INTERNATIONAL DIALOGUES ON LITIGATION AND SOCIETY

COORDINATION AND EDITION
ANTONIO RODRIGUES DE FREITAS JÚNIOR
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Dados Internacionais de Catalogação na Publicação (CIP)
(Câmara Brasileira do Livro, SP, Brasil)

International dialogues on litigation and society [livro eletrônico] / organization Henrique da Silveira Zanin, Victor Raduan da Silva ; coordination and edition Antonio Rodrigues de Freitas Júnior, Jorge Cavalcanti Boucinhas Filho. -- São Paulo : Escola Superior de Advocacia da OAB SP, 2021.
PDF

Vários autores.
ISBN 978-65-87351-46-9

1. Direito - Brasil 2. Direito - Japão 3. Litigância 4. Sistema jurídico - Brasil 5. Sistema jurídico - Japão 6. Sociedade I. Zanin, Henrique da Silveira. II. Silva, Victor Raduan da. III. Freitas Júnior, Antonio Rodrigues de. IV. Boucinhas Filho, Jorge Cavalcanti.

21-71898 CDU-34(81:520)

Índices para catálogo sistemático:

1. Litigância e sociedade : Direito 34(81:520)

Cibele Maria Dias - Bibliotecária - CRB-8/9427

COORDINATION AND EDITION
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INTERNATIONAL DIALOGUES ON LITIGATION AND SOCIETY

Sao Paulo - SP, Brazil
ISBN from 2021, published in 2022.

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TITLE
International Dialogues on Litigation and Society

NOTICE AND VERSION
ISBN 978-65-87351-46-9. Many articles of this book refer to the "Brazil-Japan Litigation and Society Seminar 2: Cultural Diversity and Global Challenges," of September 16th-17th, 2019, at the FD-USP (https://sites.usp.br/gemdit/eventos/brazil-japan-2/). Some translations into English were done by the authors; they apologize for any mistake.

COORDINATION AND EDITION
Antonio Rodrigues de Freitas Júnior; Jorge Cavalcanti Boucinhas Filho.

ORGANIZATION AND PROOFREADING
Henrique da Silveira Zanin; Victor Raduan da Silva.

FINAL PROOFREADING AND REVISION
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GRAPHIC PROJECT, ILLUSTRATIONS, AND LAYOUT
Marcos de Jesus Martins Izidoro; Ruy Dutra da Silva Junior; Victor Raduan da Silva.

We thank Adriano de Assis Ferreira and Erik Chiconelli Gomes for their assistance during the publishing process of this book.

CONTENTS

PREFACE 8

Antonio Rodrigues de Freitas Júnior

Brazil and Spain: Interfaces between
freedom of association and trade union systems 10

Antonio Rodrigues de Freitas Júnior, Ricardo Cesar Duarte, Victor Raduan da Silva

Burn them all? An introduction to
Waste Incineration Law in Brazil and Japan 40

Tiago Trentinella

Challenges of Family Law in
Japan and their interfaces with Brazil 55

Daniel Machado

Controversies in the digital era:
An overview of the Online Dispute
Resolution (ODR) development in Brazil and Japan.......... 72

Antonio Rodrigues de Freitas Júnior, Henrique da Silveira Zanin, Pedro Henrique Dias Alves Bernardes

Data protection:
10 comparisons between Brazil and Japan 86

Marcelo Spinel Cárgano

Gig economy and Labor Courts:
Notes about recent Brazilian experiences 102

Antonio Rodrigues de Freitas Júnior, Victor Raduan da Silva

Labor inclusion of people
with disabilities: Comparisons
between the regulations in Brazil and Japan 126
Lissa Tomyama

Lawyers and litigation in
Brazil and Japan: Is there any relation? 135
Jorge Cavalcanti Boucinhas Filho, Paula Esteves da Costa

Legal Realism, hard cases,
heuristics, judgment: Ideas on conflict
and mediation in less complex labor conflicts 141
Fabrizio de Bortoli

Non-regular work in Brazil
and Japan: Comparing its adoption and norms 152
Fernando Perez da Cunha Lima

The *Karoshi* phenomenon:
Scenarios from Japan and Brazil 161
*Antonio Rodrigues de Freitas Júnior, Paula Esteves da Costa,
Rodrigo Chagas Soares*

Uberized workers and dispute
resolution in Brazil: Which path to follow? 171
Maria Hemília Fonseca, Olívia de Quintana Figueiredo Pasqualeto

ABOUT THE AUTHORS... 183

PREFACE

Japan is widely known for its low litigation rates. On the other hand, Brazil shows high and increasing numbers of judicial cases. The intuitive, common-sense explanation for this huge contrast – which we take as plausible – indicates that it is due to cultural patterns. Nevertheless, such contrast seems to require further and deeper reflections.

Investigating this theme is consistent with the main questions of a research partnership between Brazilian and Japanese scholars, resulting in two International Seminars about litigation and culture. Which cultural factors could be pointed out as pro-litigation ones? Among these factors, which ones may generate cases in the courts? It is the background of this publication.

Many articles we present here were discussed at the "Brazil-Japan Litigation and Society Seminar 2: Cultural Diversity and Global Challenges," which took place from September 16th to 17th, 2019, at the University of Sao Paulo, School of Law (FD-USP), Brazil. They seek to innovatively analyze – comparing the legal systems of Brazil, Japan, Spain, the USA, etc. – the relations between cultural differences and litigation standards.

It is no easy task – we shall admit –, but it seems to be a fruitful strategy to explore the motivations behind such overwhelming litigation, as we see in Brazil. Moreover, these studies may provide worth-noting insights into some systemic obstacles concerning access to justice in low-rate litigation environments, such as the Japanese society. Comparing patterns of societies and of their legal systems may hopefully unveil some instigating aspects, underrated so far.

The mentioned second Seminar revisited and expanded the contents of the first one, held at Shinshu University, Matsumoto Campus, Nagano Prefecture, Japan, from January 8th to 9th, 2018 –, with a delegation from the USA. The theme there was "Courts and Dispute Resolution." An example of the experiences we had on that occasion: from different theoretical approaches, Brazilian practitioners

and scholars were invited to examine recently passed Japanese norms on plea bargaining.

We all had planned a third Seminar in September 2021 – probably in Portland, Oregon, USA – to aggregate other perspectives on this collective research agenda, but the COVID-19 pandemic sadly forced us to change our schedule.

We sincerely hope that these articles – most of them substantially enlarged and reframed after relevant debates – expand our horizons, beyond the borders of national legal systems and cultural backgrounds.

Antonio Rodrigues de Freitas Júnior

Sao Paulo, Winter 2021

Brazil and Spain: Interfaces between freedom of association and trade union systems[1]

Antonio Rodrigues de Freitas Júnior[2]

Ricardo Cesar Duarte[3]

Victor Raduan da Silva[4]

Abstract: Freedom of association is mentioned in the International Labor Organization (ILO) Centenary Declaration, of 2019, and in many other international documents. Brazil and Spain have corporatist traditions, saw active trade unions in their 1970s-1980s Democratic Transitions, have been facing the effects of recent economic crises, and integrate semi-peripheral economies into global capitalism. In Brazil – where the so-called "trade union exclusiveness" is still in force –, there are increased dissident moves not linked to traditional trade union leadership, as well as critical legislative reforms on freedom of

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1 Ricardo Cesar Duarte and Victor Raduan da Silva presented in Portuguese a paper called *Reflexões sobre a liberdade sindical em economias semiperiféricas: Os casos de Brasil e Espanha* in the event "Sociology of Law on the move: Perspectives from Latin America," that took place in Canoas, Rio Grande do Sul, Brazil, from May 5th to May 8th, 2015. This paper was modified and published – in English, with the title *Reflections on freedom of association in semi-peripheral economies: The cases of Brazil and Spain* and with Antonio Rodrigues de Freitas Júnior as co-author – as a chapter of the book *O centenário da Organização Internacional do Trabalho no Brasil*. This book was published in 2019 and organized by Ana Virginia Moreira Gomes, Antonio Rodrigues de Freitas Júnior, and José Francisco Siqueira Neto. The article we present now is a more developed version of the abovementioned one.

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association and on trade union funding. In Spain, the plurality of trade unions is guaranteed, but few of them seem to effectively participate. The existence of the "most representative" trade unions, institutionally represented before public bodies, hinders a broader social dialogue. And the funding of the Brazilian and the Spanish trade unions is also problematic. We present some of the difficulties experienced by trade unions – such as their crisis of legitimacy and their roles in society –, further considering the current economic context and new forms of organization. The contradictions about freedom of association are evident upon observing the normative experiences – mainly about trade union structures and funding – in both countries.

Keywords: Comparative Law; crisis; freedom of association; Labor Law; semi-periphery.

1. Introduction

The globalized financial capitalism, based on new organizational paradigms – such as Toyotism and digital-based activities –, represents a striking challenge to Labor Law as it used to be understood, with the core protection via the traditional employment relationship. Economic crises may enable more extensive discussions on the role of social actors – such as the trade unions – and unveil the "defensive agenda" that perhaps took over Labor Law in general. This field relies on many historic specificities, arising and developing in the pace of conflicts and "disturbances" from social movements – which once tried to radically and holistically transform reality. (Freitas Júnior, 2014, p. 70). Moreover, market leaders, aiming at higher profits, have been transferring jobs to "a complicated network of smaller business units" that deal with stronger competition on labor benefits. Accountability for working conditions is constantly avoided, meaning that basic labor standards are often violated. This strategy "fissured" the workplace. (Weil, 2014, p. 8). This is why trade unions – and their freedom of association – matter nowadays, as pointed out in the 2019 International Labor Organization (ILO) Centenary Declaration[5].

5 "The Conference declares that: A. In discharging its constitutional mandate, taking into account the profound transformations in the world of work, and further developing its human-centred approach to the future of work, the ILO must direct its

Another relevant set of concerns is about populism worldwide, with its different characteristics, agendas, intensities, lengths, etc. Brazil, Hungary, Nicaragua, Russia, the United States, Turkey, and Venezuela are examples here, as we see in these countries frequent moves towards: (i) stressing the idea of "my people" vs. "the enemies" and denying terms like "vulnerability," "minorities"; (ii) disqualifying and confronting mediations with political parties, trade unions, non-governmental organizations (NGOs), the press, etc.; (iii) challenging checks and balances, against Legislative and Judiciary bodies; and (iv) disagreeing with guidelines provided by international organizations, e.g. equality and sustainability. These behaviors – with clear popular appeal – may be fostered because, among other factors, the State can no longer generate "material well-being," security in general. (Freitas Júnior, 2014, p. 81).

