CELEBRATING TWENTY-FIVE YEARS AND SPECULATING OVER THE FUTURE FROM A BRAZILIAN PERSPECTIVE

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If, back in 1980, one would speculate on how labor would be in Brazil twenty-five years later, one would hardly guess that it would be as it is today: flexible, precarious, and insecure, even though still strongly regulated. One would hardly guess that millions of cases would overwhelm the labor courts, even if the "inertial" growth of the economy and of the working population allowed us to foresee such a scenario. If one was to say that twenty-five years later, Luis Inácio Lula da Silva, the local leader of a still-to-be-renovated union movement and just recently founded Worker's Party, would become Brazil's president, just about nobody would have taken such a prediction seriously. That is the danger one may find in speculating about the future: uncertainty and imponderability are variables that cannot be dominated. They turn every attempt to foresee the future into a risky game where getting it right or wrong might be just a matter of good guessing. Even so, as this is a tempting game, which we have all agreed to take part in, so be it: speculation is then the crucial idea behind these lines.

What is the future of labor law? What will the next twenty-five years bring in the field of comparative labor law: Will the field whither or grow and why? If the latter, in what direction will it move? What questions will press to the fore and call for comparative scholarship and why? What would bring that call about? Even if I cannot be certain that these lines would reveal themselves a good or bad prediction, I think this could be a fine exercise, if one does not forget a fundamental factor. What one says about the future reveals much more, how one sees the present and the possibilities it holds rather than how the future will actually be. This is an extremely

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important point that we must not forget. All this being said, I may now speculate about the future, if only as a prisoner of the present with a method nonetheless. Thus, I intend to write these prospective lines in three parts: in the first and second sections, respectively, I will discuss, from a Brazilian perspective, about the changes in labor and its impact on labor law and the labor courts. Finally, in the third and final section, I will try to relate the previous parts to the comparative field.

I. LABOR TRANSFORMATION AND ITS IMPACTS ON LABOR LAW

Many have lately argued that labor as a value is going through a crisis, which puts into evidence the limitations of the juridical categories created to regulate subordinate work. In other words, the work based on the structure that society has built up over the last two centuries may have become unable to provide the social regulation it has been furnishing so far. Consequently, not only labor itself, but also the whole identity that it provides, has been put into question, with many scholars inquiring about the pertinence of an explanatory system still based on the "capital vs. labor" equation. More importantly, what is left, or what is there to build on, if such an equation is no longer capable of explaining society?

One can ideally conceive of four different types of conflict that could be evocated to explain the changes that labor may be going through: (a) "capital vs. labor," (b) "qualified labor vs. non-qualified labor," (c) "social inclusion vs. social exclusion," and (d) "labor vs. post-labor." It is necessary to warn that the prevalence of one kind of conflict does not eliminate the remaining three. In fact, they are all envisaged here as explanatory types to describe the kind of conflict that one may assume as the structural conflict of society. Anyway, it is quite clear that all four different conflicts here pictured in an ideal configuration set out a different perspective for the legal regulation of labor, as shown in Table 1.

Table 1
Conflicts and Labor Law Emphasis

Conflict	**Labor Law Emphasis**
"Capital vs. Labor"	Subordination and its patterns
"Qualified labor vs. Non-qualified labor"	Qualification policies
"Social inclusion vs. Social exclusion"	Employment and occupation policies
"Labor vs. Post-labor"	A new regulation?

As a matter of fact, if we assume that "capital vs. labor" is still the crucial conflict to explain social dynamics and to establish its forms of solidarity, the increasing precarious status of labor implies a weaker form of social integration, which is amplified by the disarticulation of social ties and solidarities. In such a scenario, the very permanence of this organizing conflict points out to the maintenance of subordination as the key factor to labor law. That is to say, despite all the difficulties faced today by labor law in order to answer to the new challenges set forth by the reorganization of mass production, if one assumes that "capital vs. labor" is still the defining societal conflict, labor law should not undergo major changes. Actually, in such a context, labor law would not be going through a paradigm transformation, but it would only taste circumstantial modifications, due to the adaptation of the old labor law to the new dynamics of the labor market. Labor law's object, therefore, remains mostly centered on subordination and the treatment it should be given, be it in a more flexible way or emphasizing its rigidity.

