifically states that the law applies to women only, recognizing the gendered nature of the phenomenon.⁹⁸ The harms that happen to women in the domestic context are not mere coincidences. They are a reflex of a society’s imbalances of power.⁹⁹

I bring this up not to talk specifically about outsourcing, but to show that an antisubordination drive confers substance to some Constitution and statutory norms that try to concretize open-ended equality provisions. As such, it is not senseless to adopt such a view to deal with equality-based issues in Brazil. This can also be sustained by the fact that, in other cases, Justices of the Brazilian Supreme Court have resorted to considerations of socio-historical subordination to decide conflicts. An example is ADPF 186, in which affirmative action in universities was deemed constitutional, as a means of overcoming structural racial inequalities in Brazil.¹⁰⁰ I am not suggesting here that antisubordination is the only equality perspective present in the Brazilian Constitution. In fact, the Brazilian Supreme Court has adopted a different treatment-based approach in some cases.¹⁰¹ Instead, I am arguing that the antisubordination drive is recognized by the Brazilian Legal System and, therefore, can reasonably provide a basis for arguing about outsourcing.

Adopting the antisubordination perspective to analyze outsourcing from the standpoint of *terceirizadas*, the practice becomes problematic in many ways. I have explained above that *terceirizadas* enter into outsourced positions because of entangled economic, racial, and gender disadvantages that they already face. When they enter outsourcing, they receive treatment that is problematic not because it is different from the treatment others receive, but because it is worse and because it only happens due to the place

⁹⁸ Art. 5, Lei Maria da Penha reads “For the purposes of this Law, domestic and family violence against women are constituted by any action or omission based on gender that causes death, injury, physical, sexual or psychological suffering and moral or patrimonial damage” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).

⁹⁹ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

¹⁰⁰ See Adilson José Moreira, *Discourses of Citizenship in American and Brazilian Affirmative Action Court Decisions*, 64 AM. J. COMPAR. L. 455, 483 (2016).

¹⁰¹ An example is the case in which the court decided that to confer a 15-minute break to women workers only was a justified special treatment, without considering subordination as a relevant factor in deciding. S.T.F., RE No. 658.312, Relator: Ministro Dias Toffoli, 15.09.2021, Diário da Justiça Eletrônico [D.J.e], 21.09.2021.

they occupy in society—that is, they earn less, suffer more risks, work more and in specific posts not by chance, but because they are placed at the intersection of poverty, blackness, and femaleness. Once *terceirizadas* are occupying these jobs, outsourcing works as a tool for the perpetuation of subordination. *Terceirizadas* are kept poor, silenced, isolated. The reality that is omitted in both the majority and the dissenting opinions is that *terceirizadas* and outsourcing are mutually constitutive of each other: *terceirizadas* are outsourced because of inequalities; the regime of outsourcing demands that workers can only find a way out of misery in a precarious job; and, by keeping women poor, outsourcing creates its target worker—the *terceirizada*. More broadly speaking, antisubordination could also be a tool to challenge the market-based logic of the decision, keeping in mind its place in legitimating narratives that conceal and oppress.

If equality aims to combat subordination, and the outsourcing of *terceirizadas* is permeated by and perpetuates subordination, then, it is possible to make the case that the practice violates equality. This is not to be taken as a final argument, but as a tentative way of reflecting about the matter and re-starting a legal conversation from a different angle.

Concluding Remarks: On Outsourcing and Resistance

Patrícia: “How was the organization of the terceirizadas' movement?”

Silvana: “We started to organize talking about the lack of things and seeing that the problem was not one person's, but everyone's (...) After the Dima [University of São Paulos's service-provider] struggle, outsourced workers no longer let go of non-payment or wage arrears. Nor do they quietly accept companies decreeing bankruptcy.”

Patrícia: “How was the terceirizadas' leading role?”

Silvana: “It was very strong, women were the leaders. They put up a fight. The most interesting thing was that our boss brought outsourced workers from elsewhere to do our job while we were on strike, but we didn't let them work because we asked them what they were going through, and they said they were going through the same things of arrears and lack of wages. We convinced them to also stop and fight with us. It was very strong that day.”¹⁰²

In this work I have tried to perform a critical jurisprudential review of ADPF 324—the lawsuit in which the Brazilian Supreme Court declared unconstitutional the judge-made doctrine that forbade outsourcing of activities related to the core business of companies. Critical or not, at the end of the day, it is still jurisprudence, and the limitations of this kind of work

¹⁰² See Maeda, *supra* note 2.

and of law itself have long been stated.¹⁰³ Law, while useful for immediate pressing changes, is not sufficient to create radical change. Such change, from my perspective, comes from the ground up. And, fortunately, the ground is on the move.

Although times have been difficult in Brazil, *terceirizadas* have been resisting. I started this paper with a quote from Silvana Araújo da Silva, one of the leaders of the first *terceirizadas*' strike against a service-provider at the University of São Paulo that happened in 2005. Others followed in 2011, 2013, 2015, and 2016, in that and other settings.¹⁰⁴ All of them were led by *terceirizadas*. Mobilizations can happen in any form. They can happen through strikes, but they can also happen by building a community of consciousness-raising or even on an individual level, by risking jobs to be interviewed by students. The quote that opened this section says it all.¹⁰⁵

¹⁰³ See generally LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002).

¹⁰⁴ Zimmermann, *supra* note 49, at 57; Lima & Carvalho, *supra* note 58, at 124; Diana Assunção, A PRECARIZAÇÃO TEM ROSTO DE MULHER (2020). This list is, of course, not exhaustive.

¹⁰⁵ Terceirizadas mobilize everywhere. In 2019, Chilean outsourced women mobilized against outsourcing, an inheritance from Pinochet's dictatorship, conquering their insourcing in Universidad de Santiago de Chile. In 2017, French outsourced women—all of whom were migrants—from the railway sector went on strike and won their claims. In 2015, South-African students' #FeesMusFall joined forces with outsourced workers' #EndOutsourcing, leading to "insourcing" at Wits University.