Good jobs became rare, and, when workers' organizations claim decent work, non-unionized workers – i.e. the vast majority – seldom engage in these claims – perhaps because they are afraid to lose their jobs. Trade unions' capabilities to mobilize societies are doubted, and conservative measures to impact them gain momentum. Comparing labor norms in their contexts may help us pinpoint the contradictions in the trade union systems – comprising here structures and funding – of Brazil and Spain, which operate against the "full freedom of association." Although these countries are quite different in many aspects, they: (i) have long corporatist traditions; (ii) saw the active participation of trade unions in their 1970s-1980s Democratic Transitions; (iii) have been facing the effects of recent economic crises; and (iv) integrate the semi-periphery of the global capitalism. After delving into these elements, we approach the ties between Labor Law and trade unions – focusing on freedom of association's guidelines –, and the cases of Brazil and Spain – highlighting their trade union structures and funding.

efforts to: [...] (vi) promoting workers' rights as a key element for the attainment of inclusive and sustainable growth, with a focus on freedom of association and the effective recognition of the right to collective bargaining as enabling rights; [...]." (International Labor Organization, 2019a).

2. Comparing Brazil and Spain

2.1. Corporatist traditions

In the 20th century, corporatism is generally related to a specific doctrinal concept and to a variety of legal experiences. As a concept, corporatism emerges from a period of critical crises. They were noticed in the economy – with liberalism as the standard – and in politics – where democracy was the model to be followed. We are talking about the period between the First and the Second World War, when the market showed its limits to adequately regulate the economy, and democracy was still attached to liberal individualism. Nevertheless, corporatism – either as doctrine or as legal experience – may not be isolated in the mentioned period: it describes a political structure for societies – in general – and qualifies the "representation of interests" – in particular, where the trade union system, for instance, resides. Doctrines/experiences whose paths privilege the representation of interests – denying the centrality of political parties and of the Parliament – tend to corporatism. Despite the differences, corporatism was rooted in the Brazilian dictatorship of Getulio Vargas (1930-1945) – which imposed, for example, the 1937 Constitution[6] – and in the

6 "Art. 61. The attributions of the National Economy Council are: a) promoting the corporatist organization of the national economy; b) establishing rules on the assistance provided by associations, trade unions, or institutes; c) issuing norms regulating collective labor contracts between trade unions of the same sector [*categoria*] of production or between associations representing two or more sectors; d) issuing opinions about all projects, from the Government or from any of the Chambers, that directly interest the national production; e) organizing, on its own initiative or as proposed by the Government, surveys on working conditions, agriculture, manufacturing, trade, transportation, and credit, in order to increase, coordinate, and improve the national production; f) preparing the bases for the foundation of research institutes that, meeting the diversity of economic, geographical, and social conditions of the country, have as their object: I - rationalizing the organization and administration of agriculture and manufacturing; II - studying the problems of credit, distribution, and sale, and those related to the organization of work; g) issuing opinions on all questions concerning the organization and recognition of trade unions or professional associations; h) propose to the Government the creation of sectoral corporations. [...] Art. 138. The professional or trade union association is free. Only, however, the trade union regularly recognized by the State have the right to legal representation of those who participate in the

Spanish dictatorship of Francisco Franco (1936-1975) – with its *Fuero de Trabajo*[7] –, both of them inspired by the Italian fascism. (Freitas Júnior, 2014, pp. 447-452).

In Brazil, the corporatist trade union had "public functions" and operated according to the "public interest." Labor relations were coordinated with policies to "foster greater public well-being." Oliveira Vianna, a sociologist and labor expert who worked for Vargas from 1932 to 1940, was one of the main references for corporatist trade unionism. (Gomes & Prado, 2011, p. 856). Similarly, the Spanish corporatist system was pyramidal – with a heavy State presence – and, at the same time, decentralized – because the State distributed its competences in "social organs." The Francoist idea may be summarized like this: unity of power, decentralization of functions. In the 1920s, Eduardo Pérez

production sector for which it was constituted, and to defend their rights before the State and the other professional associations, to stipulate mandatory collective labor contracts for all its members, to impose contributions to its members, and to perform delegated functions of public authority." (Brazil, 1937).

7 "III. […] 5. Utilizing the Trade Union, the State shall know if the economic conditions and those of any order in which the work is carried out legally correspond to the worker. […] XI. […] 5. The State, by itself or through its trade unions, shall prevent any unfair competition in the field of production, as well as those activities that hinder the normal establishment or development of the national economy, stimulating, on the other hand, the initiatives aiming at its improvement. […] XIII. 1. The National-Trade Unionist Organization of the State shall be inspired by the principles of Unity, Totality, and Hierarchy. 2. All economic factors shall be framed by branches of production or services in vertical trade unions. Liberal and technical professions shall be organized similarly, as determined by law. 3. The vertical trade union is a public law Corporation that is constituted by the integration into a unitary organism of all elements that devote their activities to the fulfillment of the economic process, within a certain service or branch of production, hierarchically ordered under the direction of the State. 4. The hierarchies of the trade union shall necessarily be militants of the *FET y de las JONS* [Traditionalist Spanish Phalanx of the Councils of the National Trade Unionist Offensive, the Francoist political group]. 5. The vertical trade union is an instrument in the service of the State, through which it shall mainly carry out its economic policy. To the trade union, it is necessary to know the problems of production and to propose their solutions, subordinating them to the national interest. The vertical trade union may intervene utilizing bodies specialized in the regulation, monitoring, and compliance with working conditions. 6. The vertical trade union may initiate, maintain, or supervise research organizations, of moral, physical, and professional education, of welfare, assistance, and aimed at social issues that interest the elements of production. 7. It shall establish offices to employ the worker according to his/her aptitude and merit. 8. The trade unions shall provide the State with the precise data to elaborate statistics of its production. 9. The trade union law shall determine how to incorporate the current economic and professional associations into the new organization." (Spain, 1938).

Pujol influenced Eduardo Aunós – Minister of Labor in the dictatorship of Primo de Rivera (1923-1930) and, later, Franco's Minister of Justice –, who went forward with the corporatist project. (Perfecto Cuadrado, 2006, pp. 199, 214).

2.2. Trade unions in the Democratic Transitions

Brazil and Spain experienced Transitions – in the 1970s-1980s, from dictatorship to democracy – in which trade unions played important roles. The Constitutions that the countries have nowadays – the 1988 Brazilian Federal Constitution (CF) and the 1978 Spanish Constitution (CE) – remind us of these periods.

The so-called Old Trade Unionism in Brazil had some remarkable characteristics: corporatist/Varguist origins, strongly protected by the State, and ideologically averse to conflicts. The trade union was a fertile soil for populism and inadequate to represent its workers. Seeking to counteract, the New Trade Unionism emerged in the 1970s, based on the Single Union of Workers (CUT). As a movement from a modern sector at that time – the manufacturers of the ABC Region, which comprehends Santo Andre, Sao Bernardo do Campo and Sao Caetano do Sul, in the State of Sao Paulo –, it advocated genuine autonomy from political parties and from the State, as well as a real agenda of demands. By the way, the former ABC trade union leader Lula da Silva was elected President of the Republic in 2002 with the Workers' Party (PT). The New Trade Unionism pursued rupture and novelty, denying populisms for real, fighting against conservative/restrictive policies, increasing workers' participation, and promoting democracy in Brazil. (Santana, 1998, pp. 104, 108-109, 111, 117). However, trade unions in the country live between "domestication" and "rupture": they flirted in the Democratic Transition with the maintenance of their problematic structures and welcomed new ones – like the trade union centers and the company commissions, which revitalized this system. (Freitas Júnior, 1989, pp. 163, 166).

In Spain, there are historic bonds between trade unions and socialist parties, especially between the Spanish Socialist Worker's Party (PSOE) and the General Union of Workers (UGT) – which paved the way for the 1970s-1980s Social Concertation. It lasted around 10

years and was significant to restrict conflicts/violence, to value agreed norms, and to strengthen trade unions and other associations. From the 1977 Pacts of Moncloa to the 1984 Socioeconomic Agreement (AES), many negotiation processes occurred and set up some pillars for Spanish development. Conflicts became more evident in 1987-1990, although some pacts were signed at that moment – e.g. the Priority Trade Union Proposal, discussing the posture of companies and of the Government. PSOE documents from the Francoist period highlight the protection of workers' interests via socialist trade unionism, while the UGT publicly supports the PSOE as the upholder of labor rights. In other words, the party uses the trade union to win the elections, and the trade union uses these victories to obtain/keep institutional recognition. And, as in Brazil, a socialist leader came into power some years after the Transition: Felipe González, in 1982. (Alonso Soto, 1991, pp. 42-43; Marin, 2013, pp. 32-33).

2.3. Recent economic crises

Both countries share traumatic experiences of recent economic downturns, as the subprime credit crunch in 2008 (Assalve, 2011) and its repercussions – including the fall in commodity prices (Castro, 2018) – affected their performances, including their labor systems. Increasing unemployment rates, precarious labor relationships, and fragile social protection networks – which were created and fostered by the Welfare States in the Western democracies, including Brazil and Spain – are examples.

Brazil has been facing the effects of its fiscal crisis since 2014. On March 30th, 2019, Lima and Cagliari (2019) reported that the unemployment rate in the country reached 12.4%, or 13.1 million people. Other 14.8 million people were underemployed, considering that they work less than 40 hours per week and do not achieve better opportunities. Talking about the "discouraged" workers – those who gave up seeking jobs –, they were 4.9 million people. And, according to Financial Times (2015), "a large part of the blame lies with Brazil itself."