On the other hand, if one assumes that the market is the perfect regulatory institution, economical criteria are the most legitimate parameters for public policy elaboration; globalization is an inevitable process that demands integration of the world economy on the standards fixed by the new centers of power, that is to say, with a reduction of State architecture and power controlling economical and social activities, one will have to acknowledge that there is a general crisis on work conditions that contributes to a shift from the old conflict to a new one that opposes "qualified labor to non-qualified labor." This change would be caused by technological innovation, new managing models of the production process, economic internalization, and the overcoming of taylorism and fordism as

organization models for labor. In such a scenario, there would be no more room for a tutelary and law-based system similar to the one Brazil has known so far. Labor law in such a context would not have subordination as a main object, but would have to be related to labor productivity, to the institutionalization of more flexible work conditions and, most of all, to qualification policies generally conceived to increase a worker's employability and, therefore, to overcome the gap created by qualification.

A third possibility consists in the dislocation of the society's organizing conflict from the labor world to the social sphere, represented by the opposition between "social included vs. social excluded." From such a perspective, these times are witnessing the change from a vertical society, structured by classes, to a horizontal society in which those who are at the center are at the core of participation and those at the periphery are in a state of exclusion. This new societal design eliminates the pertinence of being "up" or "down" as its structure is based on the idea of being "in" or "out." If, in the previous scenario, a societal reorganization were conceived as a possible result of a united "down" class, nowadays the struggles would be for permanence or admittance for those who are respectively "in" or "out." If getting in becomes one's major desire and the result of this quest has great impact on citizenship whose exercise relies on patterns of inclusion, it becomes necessary to create a new form of social insertion that cannot be limited to the labor market and the traditional demand for more job positions. Rather, it has to relate to the still unclear idea of regulating and promoting social activity or occupation. Subordination as the main labor law object is here amalgamated with new objects that force the State to a new challenge: to go beyond a labor-regulating role and become a real promoter of social inclusion.

Finally, the last possibility consists in acknowledging that there is a strong crisis within the labor-based society, which implies a social organizational paradigmatic modification. In fact, as economical growth does not necessarily mean the increase of employment places, one is compelled to realize that the whole idea of full employment may not be useful to structure society, as it may have been in the past. There is a new form of accumulation that does not place labor as a part of the economical equation. In this sense, labor would have lost its capacity to be the central element of our lives, whose rhythm is therefore marked by short-term jobs, intense mobility, and continuous education. Nevertheless, as one may find that "labor vs. post-labor" has become the new structural conflict, one also has to realize that

there are two ways to characterize the "post-labor" scenario. From a sociological perspective, one may argue that such reasoning relates to a certain historical circumstance in which labor has a trade value and is only possible if labor and employment are taken as synonymous, while from an anthropological point of view, labor is not conceived as something that possesses a trade value. In either case, one may sustain that it is actually the decline of an era based only on employment, which is just one among other kinds of labor. What happens then with labor law? It would be compelled to evolve to a different kind of approach, which could no longer be solely based on subordination but would have to create new forms of integration, social solidarity and maintenance of the social body's integration taking into consideration the world of "non-labor" and the importance acquired by the "free time."

Table 2
Conflicts and Their Approach to Subordination

Conflict	**Approach to Subordination**
"Capital vs. Labor"	Still the main object
"Qualified labor vs. Non-qualified labor"	Replaced by another object: qualification
"Social inclusion vs. Social exclusion"	Amalgamated with new objects: occupation and employment rates
"Labor vs. Post-labor"	Disappeared as a object

The four ideal forms of conflict have different impacts on labor law, especially on its approach to subordination, as shown on Table 2. Does it mean that labor law will expand, be reduced, or remain as it is today? Yet does it mean that it will disappear as an object, maybe reclaiming its civilian origins? Well, in the first place, one cannot forget that reality is more complex and less unilateral than the law may foresee. Thus, it is necessary to realize that the four different types of conflict are not compartmentalized and immune to influence from one another. Law itself has become more complex and it is quite hard to continue to reason on terms of specified and separate branches. Second, one has to realize that, in the context of an "emerging" country, Brazil is compelled to work simultaneously in order to overcome an extreme social gap, to improve labor force qualification and yet keep it at a competitive cost in order to increase

its market and international insertion. Thus, Brazilian labor law becomes an empirical laboratory in which many regulations are made as an attempt to create better conditions for the accomplishment of one of the many different goals conceived for the public policy. In fact, Brazilian labor law is a dense and complex set of rules that strongly regulate the labor contracts and market that become flexible, precarious, and insecure through practices of negotiation that sometimes step over their legal limits. Certainly, this situation has its impact on labor courts as is shown in the following section.