Spain was optimistic some years ago, but the 2007-2008 World Crisis left chaos behind: the unemployment rate in the country was 26% in late 2012 (Bosen, 2013). On January 29th, 2019, Sánchez (2019)

demonstrated that between the third trimester of 2007 – when there were 20.57 million jobs – and the first trimester of 2014 – with its 16.95 million jobs –, 3.62 million jobs were lost. The economic recovery led to more than 2.61 million jobs, which means that in 2019 around one million jobs were expected to be created to reach the 2007 record. If the recovery kept that pace – about half a million more jobs yearly –, that record would be seen in early 2021. In other words, Spain would spend 14 years to restore its labor market. The year 2018, however, ended with more than 3.3 million unemployed people – 14.45% of its economically active population –, almost double the number verified in the second trimester of 2007 – when it was 7.93%.

2.4. Semi-peripheral economies in the capitalism

Although Spain may be placed as a core country in global capitalism, we understand that Brazil and Spain are its semi-peripheries – which makes reasonable the comparison between their public policies. They are intermediate societies on economic/human development and can partially satisfy "immediate interests" of large sectors observing "dominant patterns of consumption." (Santos, 1985, p. 872). Our reference here is the World-System Theory, of Immanuel Wallerstein, and his critique of global capitalism, but we do not delve into the Dependency Theories. Semi-peripheral economies play an essential role in the mobility that the World-System values; Wallerstein wrote about countries at different periods, indicating development models. For example, Portugal and a major part of Spain have always been semi-peripheries in recent eras. Older semi-peripheries became core economies by 1900 – such as the USA and Germany – or by 1980 – e.g. Northern Italy and Sweden –, indicating that present-day core countries may have semi-peripheral roots – as well as peripheries may improve their status. (Terlouw, 2003, p. 72). Mentioning the semi-periphery status of Brazil and Spain emphasizes the weak position that economies like theirs bear, vulnerable to contemporary systemic downturns: the countries have flourished since their Democratic Transitions, but are relatively fragile in this System – which explains the persistent uncertainties in their labor issues.

3. Labor Law and trade unions

Labor Law is at a crucial moment of reflection/redefinition because, generally, labor markets have fragmented, unemployment has escalated, the employment status has been avoided, and labor relations have become precarious. After all, protective legislations proved to be ineffective in many sectors, excluding a large part of the labor markets – and of their representation via trade unions. Cardoso (2011, p. 293) presents two opposite paths: waiting for the sociological results of the "capitalism's cyclical crisis" or believing in labor as an enduring "central category of social analysis." We say that the globalized economy and the new forms of work have not removed the central role of labor in societies, which explains the current debates around how workers may effectively represent their interests. To reinvigorate trade unions, we should: (i) recognize the importance of "counter-hegemonic agendas"; (ii) value collective bargaining beyond State initiatives; (iii) expand formal labor protection; and (iv) design new forms of representation, capable of overcoming the traditional trade union structure. (Freitas Júnior, 2010). In Brazil, popular protests and strikes are organized without the participation of trade unions (Oliveira, 2014; Roxo, 2014), which may show that Vargas-type institutions can no longer represent workers properly. Although Spain has a distinct structure, its norms give a real voice to certain trade unions – the "most representative" ones –, generating an intricate private-public dynamic that fuels representation crises. El Mundo (2017) reported the nostalgia in the current May 1st demonstrations, bringing back memories of a time when trade unions acted as social protagonists and when social democracy ruled Western Europe.

3.1. Freedom of association

3.1.1. Definitions

Freedom of association was the core labor right in Western industrialized countries after the Second World War and presupposes democratic societies. (Siqueira Neto, 1999, p. 372). It counts on many

definitions, depending on the historical moment, on the stage of legal recognition, and on the ideological/theoretical premises. For example, in Brazil – where trade union (*sindicato*) also names employers' organizations –, Magano (1993, p. 27) said freedom of association is the right of employers and workers to avert interferences from each other and from public authorities. In Spain, Ojeda Avilés (1998, p. 34) described it as a fundamental right of workers to stably organize themselves and, thus, to take part in productive relations. Regardless of the author we quote, freedom of association usually gathers the following ideas: (i) it is a fundamental/human right; (ii) it focuses on workers; and (iii) it refers to organizations dedicated to negotiate, act, and fight for rights, claims, and interests. Its protection covers: (i) workers individually considered; (ii) groups of workers, including minorities and the ones who lose trade union elections – "internal democracy" –; and (iii) trade unions, with their prerogatives to manage, organize, affiliate, etc. The scope of freedom of association is both positive – affiliation, constitution, proselytism, and participation – and negative – rights to dissociate and not affiliate. A worker has rights towards his/her trade union and his/her employer, i.e. the so-called "horizontal efficacy of fundamental rights" must be preserved. And a trade union has rights before employers and other trade unions, which means that it may freely operate.

3.1.2. International norms

Freedom of association is mentioned, for instance, in: (i) the Treaty of Versailles and the ILO Constitution[8] of 1919; (ii) the American Declaration on the Rights and Duties of Man[9], of May 1948; (iii) the Universal Declaration of Human Rights[10], of December 1948, when

8 "Preamble. [...] and an improvement of those conditions is urgently required; as, for example, [...] recognition of the principle of freedom of association [...]." (International Labor Organization, 1919).
9 "Art. XXII. Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature." (Organization of American States, 1948).
10 "Art. 20. (1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association. [...] Art. 23. [...]

Human Rights became mandatory to the international community and to the States; (iv) the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[11] and in the International Covenant on Civil and Political Rights (ICCPR)[12], as well as in the ICCPR Optional Protocol, of December 1966; (v) the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which reaffirmed the 1944 Declaration of Philadelphia[13]; (vi) the 1969 American Convention on Human Rights, or Pact of San Jose, Costa Rica[14]; (vii) the 1998 Social and Labor Declaration of the Southern Common Market

(4) Everyone has the right to form and to join trade unions for the protection of his interests." (United Nations, 1948).

11 "Art. 8. [...] 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention." (Office of the High Commissioner for Human Rights, 1966b).

12 "Art. 22. 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." (Office of the High Commissioner for Human Rights, 1966a).

13 The ILO Declaration on Fundamental Principles and Rights at Work established: "I. Overall purpose. 1. The aim of the follow-up described below is to encourage the efforts made by the Members of the Organization to promote the fundamental principles and rights enshrined in the Constitution of the ILO and the Declaration of Philadelphia and reaffirmed in this Declaration." (International Labor Organization, 1998). The Declaration of Philadelphia, in turn, expressed: "IV. [...] the Conference pledges the full cooperation of the International Labour Organization with such international bodies as may be entrusted with a share of the responsibility for this great task and for the promotion of the health, education and well-being of all peoples." (International Labor Organization, 1944).

14 "Art. 16. Freedom of Association. 1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others. 3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police." (Organization of American States, 1969).

(MERCOSUR)[15]; (viii) the European Convention on Human Rights[16]; and (ix) the Charter of Fundamental Rights of the European Union[17].

Proselytism "precedes and exceeds" the right to organize trade unions, while autonomy guarantees that they may regulate their relations, create/extinct their bodies, fund and represent themselves – as ILO Convention No. 135 expresses[18]. States must protect trade unions from interferences, preventing anti-union discrimination[19] and unfair labor practices[20]; after all, collective bargaining and strikes are part of their regular activities. Freedom of association is originally devoted to employment relationships, but it may apply to other situations. Curiously, the USA is an exception here because of antitrust norms: the 1890 Sherman Act. ILO Convention No. 151 extended protections to workers of public bodies, but restricted them to, for

15 "Art. 16. Freedom of association. 1. All employers and workers have the right to establish the organizations they deem appropriate, as well as to join such organizations, in accordance with current national laws." (Southern Common Market, 2015).

16 "Art. 11. Freedom of assembly and association. 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." (Council of Europe, 1950).

17 "Art. 12. Freedom of assembly and of association. 1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. 2. Political parties at Union level contribute to expressing the political will of the citizens of the Union." (European Union, 2012).

18 "Art. 1. Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements." (International Labor Organization, 1971).

19 "Art. 1. 1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment." (International Labor Organization, 1949). An ILO compilation says: "44. When a State decides to become a Member of the International Labour Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association." (International Labor Organization, 2018, p. 12).

20 There are lists of practices about this concept in the United States Code (USC): "§ 7116. Unfair labor practices. (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency: [...]. (b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization: [...]." (United States, 2010).

example, the Armed Forces[21]. ILO Convention No. 87 focuses on public actors, the States[22], and No. 98 deals with private ones, the employers[23]; they are two of the ILO Fundamental Conventions. But were these norms ratified by Brazil and Spain?

	BRAZIL	SPAIN
C087	NOT RATIFIED	April 20th, 1977
C098	November 18th, 1952	April 20th, 1977
C135	May 18th, 1990	December 21st, 1972
C151	June 15th, 2010	September 18th, 1984

Table 1. Ratification of ILO Conventions by Brazil and Spain. (International Labor Organization, 2019b; 2019c).

This table unveils some nuances we will delve into: the 1988 Brazilian Constitution and the 1978 Spanish one guarantee freedom of association, but with different approaches to trade union systems.

21 "Art. 9. Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions." (International Labor Organization, 1978).
22 "Art. 2. Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. Art. 3. 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof." (International Labor Organization, 1948).
23 "Art. 1. [...] 2. Such protection shall apply more particularly in respect of acts calculated to: (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours." (International Labor Organization, 1949).

4. Brazil

4.1. *UNICIDADE* AND TRADE UNION CENTERS

As we presented, the Brazilian trade union system complies with the 1930s centralizing ideology of Getulio Vargas. For example, his still-in-force "trade union exclusiveness" (*unicidade sindical*) is explained in Decree No. 19,770/1931, in Decree-Law No. 1,402/1939, and in the Consolidation of Labor Laws (CLT) – Decree-Law No. 5,452/1943 –, which is quite intriguing[24]. Corporatism has faded away since his regime but is still rooted in trade unionism: trade unions keep holding the "monopoly of representation," with features that make it compulsory, and a non-competitive dynamic among them. It is a corporatist trade union system without a corporatist State, which may explain the use of trade unions as authoritarian instruments to control labor conflicts. The 1988 Constitution, recognizing freedom of association, assumes no public or private interferences and fosters "a more pluralist system" – very much inspired by international labor standards. However, a corporatist *ethos* incoherently remained in the CF and shaped an undermined freedom of association[25]. (Gomes & Prado, 2011, pp. 848, 857; Pamplona Filho & Lima Filho, 2013, p. 162).

24 "Art. 9. If a class is split and affiliated in two or more trade unions, the recognized will be the one that assembles two-thirds of the same class, and, if it is not verified, the one which assembles the largest number of members. Single paragraph. If one or more associations of a class already exist and intend to adopt the trade union status, under the terms of this decree, this recognition will be granted, according to the method established in this article." (Brazil, 1931). "Art. 6. It will not be recognized more than one trade union for each profession." (Brazil, 1939). "Art. 516. It will not be recognized more than one Trade Union representing the same economic or professional sector [*categoria*] or a liberal profession in a given territorial base." (Brazil, 1943).

25 "Art. 8. The professional and trade union affiliation is free, observing the following: I - the law may not require authorization from the State on the foundation of a trade union, except on the registration with the competent body, being forbidden to the Public Authority its interference and intervention in the trade union organization; II - it is forbidden the creation of more than one trade union organization, in any level, representing a professional or economic sector, in the same territorial base, which shall be defined by the involved workers or employers and may not be smaller than the extension of a Municipality; III - the trade union is responsible for protecting the collective or individual rights and interests of its sector, including in judicial or

Perhaps surprisingly, when the Workers' Party governed Brazil, from 2003 to 2016, the corporatist trade unionism was not only protected from reforms, but also deepened: Law No. 11,648/2008 included prerogatives and contributions to the so-called "trade union centers" (*centrais sindicais*)[26], born outside the traditional trade union system – of trade unions, federations, and confederations – and referring to workers only – not to employers. It became a more asymmetrical and State-driven system, as freedom of association keeps

administrative matters; IV - the general assembly shall determine the contribution which, in the case of a professional sector, is deducted from payrolls to fund the confederative system of the respective trade union representation, regardless of the contribution provided for by law; V - nobody shall be required to join a trade union or to remain its member; VI - it is mandatory the participation of trade unions in collective bargaining; VII - members who are retired have the right to vote and to be voted in trade unions; VIII - dismissing unionized employees is forbidden from their candidacy registration for trade union directors or representatives and, if they are elected, even as alternate, until one year after their tenures end, unless they commit serious misconduct as defined in law. Single paragraph. The provisions of this article apply to the organization of rural and fishery trade unions, observing the conditions that the law establishes." (Brazil, 1988).

26 "Art. 1. A trade union center, an entity for workers' general representation, constituted nationwide, shall have the following responsibilities and prerogatives: I - coordinating the workers' representation through its affiliated trade union organizations; and II - attending negotiations in fora, committees of public bodies, and other spaces for social dialogue that have tripartite composition, in which issues of workers' general interest are discussed. Single paragraph. A trade union center is considered, for the purposes of this Law, a private-law associative entity composed of workers' trade union organizations. Art. 2. To exercise the responsibilities and prerogatives referred to in item II, caput of art. 1 of this Law, the trade union center must meet the following requirements: I - membership of at least 100 (one hundred) trade unions spread in the 5 (five) regions of the Country; II - membership in at least 3 (three) regions of the Country, with 20 (twenty) trade unions minimum in each region; III - membership of trade unions of at least 5 (five) economic activity sectors; and IV - membership of trade unions that represent at least 7% (seven percent) of all unionized employees nationwide. Single paragraph. The index provided for in item IV, caput of this article, shall be 5% (five percent) of all unionized employees nationwide within 24 (twenty-four) months from the publication of this Law. [...] Art. 4. The assessment of the representativeness requirements mentioned in art. 2 of this Law shall be carried out by the Ministry of Labor and Employment. § 1. The State Minister of Labor and Employment, listening to the trade union centers, may issue guidelines to regulate the procedures necessary to assess the representativeness requirements, as well as to alter them based on the analysis of unionization rates of trade unions affiliated to trade union centers. § 2. A measure of the State Minister of Labor and Employment shall annually disclose a list of the trade union centers that meet the requirements mentioned in art. 2 of this Law, indicating their representativeness indexes." (Brazil, 2008).

tensing and adapting in different contexts. (Freitas Júnior, 2010, pp. 95, 97). This measure is more annoying when we look at some numbers: in 2017, only about 13.1 million out of 91.5 million workers were trade union members, a 14.4% rate; the lowest one at that time was 16.2% in 2012. (Loschi & Benedicto, 2018). In 2016, the three largest trade union centers were the Workers' Single Center (CUT) – with 2,319 affiliated trade unions, or about 28% –, *Força Sindical* (FS) – 1,616 trade unions, 19.5% –, and the Workers' General Unity (UGT) – 1,314 trade unions, 15.9%. (Força Sindical, 2016).

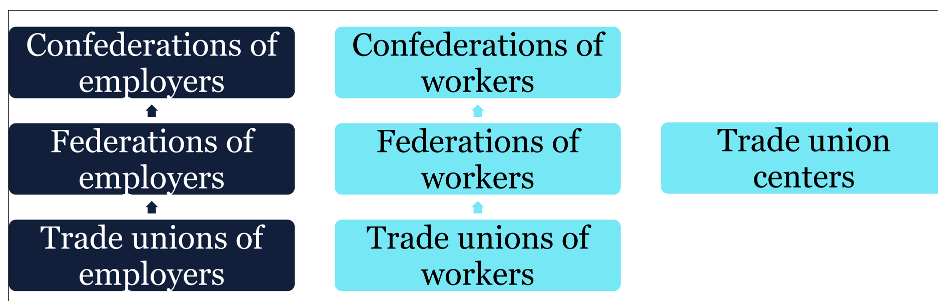

Figure 1. Trade union structures for employers and workers in Brazil. (Brazil, 2008).

4.2. Mandatory contribution

Brazil used to impose a contribution known as "trade union tax" (*imposto sindical*), as established by Decree-Law No. 2,377/1940 and incorporated by the CLT[27]. (Gomes & Prado, 2011, p. 848). Law No. 11,648/2008 included the trade union centers in the distribution of these amounts by modifying art. 589 of the CLT: employers pay 5% for their confederations, 15% for their federations, 60% for their trade unions, and 20% for the "Employment and Salary" Special Account – an additional resource for the Ministries dedicated to labor and Social Insurance matters at the moment –, while workers pay 10% for their trade union centers, 5% for their confederations, 15% for their

27 "Art. 2. The trade union tax must be paid by all those who take part in a certain economic or professional sector to the professional association legally recognized as the representative trade union of the same sector." (Brazil, 1940).

federations, 60% for their trade unions, and 10% for the mentioned Account. (Brazil, 1943; 1964; 2008).

The 2017 Labor Reform – Law No. 13,467/2017 – impacted this funding scheme because, among other major changes, the contribution became no longer compulsory[28]. Trade unions thus have been suffering from low unionization rates and, since 2017, from the lack of an assured financial source. Solutions are, for example, selling some of their properties – such as buildings – and associating with other trade unions – with possible modifications on sectors and territorial bases. (Mazzini, 2019; Silva & De Chiara, 2019). Some trade unions approved in their general assemblies that all represented workers/businesses had to contribute and used collective labor agreements/conventions to enable this strategy. (Nascimento, 2018). To avoid it, President Jair Bolsonaro issued the Provisional Measure (MPv) No. 873/2019, determining that trade union initiatives to charge mandatory contributions are null and void. This MPv also made these contributions payable only via "bank slips" (*boletos bancários*) to be sent to the ones who really want to contribute, which hinders payslip/payroll deductions. (Brazil, 2019). With no more mandatory contributions to trade unions, Brazil strengthens freedom of association – with its inherent pluralism and competition – and may finally ratify ILO Convention No. 87.

5. Spain

5.1. *PLURALIDAD* AND REPRESENTATIVENESS LEVELS

Freedom of association is among the fundamental rights and public freedoms of the 1978 Spanish Constitution[29]. Organic Law No.

28 "Art. 579. The deduction of trade union contributions is conditioned to prior and express authorizations of the ones who take part in a certain economic or professional sector, or in a liberal profession, benefiting the trade union that represents the same sector or profession or, if it does not exist, observing the provisions of art. 591 of this Consolidation. (Wording given by Law No. 13,467 of 2017)." Art. 591 says that federations and confederations may receive these contributions. (Brazil, 1943).
29 "Art. 7. Workers' trade unions and business associations help to protect and promote their own economic and social interests. Their creation and the exercise of their activities are free, observing the Constitution and the law. Their internal structures and operations must be democratic. [...] Art. 28. 1. Everyone has the right

11/1985 – or Organic Act on Freedom of Association (LOLS)[30] – and Royal Legislative Decree No. 2/2015 – the Workers' Statute (ET)[31] – refer to its individual and collective aspects. Although *pluralidad* – with no Brazilian-type *unicidade* – is guaranteed, workers' initiatives in the country tend to be concentrated in few organizations because "representativeness levels" classify them *grosso modo* as "most representative" or as "minority" trade unions. Being more specific, there are four types of trade unions: (i) the nationally most representative, which are the Workers' Commissions (CC.OO.) and the Workers' General Unity (UGT); (ii) the most representative in the Autonomous Communities – i.e. in the states that form Spain –, which may negotiate nationally and are the Basque Workers' Solidarity (ELA-STV), the Basque Nationalist Workers' Committees (LAB), and the Galician Trade Union Confederation (CIG); (iii) the representative in specific fields; and (iv) the minority. Only the most representative trade unions – groups (i) and (ii) – sit at public bodies' tables[32]. (Cruz Villalón, 2013, pp. 466-470).

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to freely join trade unions. The law may limit or exclude the exercise of this right to the Armed Forces or Institutes, or to other Bodies subject to military discipline, and shall regulate the peculiarities of its exercise for public servants. Freedom of association includes the people's right to create trade unions and to join the ones they prefer, as well as the trade unions' right to form confederations and to create or join international trade union organizations. Nobody may be forced to join a trade union." (Spain, 1978).

30 "Art. 2. [...] 2. Trade union organizations exercising freedom of association have the right to: [...] d) The exercise of trade union activities inside or outside the companies, which shall include, in any case, the right to collective bargaining, the exercise of the right to strike, approaches on individual and collective conflicts, and applying as candidates in the elections for Work Councils and Staff Delegates, and for the corresponding Public Bodies, in the terms expressed by the corresponding norms." (Spain, 1985).