II. LABOR TRANSFORMATION AND ITS IMPACT ON LABOR COURTS

Over the last sixty-three years, Brazilian labor courts have received almost 49.1 million cases and have scrutinized 46.6 million. No doubt, although these figures are quite impressive, what is even more extraordinary is that almost twenty-three million—virtually half of the total number—have been received in the last ten years, averaging more than two million every year. Finally, in 2003, 2,299,768 complaints have been addressed to Brazilian labor courts! As one examines this number more closely, its distribution in the judicial labor system will be as shown in Table 3.

Table 3
Labor Justice
Cases
2003[1]

Stage	**Cases**
Labor Judges	1,706,778
Regional Tribunal of Labor	469,593
Superior Tribunal of Labor	123,397
Total	2,299,768

Although very imposing when examined out of context, these numbers need more parameters to be accurately appreciated and this can be done by comparing them with the labor judicial structure, which is detailed in Table 4.

1. *Available at* http://www.tst.gov.br (last accessed Jan. 26, 2005).

Table 4
Labor Justice
Structure[2]

Stage	Sections	Placements
Labor Judges	1,109	2,294
Regional Tribunal of Labor	24	463
Superior Tribunal of Labor	1	17

Even if the amount of judicial sections is not equally distributed in the country[3] and the total number of placements does not correspond to the actual number of judges in activity,[4] these are interesting figures to generate an average of cases received by each Brazilian judge, as shown in Table 5.

Table 5
Labor Justice
Averages

Stage	Cases vs.	
	Sections	Placements
Labor Judges	1,539	744
Regional Tribunal of Labor	19,566	1,014
Superior Tribunal of Labor	123,397	7,258

As one takes a close look at these figures, it is quite clear that the filters that should be reducing the number of cases at the higher stages are not working as they should be. Notwithstanding the simultaneous and collective decision-making process that the mass litigation witnessed at the higher courts allow to be implemented, it is quite

2. *Id.*
3. For instance, the States of São Paulo, Rio de Janeiro and Minas Gerais together have 486 sections.
4. One may expect such a difference due to the turnover generated by early retirements combined with a low rate of success in the admittance exams.

hard to understand how those who are at the two appellate stages have, at least theoretically, a greater amount of cases than those who are at the first stage, at the entrance of the system. Actually, it is quite inconceivable how the seventeen Ministers of the Superior Tribunal of Labor manage to deal with more than seven thousand cases each year. Even more than the point commonly made (and usually without empirical evidence) that judicial certainty is necessary to manage labor costs and to attract international investment, these average numbers help to understand why the higher courts have so intensely stood up for mandatory judicial precedents. Although this may become an important filter to invert the judicial pyramid and place the higher averages at its bottom, it does not face the major problem embodied by an annual number of almost 2.3 million complaints.

How can we face this challenge? Though I have no empirical evidence of such statements, two important and different factors may provide the answer: (1) alternative dispute resolution (ADR) and (2) collective voice via union bargaining and class actions, i.e., judicial collective complaints. The actual pertinence of these two aspects compels me to speculate on how they relate to the Brazilian scenario.

Although ADR programs are not quite well established in the labor field in Brazil, the whole idea of reaching a decision and solving a conflict without having to go through the jurisdictional system has made its way in the Brazilian legal culture and, as a consequence, is jeopardizing the judicial monopoly. As it has been already pointed out, the traditional judicial system operates in a deferred time, which makes decision-making very hard to do in a socially and economically valuable timeframe, while the economic system of today operates almost instantaneously. If, in economical time, as absurd as it may sound, one year delays are already considered long term periods, what can be said about a judicial decision that takes more than a decade to be solved? Most certainly, in an era where the instantaneous has become the rule, such timing is outrageous! As one walks into a courtroom, especially in the Brazilian context, one has, at least, one certainty: it is going to be long (unless it is settled by conciliation)! As much as the judiciary system will be compelled to re-invent itself in order to provide decisions in a socially and economically useful timeframe,[5] it seems that the quest for extra-jurisdictional solutions will very much grow in importance. In Brazil, evidence of it may be found in the proliferation of enterprise or union-based Previous

5. Undoubtedly, this is one of the reasons many are in favor of a professionalization of court management, which until now has been done by the judges themselves.

Conciliation Committees where plaintiffs are now required by law to make at least a formal attempt at conciliation before they turn their dispute into a judicial one.