31 "Art. 4. Labor rights. 1. Workers have as basic rights, with contents and scopes displayed on their specific regulations, the following: a) Working and freely choosing profession or occupation. b) Unionizing freely. c) Collective bargaining. d) Adopting measures about collective conflicts. e) Striking. f) Assembling. g) Informing, consulting, and participating in the company." (Spain, 2015).

32 "Art. 6. 1. The greater trade union representativeness recognized to certain trade unions gives them a unique legal position for purposes of both institutional participation and trade union activity. 2. The nationally most representative trade unions are considered: a) The ones which accredit a special public, obtaining in said range 10% or more of the total staff delegates, work council members, and members of Public Bodies' corresponding fora. b) The trade unions or trade union entities, affiliated, federated, or confederated to a trade union organization of national range

Categorizing trade unions dates back to the early 20th century, when ILO was established and needed to define which trade unions might represent workers in its bodies. National governments have designed criteria for this purpose, offering a clearer panorama of the social roles of their trade unions. Spain based its assessment solely on numbers of representatives, i.e. on how many workers are elected via trade unions for work councils and staff delegates at workplaces. It curiously disregards the number of votes that the trade unions obtain. There is a "double election": the same votes count to indicate workers' representatives and representativeness levels of their trade unions. This criterion highlights representation at workplaces, but ends up discouraging trade union membership: combative trade unions may have few members, while bureaucratic ones may be recognized as the most representative. (Cruz Villalón, 2013, pp. 448, 464-465). When Spain showed economic growth, its rates grew more than employment

that is considered most representative according to the provisions of letter 'a.' 3. Organizations that are considered the most representative trade unions according to the previous number shall have representative positions at all territorial and functional levels to: a) Hold institutional representation before the Public Bodies or other entities and national or Autonomous Communities' organizations that enable this representation. b) Collective bargaining, in the terms provided for by the Workers' Statute. c) Take part in dialogues to determine working conditions in Public Bodies through the appropriate consultation or negotiation procedures. d) Take part in non-judicial systems for resolving labor disputes. e) Promote elections for staff delegates and work councils and Public Bodies' corresponding fora. f) Obtain temporary concessions to use public real estate on the legally established terms. g) Have any other established representative function. Art. 7. 1. The most representative trade unions in Autonomous Communities are considered: a) The trade unions that accredit a special public in said range, obtaining at least 15% of the staff delegates and of the workers' representatives in work councils, and in the Public Bodies' corresponding fora, when they have a minimum of 1,500 representatives and are not federated or confederated to trade union organizations of national range; b) The trade unions or trade union entities affiliated, federated, or confederated to a trade union organization of Autonomous Community range, considered most representative according to the provisions of letter 'a.' These organizations shall have representative positions to exercise within their specific Autonomous Communities the functions and powers listed in number 3 of the previous article, as well as to hold institutional representation before the national Public Bodies and other entities or organizations. 2. The trade union organizations that are not considered most representative, but obtained, in a specific territorial and functional scope, 10% or more of staff delegates, work council members, and Public Bodies' corresponding fora members, shall exercise, in said functional and territorial scope, the functions and powers referred to in sections 'b,' 'c,' 'd,' 'e,' and 'g' of number 3, article 6, according to the applicable regulation in each case." (Spain, 1985).

ones. However, the 2008 Crisis made unionization rarer. Between 2000 and 2007, for example, the wage-earning population rose 32.7%, and trade union membership increased by 40%; between 2008 and 2011, this population declined by 15.9%, and this membership fell by 11.6%. It is a common trend in countries of the Organization for Economic Cooperation and Development (OECD), but Spain has especially low unionization rates: around 15.9%. In OCDE, only France, Estonia, and Poland have lower rates, and the average is 19.9%. (Malvar, 2013; Gómez, 2016).

5.2. State resources

Trade unions in Spain – like in Brazil – are private legal entities that may call their members to financially contribute if they want to take part in associative/statutory issues. The affiliated workers must consent that their employers periodically deduct from their payslips the corresponding trade union membership fees[33]. Trade unions may also receive specific amounts from all workers – regardless of their membership – to bear operating costs, considering that collective bargaining involves expenses/efforts and benefits trade union members and non-members. Clauses of collective conventions may fix these amounts, but the workers must express their consent to the relative payslip deductions: the Spanish Constitutional Court (TC) rejected the interpretation that workers may tacitly authorize the deduction, which made these clauses rarely seen. (Cruz Villalón, 2013, pp. 462-463; Tribunal Constitucional de España, 1985).

When Franco ruled the country, trade unions were declared illegal, and the "official vertical trade union" received compulsory and public resources, e.g. public real estate. Part of these resources came from the seizure suffered by traditional and combative trade unions,

33 "Art. 11. 1. In collective conventions, clauses may establish that workers included in their scope financially support their trade union management represented in negotiating commissions, fixing an economic contribution and regulating how it may be paid. In any case, the worker's individual choice shall be respected and must be expressed in writing observing means and deadlines determined in collective bargaining. 2. The business owner shall deduct the trade union percentage from wages and transfer the corresponding amount to the trade union pointed out by the affiliated worker, who must always authorize it." (Spain, 1985).

like UGT. With the Democratic Transition, the Spanish State calculated the trade unions' losses and reimbursed them, making resources available to trade union organizations according to their representativeness[34]. Trade unions count on shares of the national and Autonomous Communities' General Budgets too – observing representativeness levels, as usual. The explanation here is that trade unions take part in public fora of discussion and carry out services of public interest, such as professional training courses and leisure activities. (Cruz Villalón, 2013, pp. 463-464).

From 2008 to 2013, the Spanish trade unions failed to receive EUR 40 million – around USD 61.5 million, using a 2008 rate – per year only in terms of membership fees – their main resources –, as 382,000 workers no longer contributed. For example, UGT and CC.OO. monthly fees were around EUR 11 – or USD 17 in 2008. The General State Budgets (PGE) also decreased their support: trade unions received EUR 15.79 million – USD 22.38 million – in 2011 and EUR 11 million – USD 14.66 million – in 2013. (Malvar, 2013). Nonetheless, García-Abadillo (2013) labeled trade union funding as "one of the major secrets" of Spanish democracy; perhaps only leaders know how much money trade unions earn, save, and spend. For example, although CC.OO. and UGT total almost 80% of the trade union representation, none of them is subject to compliance checks on these State resources.

6. Conclusion

In this context of different combined downturns, countries that found their labor systems on "elite" trade unions – unaware of their workers' interests/needs and keen to reach/secure broad State benefits – certainly damage efforts around "full freedom of association." All in all, workers and their trade unions – not States – should address trade

34 "Art. 3. The goods and rights referred to in article 1 of this Law shall be offered to Workers' Trade Unions and Business Associations, preferably to those considered most representative according to the provisions of Organic Law 11/1985, on Freedom of Association, and of the Legal System as a whole. The goods, rights, and obligations of the Accumulated Trade Union Assets that are neither offered to Trade Unions and Business Associations nor retained for the purpose referred to in article 4.1 of this Law shall compose the State Assets and be subject to the provisions of its Regulatory Law, after the inventory mentioned in additional provision 1 of this Law." (Spain, 1986).

union subjects. Brazil and Spain should reflect more on the way both work and workers organize and adapt them to their recent features and needs.

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Burn them all? An introduction to Waste Incineration Law in Brazil and Japan

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Abstract: Japan and Brazil handle household waste differently: while Japan prioritizes incineration, Brazil prefers landfilling it. The Japanese regulation on waste is from the year 1900, when municipalities started being responsible for this issue. Incineration had sanitary reasons for being chosen in the country, and, in the 1960s, emergency budget provisions addressed sanitary infrastructure, including residues management and a widespread network of incinerators – which must be authorized by prefectural governments. Although the national legislation does not require Environmental Impact Assessment (EIA) for incinerators, this type of approach may be considered. And stakeholders, in a final step, may submit their views about the facilities. In Brazil, the first norms on waste are from the 1950s and only demanded "adequate disposal." Federal Constitutions made municipalities in charge of it and led to landfills throughout the country, also incorporating unlawful ones – the so-called *lixões*. However, incineration so far counts on a federal regulation acknowledging it as an adequate method and making its plants subject to EIA and public hearings. Brazil has no obstacles to adopt incineration more widely, but its people's mindset seems to be against burning waste, as waste pickers need recyclables to earn a living. The recycling rate in Japan, curiously, is much higher than in Brazil, which indicates that a landfilling model does not necessarily benefit waste pickers. This article further explores these ideas to suggest that Brazil open its eyes to the variety of technologies on waste treatment/disposal.

Keywords: Brazil; Environmental Law; incineration; Japan; waste.

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1. Introduction

It is very likely that a piece of waste in the world, if handled properly, ends up in a landfill. However, landfills depend on – as its name indicates – land, which may be scarce and too expensive. Smart waste policies, thus, often value intermediary means, averting waste from being dumped directly into landfills. Scarcity of available land is one of the reasons Japan has around 80% of its household waste incinerated before landfilling – i.e. burning waste and burring its ashes. By the way, incineration of domestic waste is largely used in developed countries. (Tisi, 2019, pp. 5-6). The situation is quite different in Brazil: land is abundant in almost any region, a fact that may explain why the country buries almost 100% of household waste without any previous treatment. This article presents an overview of household/domestic waste management in Japan and Brazil, focusing on how their federal/national norms regulate incineration methods and speculating why Brazil has been dodging these methods.