On the other hand, collective voice, through class action, has made its way in the judicial procedure to the detriment of individual responses to managerial prerogative. In fact, this means that some possibilities have popped up to overcome the idea that one can be in a courtroom only with standing to litigate as an individual. Moreover, they are not only restricted to a representative capacity attributed to unions. Brazilian law has established, under very specific circumstances, the possibility of judicial protection for diffuse, collective, or individually homogenous rights that can be obtained by a third party whose judicial actions will have a consequence for the collectivity even if it does not directly represent its components. This is indeed a very interesting option to reduce the incredible amount of legal cases faced by the Brazilian labor courts and, I am sure, shall be deeply explored in the next few years. Nevertheless, collective voice shall also be heard through union bargaining, as a change in the law is no longer inconceivable and pluralistic representation may finally become possible. This means a more competitive union representation and, as a possible and desired consequence, the construction of a legal culture that actually favors real negotiations between employers and workers and that doesn't drown workers under an uncountable number of State-imposed laws.

As I tried to put into evidence, Brazilian labor courts are overloaded by complaints. There have been two different approaches to solve such a problem: the first one, concentrating on reducing the permeability of the internal filters of the judiciary system, focuses mainly on judicial discipline and litigation outcome certainty, while the second one, perceiving the importance of a paradigm change, bets on diversity for conflict resolution and encourages collective voice as the most viable way to obtain decisions in a reasonable time, i.e., in a socially and economically useful way. Regardless of the chosen approach, it is quite clear that both Brazilian labor courts and Brazilian labor law are going through a change, as I pointed out in the first part. How all these changes relate to the comparative field is what I intend to explore in the third and final section.

III. RELATING TO THE COMPARATIVE FIELD

As I tried to indicate, labor law and courts are exposed to major transformations in the context of labor itself: flexible employment,

productive restructuration, and outsourcing, undeniably, have become a part of the daily labor world. As labor relations grow to be increasingly less standardized, one has to realize that this new diversity is magnified by an internationalization of the economies. Therefore, in order to put some sense into this scenario, one must broaden one's horizons! Such an enlargement must be done in two directions: territorially, as it becomes progressively impossible to reason exclusively on a national basis, and disciplinary, as not only the importance of different academic fields in its relation with the law grows rapidly, but as the different branches of the law become more and more intricate.

Legal teaching can no longer be just "legal" and compartmentalized by isolated units but is compelled, on one side, to incorporate an impressive amount of economical, sociological, political, and management contents, and, on the other side, to reveal the complexity of the law itself, the different contributions made by its different fields. A labor problem may point to different questions related to, for example, taxation, public health, commerce, immigration, and gender, which may not be solved just by positive knowledge of the labor law and how it is perceived by the labor courts. Knowing the law is just not enough!

Undoubtedly, from this point of view, as comparative analysis is perceived as the perfect instrument to create a favorable environment to compress all these necessary and diverse contents, the field of comparative labor law will most certainly expand both in an academic as well as in a practical perspective. That is to say that, as legal firms internationalize, the field has to incorporate practical concerns related to a daily practice of the labor law. In addition to the creation of a multinational legal market, which definitely calls for comparative studies, legal academic research and speculation contribute to outline the framework in which one may evolve, reaffirming consensual and common values that may not be forgotten in this enterprise.

What questions will press to the fore and call for comparative scholarship? In this scenario, several questions raise as important themes of research:

1. How is law being used as merchandise? What are its impacts on the practices of social dumping?
2. How is the reconstruction of identities performed in a more fragmented labor world? How do the different aspects of gender relate to labor and how does the latter relate to citizenship practices?

3. How are fundamental rights perceived and enforced in different labor contexts?
4. What is the real impact of litigation? What are the matters submitted to litigation? Who actually litigates?
5. What is the role left to unions? How can representation be reconstructed in a changing environment?
6. What is the impact of internationalization and social regionalism?

These questions, as they do not rule out the emergence of other topics, do not delimit the boundaries of investigation for the field. However, they set forth a good agenda for the comparative labor field in the following years. And, I shall say, it is quite an agenda!

As I noted in the beginning, what one says about the future reveals much more how one sees the present and the possibilities it holds than how the future will actually be. As we celebrate twenty-five years, it may be very appealing to look back, recreate the past in order to render present times intelligible and refine the possibilities the future holds. Yet this is not an easy task, especially in blurred times, when the most difficult thing is to lend new contents to old categories. What lies ahead for the next twenty-five years is yet unrevealed, but thinking it over may also be a way to collaborate for a better present.