2. Waste management in general

2.1. Japan

In 1900, during the Meiji Era, the country first established a regulation on waste management, known as the Waste Cleaning Act – Law No. 31/1900, 汚物掃除法 –, defining "the collection and disposal of waste as the obligation of municipalities," placing the "waste treatment operators under the supervision of government organizations," and stating that "waste should be incinerated if possible." Its main objective was tackling sanitary issues, as Japan was suffering an outbreak of infectious diseases. With the intense economic growth after World War II, municipalities alone could no longer properly handle residues, a scenario that led to the Public Cleansing Act – Law No. 72/1954, 清掃法、昭和29年4月22日法律第72号. According to its arts. 2, municipalities remained in charge of the conventional system, but prefectural and national governments had to

technologically/financially support them, while residents had to take part in waste collection/disposal. The Act on Emergency Measures concerning the Development of Living Environment Facilities – Law No. 183/1963, 生活環境施設整備緊急措置法、昭和38年12月24日法律第183号 – promoted urgent and systematic maintenance and implementation of sanitation-related infrastructures, like the ones about waste disposal – arts. 1 and 2. Based on its art. 3, the Cabinet approved in 1965 the First Five-Year Plan for the Development of Living Environment Facilities; other norms gave room for the Plans from the 1960s to the 1990s. (Japan, 1900; 1954; 1963; Ministry of the Environment - Japan, 2005; 2014, pp. 3-4; Mizoiri, 2006, p. 1).

Nevertheless, since the 1900 Waste Cleaning Act, municipalities have remained the only ones responsible for industrial waste. It changed with the Waste Management and Public Cleansing Act – Law No. 137/1970, 廃棄物の処理及び清掃に関する法律、昭和45年12月25日法律第137号 –, whose art. 2 made clear distinctions between general waste – such as the one from households – and industrial one. Waste-generating business operators – arts. 3 and 11 – and municipalities – arts. 4 and 6, (2) – had their functions fixed, and facilities – like incinerators and landfills – were further regulated. Recycling was the focus in the 1990s, marking the dawn of the Sound Material-Cycle Society (循環型社会). The 1995 Containers and Packaging Recycling Act, the 1998 Home Appliance Recycling Act, the 2000 Basic Act for Establishing a Sound Material-Cycle Society, the 2000 Food Recycling Act, the 2000 Construction Recycling Act, the 2002 Automobile Recycling Act, and the 2012 Small Home Appliance Recycling Act are other examples of relevant norms in the field. (Japan, 1970; Ministry of the Environment - Japan, 2014, pp. 4, 10, 17).

Household waste in Japan increased steadily until 2000, at the pace of 54,830,000 tons/year or 1,185 grams/person/day. Since then, both per capita and general amounts of waste have been decreasing – e.g. 42,890,000 tons/year in 2017, representing 920 grams/person/day – due to changes in the economy and in social habits. Nowadays, the country incinerates 80.3% of its household waste, while 18.7% is sent to intermediate treatments, and 1% goes straight to landfills; around 20% is recycled. (Ministry of the Environment - Japan, 2014, p. 15; 2019, pp. 11, 14).

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2.2. Brazil

It was in the 1950s that Brazil passed norms mentioning this theme for the first time, having Law No. 2,312/1954 – focused on Public Health – as its milestone. Art. 12, for example, indicates that the collection, transportation, and destination of waste must avoid inconveniences to the social well-being. Decree No. 49,974-A/1961 was supposed to give us more details, but the only provision on waste was its art. 40, which basically copied art. 12 of the 1954 Law. In other words, handling waste remained a vague activity. Some Brazilian Constitutions[2] – like some Japanese norms – fixed that municipalities were responsible for domestic waste, but offered no national guideline for them. Art. 30, V, of the in-force 1988 Constitution, for example, states that municipalities shall "organize and render, directly or by concession or permission, public services of local interest"; it makes sense that handling waste refers to local interests. Nevertheless, waste management only received proper attention many years later, more specifically in Law No. 12,305/2010, which instituted the National Policy on Solid Residues – further shaped in Decree No. 7,404/2010. The 2010 Law displays principles and objectives – arts. 6 and 7 – of the Policy, stating that, e.g.: (i) economy, environment, society, culture, technology, and public health shall be taken into consideration; (ii) federal, state, and municipal governments, as well as companies and other social institutions shall cooperate; and (iii) waste shall not be over-generated, but reduced, reused, recycled, adequately treated, and eco-friendly disposed. Moreover, as we see in art. 33, business and manufacturing sectors must arrange reverse logistics/take-back systems. Art. 3 of Law No. 12,305 and art. 15 of Decree No. 7,404 detail

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2 Due to several political turbulences over its history, Brazil had *de facto* eight Constitutions. After its Independence from Portugal in 1822, Brazil became a Parliamentary Monarchy under the 1824 Constitution. The Proclamation of the Republic took place in 1889, and the 1891 Constitution instituted the Presidentialism. The so-called Old Republic ended in 1930, and the 1934 Constitution tried to pacify the country, a plan that failed with the dictatorship of Getulio Vargas and its 1937 Constitution. The "Vargas Era" was finished in 1945, and the 1946 Constitution symbolized it. With a new *coup d'État* in 1964, another dictatorship was installed, leading to "two" Constitutions: the 1967 one was completely amended in 1969, which gives us the idea of different norms. This dictatorship faded away in the 1980s, and the 1988 Constitution – in force nowadays – gave room for democracy again.

the Sectoral Agreements between public and private sectors. (Brazil, 1954; 1961; 1988; 2010a; 2010b).

Household waste in Brazil has been increasing. 78,426,820 tons of domestic waste were generated in 2017, 1% more than in 2016 and representing 1,035 grams/person/day. In 2018, we had 79,069,585 tons, which is 0.82% higher than the 2017 amount and means 1,039 grams/person/day. In 2017, 91.2% of the amount of waste was collected, which means that around 71.6 million tons were handled by municipalities and that the 6.9 million tons left were inadequately disposed. In 2018, in turn, the waste collection reached 92% – approximately 72.7 million tons –, leaving 6.3 million tons to be carelessly disposed. (Associação Brasileira de Empresas de Limpeza Pública e Resíduos Especiais, 2017, pp. 14-15; 2019, pp. 11-12). However, data may indicate that only 50.8 million tons of waste were collected by municipalities, perhaps adopting other methodologies. (Secretaria Nacional de Saneamento, 2019, p. 8).

Most waste, 59.5%, is disposed of in landfills, 23% in inadequate landfills (*aterros controlados*), and 17.5% in unlawful ones (*lixões*). A *lixão* is an outdoor area where waste is simply dumped into, without any supervision or control of sanitary/environmental impacts; in an *aterro controlado*, the waste accumulated is periodically covered with layers of ground – which does not mean further care with the public health. Hence the deficiency in the final destination of 40.5% of the domestic waste in Brazil. In 2010, we had a worse scenario: municipalities disposed of their waste improperly, more specifically 50.8% in *lixões* and 22.5% in *aterros controlados* – 22.7% in landfills. Brazil recycles only 1.6% of its waste. But what about incineration? It is often applied in the waste generated by health services and may reach an "impressive" 0.07% of the overall waste; the real percentage is uncertain or inconsiderable. (Associação Brasileira de Empresas de Limpeza Pública e Resíduos Especiais, 2019, pp. 16, 40; Instituto Brasileiro de Geografia e Estatística, 2010, pp. 60, 185, 214; Secretaria Nacional de Saneamento, 2019, pp. 8, 144).

3. Waste incineration

3.1. Japan

Art. 5 of the Enforcement Regulation of the Waste Cleaning Act – Ordinance No. 5/1958 of the Ministry of Home Affairs, 汚物掃除法施行規則、明治33年3月8日内務省令第5号 – states that the waste collected by municipalities shall be, as much as possible, incinerated. This practice mirrored the ones of Europe and the USA, but Japan had few incineration facilities, which made waste be piled up outdoors and burned continuously. These facilities also produced ashes for agricultural purposes. The mentioned 1954 Public Cleansing Act said, in its art. 19, that the National Government shall help the municipalities with the necessary funds to establish waste incineration plants. The Act on Emergency Measures concerning the Development of Living Environment Facilities, the First Five-Year Plan for the Development of Living Environment Facilities, and the 1970 Waste Management and Public Cleansing Act followed this policy. (Japan, 1954, 1963; 1970; Ministry of Home Affairs - Japan, 1958; Ministry of the Environment - Japan, 2014, pp. 3-4; Mizoiri, 2006, p. 6).

Air emissions from incinerators, in turn, are referred to by the Air Pollution Control Act – Law No. 97/1968, 大気汚染防止法、昭和43年6月10日法律第97 号 – and by the Act on Special Measures against Dioxins – Law No. 105/1999, ダイオキシン類対策特別措置法、平成11年法律第105号. Dioxins are harmful polluting substances for human health and generated via waste incineration. In the early 1980s, Japan saw the first reports about dioxin-contaminated dust and, in the 1990s, about dioxins in soil and even in breastmilk. Dioxins became a public threat, triggering moves to shut down/severely supervise waste incineration facilities and to develop more emission control technologies. As a result, dioxin emissions from these facilities reduced by 99% from 1997 to 2011. (Japan, 1968; 1999; Ministry of the Environment - Japan, 2014, pp. 6-7, 9, 13).

Following the 1970 Waste Management and Public Cleansing Act, art. 8, the installation of a waste incineration facility shall have the respective prefectural license, technical documents backing it up –

about residues, capacity, location, blueprints, operation, etc. –, and living environment assessment reports on the facility's surroundings (周辺地域の生活環境に及ぼす影響についての調査の結果を記載した書類). The Environmental Impact Assessment Act – Law No. 81/1997, 環境影響評価法、平成9 年6月13日法律第81号 –, art. 2, lists the activities that shall have EIA attached to. The facilities mentioned by the 1970 Act are landfills, not incinerators, which may dismiss EIA. It does not mean that environmental requirements vanish: living environment assessment reports must be formulated. Art. 61 of the 1997 Act also allows municipalities and prefectures, based on local regulations, to demand EIA for incinerators. (Japan, 1970; 1997).

The National Government delayed certain environmental requirements: the Fukuoka Prefecture, in 1973, and the Municipality of Kawasaki, in 1976, pioneered some of them. (Kitamura, 2017, p. 301). Details are in the Enforcement Regulation Ordinance No. 35/1971 of the Ministry of Health and Welfare (廃棄物の処理及び清掃に関する法律施行規則、昭和46年厚生省令第35 号), whose competence was transferred to the Ministry of the Environment. Art. 3, (2), of the 1971 Ordinance requires the description of the incinerators' impacts on the surrounding areas – air/water quality, noise, vibration, odor, etc. –, of their population, land use, and other relevant factors. The 1970 Waste Management and Public Cleansing Act, art. 8, obliges prefectures to publicize these documents for one month, so the cities and the stakeholders to be affected may express their opinions – and specialists shall hand in technical reports. The general parameters for the license are the norms of the Ministry of the Environment, but additional conditions may be fixed. Nowadays, Japan has a widespread network of incinerators: 1,103 municipality-owned facilities – with a capacity of 180,471 tons/day – and 306 private ones – able to handle 107,293 tons/day. (Japan, 1970; Ministry of Health and Welfare - Japan, 1971; Ministry of the Environment - Japan, 2019, p. 22). In Tokyo metropolitan area, for example, there are 19 operational plants. (Clean Authority of Tokyo, 2019).

3.2. BRAZIL

In 1888, the City of Porto Alegre, State of Rio Grande do Sul, was the first to install a plant to incinerate waste in the country; Manaus, State of Amazonas, in 1896, and Belem, State of Para, in the early 20th century, followed this path right after. Sao Paulo, the largest Brazilian city, totaled four incinerators: Araca, in 1913, Pinheiros, in 1949, Ponte Pequena, in 1959, and Vergueiro, in 1967. They are no longer operational due to, for instance, the population growth around them. In the early 1900s, Sao Paulo witnessed debates involving scholars and politicians about waste management, a situation that might have happened in other cities at that time. The academia advocated in general for incinerators because they would not only reduce the waste volume but also eliminate sanitary risks to the population. Although many politicians consented, they argued budgetary issues, as incinerators were too expensive. Incinerators – causing pollution and relying on bad maintenance – have disturbed neighborhoods in Sao Paulo for years, which created a social rejection against them. Vergueiro was the last one in the city and stopped working in 2002, when a closedown ceremony was conducted by the Mayor at that time, with balloons released from chimneys. (Caodaglio & Cytrynowicz, 2012, pp. 51-53, 64, 110, 116, 154, 156-157, 213).

Such facilities had their reputation damaged in the country and are seen as a method to be avoided. Waste pickers – usually low-income workers who collect and sell recyclable waste – total 800,000 or 1,000,000 people. Incinerators may increase their unemployment, generate dangerous air emissions, and worsen climate change effects. There are controversies about the National Policy on Solid Residues too. (Gama, 2019; Movimento Nacional dos Catadores de Materiais Recicláveis, Aliança Global por Alternativas à Incineração & Aliança Resíduo Zero Brasil, 2019, pp. 3, 8).

Although mentioned by many organs and associations, the term “incineration” has almost no entry in recent norms on waste management; synonyms are though abundant. For instance: (i) art. 24 of National Environment Council (CONAMA) Resolution No. 316/2002 refers to “thermal treatment” of urban residues after separation for recycling (Conselho Nacional do Meio Ambiente - Brazil, 2002); (ii) art.

7, XIV, of Law No. 12,305/2010 deals with “energy recovery and utilization” (Brazil, 2010); and (iii) Inter-Ministry Ordinance No. 274/2019 – signed by the Ministries of the Environment, of Mines and Energy, and of Regional Development – addresses “energy recovery” (Ministério do Meio Ambiente - Brazil, 2019). Even in business, the term seems to lose space. At least two projects of incinerators exist in the Metropolitan Area of Sao Paulo, more specifically Energy Recovery Units/Power Plants (UREs) in Barueri and Maua. (Foxx Haztec Tecnologia e Planejamento Ambiental, 2019; Lara Central de Tratamento de Resíduos, 2019). And, in academia, the expression “waste-to-energy” is more and more employed. (Tisi, 2019). Nonetheless, synonyms do not change the fact that waste may be burned.

According to Law No. 6,938/1981 – which instituted the National Environment Policy –, art. 10, installing any facility that may generate pollution – like a waste incinerator – demands previous environmental licensing. (Brazil, 1981). The 2002 CONAMA Resolution, art. 26, lists documents – for example, the EIA – to be submitted for this licensing, which shall identify direct/indirect social, economic, physical, and biological impacts, preventing or mitigating problems. Its art. 38, in turn, fixes air pollution limits for any “thermal treatment system.” Arts. 5, 6, and 11 of the CONAMA Resolution No. 01/1986 had already paved the way for these technical reports and for their availability to the population, which may give its opinions. Public hearings are further regulated in CONAMA Resolution No. 09/1987: its art. 5 states that these sessions shall be considered in the licensing procedure. (Conselho Nacional do Meio Ambiente - Brazil, 1986; 1987; 2002).

4. Conclusion

Waste incineration in Japan has a long-lasting history, dating back to the Meiji Era and permitting robust recycling initiatives. In Brazil, incinerators were installed in the late 19th century, but landfilling ended up being the preferred method – which allegedly benefits waste pickers. Both countries require documents about environmental impacts and value public opinion, but Brazil emphasized the role of

public hearings – not necessarily obstacles for waste management facilities.

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Challenges of Family Law in Japan and their interfaces with Brazil

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Abstract: The main purpose of this article is to give an overview of the challenges that Family Law faces in Japan, comparing them with recent Brazilian debates. Among others, I address the following aspects: (i) milestones of the Japanese Family Law; (ii) the legislative inertia as a background for litigation involving family changes; and (iii) relevant cases seen in the past decades, with the increasing role of the Judiciary.

Keywords: Court; equality; Family Law; Human Rights; litigation.

1. Introduction

Particularly since 2011, when the Brazilian Federal Supreme Court (STF) recognized same-sex unions – a long-lasting LGBT+ cause –, the Judiciary has been playing a fundamental role in the country's Family Law. (Supremo Tribunal Federal - Brazil, 2011a; 2011b). Family Law is rooted in the 2002 Civil Code (CC) but has a great influence from judicial precedents – as accepted by the 1988 Federal Constitution (CF), in-force nowadays. As I discussed in my Master Thesis, the STF decision of 2011 represented an entirely new understanding of Family Law, now based on constitutional principles of diversity and affectivity. (Machado, 2018). Following this decision, we saw equal inheritance rights for unmarried couples, affective parent-child relationships, civil liability for childhood/parental emotional neglect, the right of transexuals to change their legal name/gender, etc. (Superior Tribunal de Justiça - Brazil, 2012; Supremo Tribunal Federal - Brazil, 2016b; 2018a; 2018b). Even if the 2002 Civil Code was not "born old" – as many Family Law scholars say –, it was "murdered" by the Brazilian

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Courts. (Dias, 2013, p. 31). Nevertheless, I would not affirm that the country's Judiciary is particularly activist. These successful decisions came after relentless litigation, very much caused by a chronic institutional disfunction: despite the striking social changes of the last decades, the Legislative has been vehemently refusing some normative changes. (Machado, 2018).

The Japanese Judiciary, in turn, had a long-lasting image of passivity and subordination to the Legislative: until very recently, there was no Court decision deeming any Civil Code provision unconstitutional. It does not mean, however, that Japan has solved all its diversity issues. This article debates the challenges of the Japanese Family Law – some of them already overcome in Brazil – and presents how its legislative stagnation gave room for decisions overturning well-established precedents – as we notice in Brazil.

2. Family Law in Japan

Like Brazil, Japan belongs to the Civil/Roman Law tradition; its first Civil Code dates back to 1890. To renegotiate unequal treaties, Japan was required by Western powers to "modernize" its legal system. There was an attempt to translate the Napoleonic Code and to enact it as the Civil Code of Japan: Minister of Justice Eto Shinpei ordered Rinsho Mitsukuri – who later became the Chairman of the Civil Code Draft Committee – to translate it as fast as possible. Japan was interested in French Law because it had a worldwide impact and was much easier to transplant than a Common Law system, but this effort was not well-received. The Japanese Government thus invited French scholar Gustave Émile Boissonade (1825-1910) to help the elaboration of a Western-type Civil Code – including Family Law – tailored to the country's needs. The first Civil Code passed in 1890, but the famous Civil Code Controversy (民法典論争) postponed its enactment. The Controversy was not merely about Family Law or between French scholars and German ones; it was primarily about the need for a Code. A new Commission – formed by Japanese scholars only, more specifically Nobushige Hozumi (1855-1926), Masaaki Tomii (1858-1935), and Kenjiro Ume (1860-1910) – was set up to write a draft from scratch, having the German Civil Code – the *Bürgerliches Gesetzbuch*

(BGB) – as the main inspiration. The first Japanese Code was then adopted in two Acts: (i) in an 1896 Act, which referred to general provisions and Property Law; and (ii) in an 1898 Act, related to Family Law and Succession Law. The so-called Meiji Civil Code was finally in force – and still is. (Isono, 1988, pp. 185-191; Ogawa, 1992, pp. 112, 114-116; Ono, 1996, pp. 27-29; Omura, 2010, p. 17; Pedriza, 2017, pp. 30-31, 172).

While Brazil – also inspired by the BGB – had a "German Code for a French doctrine," Japan applied "a German doctrine to French provisions." (Delgado, 2011, pp. 207-210). Instead of a model for rules, the BGB was a model for the codification itself, a fact that let European-type norms remain in the Civil Codes of the period. This confusion was criticized by Eiichi Hoshino in the 1960s, and the Japanese scholars tend to put aside the German/French influences – weaker in Family Law, as it closely observed the Japanese tradition. The Western curiosity led, already in 1902, L. H. Loenholm and Jules Adam to translate the Meiji Code into French. (Omura & Machado, 2019, pp. 49-51). In 1916, when the first Brazilian Civil Code was enacted with the leadership of Clóvis Beviláqua, the Meiji Code was known in Brazil; Beviláqua (1975, p. 821) mentions, for instance, that "pursuant to article 837 of the Japanese Civil Code, any adult may adopt." His knowledge may have come from Japanese people – as the Japanese mass migration to Brazil had started in 1908 – or from French sources. Although Japan was highly influenced by foreign legal systems, it nowadays influences other countries: Japan has been supporting – or supported – the establishment of legal systems, for example, in Vietnam (1994), Cambodia (1996), Laos (1998), Indonesia (1998), Uzbekistan (2001), Mongolia (2004), China (2007), and East Timor (2008). (Ministry of Justice, n.d.).

But what was different between the Japanese and the Western Family Laws? First of all, Japan mainly valued the "household" or "family" (家, *iye*), not the marriage: rather than a via to establish a new family, marriage was conceived to a person entering an already-existing family. The "household's head" (戸主, *koshu*), usually the oldest male of the family, was the key figure and symbolized by the "family name" in the Family Registry. All members of the household had the duty to obey the *koshu*, while the *koshu* had to protect/support all members – arts.

747 to 750 of the Meiji Code. Unless essential for the perpetuation of the household, a woman could not become the *koshu* and was subordinated both to her husband and to the *koshu* – arts. 14 to 18, 970 and 974, Meiji Code. (Isono, 1988, pp. 185-191; Japan, 1896; Ogawa, 1992, pp. 117-118; Omura, 2015, pp. 328-331, 339-342; Pedriza, 2017, pp. 229-230; Tanaka, 1980, p. 623). However, Tanaka (1980, p. 623) points out that "the notion of the household took precedence over that of male dominance" because "if a *koshu* had no son or the son died without heirs, the eldest daughter became the head of the household." And complementing:

> The eldest daughter [...] preceded the wife or brother of the deceased. When a female head of the household married, she remained the head of the household unless her spouse manifested an intention to the contrary [...] [and] could use her husband's property and receive the proceeds therefrom.
> (Tanaka, 1980, p. 623).

Although diverse from Western systems – in which even the paternity recognition of children born out of wedlock was forbidden –, there was in Japan a hierarchy among children. The firstborn son was endowed with the position of the *koshu*, i.e. he had the right to inherit the whole household with everything and everyone within. Although a younger son did not inherit the *koshu*'s property, he could receive a share of it and have his own property – mainly when the *koshu* authorized him to set up his own household. It was more important that the heir was a male than that he was a legitimate child; thus, if all children were women, the priority would be given to sons born out of wedlock or to adopted sons. Adoption was designed as the marriage: it was a way to enter the household and secure a male heir. For instance, art. 739 of the Meiji Code stated that, if a dissolution of adoption or a divorce occurred, the person involved went back to his/her original household. Art. 750, in turn, indicated that a member had to "obtain authorization from the *koshu* to marry or adopt." So, the Meiji Code – in its arts. 786, 788, 813, (x), 858, and 866 – ended up allowing *mukoyoshi*, literally "husband adoption": parents could adopt a man if he married their daughter. The wife had to leave her maiden name and adopt her husband's one, something that averted the perpetuation of her original household. However, if a husband was adopted, he entered

his wife's household taking her family name. Even nowadays, adoptive brotherhood does not prevent marriage in the country. Some Meiji norms may give us the impression that Japan elaborated a groundbreaking system, e.g. spouses could "divorce by mutual consent" and with non-judicial agreements – arts. 808 to 812. (Isono, 1988, pp. 189-191; Japan, 1896). In Prewar Japan, however, this freedom to divorce only meant less protection for women, who could be easily forced to divorce by pressures from the household.

> This seemingly modern phenomenon [divorce by mutual consent], however, has its own historical background. According to the value system of the *iye* (household), the *yome* (wife) who did not please the parents of the husband had to be removed from the *iye* circle. The failure to produce a male heir was one of the main accepted reasons; but the most common justification was that she did not fit into the "culture" of the *iye*, especially from the mother-in-law's point of view.
> (Isono, 1988, p. 191).

In the West, the old prohibition of divorce helped protect women within patriarchal societies. On child adoption, the 1916 Brazilian Code allowed it under strict conditions and contractually – the adopter and the adoptee. In Japan, the ground rule for adoption was that the adopter had to be older than the adoptee, and their relationship was an ordinary child-parent one extended to the whole household – art. 727. (Japan, 1896). It was very protective for adoptive children, but the lack of control to verify if they were benefited – not simply used as heirs – made room for child trafficking. Some girls were given for adoption to work in *geisha* houses. (Miyazaki, 2019, pp. 34-37). Curiously, the Meiji Code entered into force anachronistically, as most Japanese families had already become nuclear units composed of a married couple and its children; this discrepancy encouraged judicial decisions and normative amendments. The Prewar Family Law mirrored the ruling ideology: citizens were subordinated to the Emperor as household members were subordinated to the *koshu*. It reminds us of a *matryoshka* doll, wherein the Japanese were expected to think/act alike. After World War II, one of the main concerns of the USA in Japan was to dismantle its old family system. Once again, the Japanese Family Law changed because of

foreign pressures, as noticed in the 1946 Japanese Constitution[2]. (Isono, 1988, pp. 184-185, 194, 198-199; Kawashima, 1987, pp. 1167-1168; Pedriza, 2017, pp. 34-35, 108-112, 229-230; Tanaka, 1980, pp. 623, 626-628).

The 1946 Japanese Constitution, like the 1988 Brazilian one, guarantees freedom to take personal decisions, individual dignity, and gender equality. In Brazil, the Beviláqua Code was replaced almost 90 years later, in 2002, a period that permitted a renewed constitutionalized Family Law. Differently, in Japan, Books IV and V of the Meiji Code – involving Family Law – were entirely reformed at the moment of the Constitution, and a temporary act – Law No. 74/1947 – covered a gap of some months until the new Meiji Code. While the Japanese Constitution was drafted by the USA, the Meiji Code changes were conducted by Japanese scholars and lawmakers – like Sakae Wagatsuma, who was one of the most renowned jurists in Postwar Japan and published a book describing this reform. We had the "abolition of the household system" (家制度の廃止) – the *koshu* no longer exists – and the emphasis on equality – men and women have the same rights/duties, including the inheritance ones, and may divorce by agreement. (Isono, 1988, pp. 198-199; Kawashima, 1992, p. 87; Omura, 2015, p. 318; Wagatsuma, 1956).

Nonetheless, no matter how disruptive the enacted norms were, they did not come from Japanese society. Upham (1987, p. 12) says that it is an "undeniable fact that Japan's legal norms are basically the result of foreign imposition or conscious, at times uncritical, imitation and not the result of internal social evolution." The old family system kept working in the country's routine, although Tanaka (1980, pp. 639-642) refers to a gradual conciliation involving the Constitution, the Civil Code, and the society. An example: married couples may choose their wives' surnames, but almost all of them – 96% in 2016 – elect their

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2 "Art. 24. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation, with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of sexes." (Japan, 1946). This norm was prepared by Beate Sirota Gordon (1923-2012), an Austrian-born American raised in Japan who worked under the General Headquarters (GHQ). She described in her biography this elaboration. (Gordon, 1997).

husbands' ones. (Ministry of Health, Labor, and Welfare - Japan, 2016, p. 10). Brazilians seldom care about the preservation of family names, but it is so important for the Japanese that art. 3 of the 1996 Guidelines to the Civil Code Reform said that a couple had to choose in advance which family name its child would have. For some conservatives, changing this culture may "open the Pandora's box" of family diversity. Moreover, parents usually give all the inheritance assets to their firstborn son, and the other sons and daughters are pressured into renouncing their rights. (Ministry of Justice - Japan, 1996; Tanaka, 2012, pp. 233-235).

I perceive that the Japanese Law, establishing purely formal equality, made judicial interventions difficult – if not impossible – when inequality is substantive. A Code ahead of its society perhaps denied the opportunity to fight for rights, which may explain the delays towards the reality envisioned by the Constitution. In the 1980s, Japan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and amended provisions about intestate inheritance – Law No. 51/1980, which gave the spouse the right to half, no longer to a third, of the inheritance when having children. However, the proposal that equalized inheritance rights of "illegitimate" – sadly, a term still used – and legitimate children was dropped after a public opinion survey. (Matsui, 2016, pp. 596, 599). In the 1990s, Japan and the West started paying more attention to topics like child abuse/neglect, minorities, and domestic violence; it motivated a detailed Bill at that time to amend Books IV and V of the Meiji Code. When Brazil saw the first Bill on same-sex partnerships submitted to – and immediately shelved by – the National Congress, Japan approved Bills to end discrimination against illegitimate children, to improve gender equality, and to disregard blame in divorce. But, when spouses in Japan were granted the right to keep their maiden names, a more conservative wave gained momentum and precluded a whole set of amendments from passing. The Judiciary was prominent here. (Ministry of Justice - Japan, 1996).

There is a long-standing debate on litigation in Japan, as Foote (2014, pp. 165-166) summarized. Haley (1978) rejects that the Japanese culturally avoid fighting for their rights in the Courts, but this idea remains powerful perhaps because the number of lawsuits in Japan is quite smaller than the one in the USA or Brazil.

2.1. The Judiciary's role

The Judiciary has been taking part in important aspects of Family Law since Prewar Japan. On January 26th, 1915, the Court of Cassation determined that a compensation was paid to the wronged party – usually a woman – because of the breach of promise to marry – and Case Law emerged to protect women in unmarried couples. On November 2nd, 1922, the same Court ruled that adoptions not intended for true parent-child relationships and for the best interest of the adoptees were void, which hindered the aforesaid human trafficking via adoption. On July 20th, 1926, the Court ruled that a husband had to be faithful to his wife, a milestone for divorces caused by male infidelity and to women's liberation movements (婦人運動) in the late Meiji Era to the late Taisho one. (Court of Cassation - Japan, 1915; 1922; 1926).

In Postwar Japan, the Judiciary deepened the protection of unmarried couples with the theory of *de facto* marriage, elaborated by Zennosuke Nakagawa. (Omura, 2010, pp. 230-231). Excepting inheritance and joint custody, unmarried couples have very much the same duties and rights as married ones. Brazil, however, gave the proper attention to these relationships from the 1988 Constitution on. (Machado, 2018, pp. 241-246). Japan seldom witnesses judicial reviews, and its Supreme Court in 1995 held that assigning disparate inheritance rights to legitimate and illegitimate children was within the "reasonable discretion" of the Legislative. It was so because the provision covered intestate inheritance and balanced the protections on legal marriage and illegitimate children. Guidelines for amending the Meiji Code were published at that time, but some legislative/judicial changes did not occur. (Supreme Court of Japan, 1995; 2000; 2009).

Almost two decades and five decisions afterward, on September 4th, 2013, the Supreme Court finally ruled that the distinction between intestate inheritance rights of legitimate and illegitimate children violates art. 14, (1), of the Japanese Constitution. (Supreme Court of Japan, 2013a). However, its 1995 decision was not invalidated; it was argued that a plethora of conditions changed:

> 3. [...] (4) None of the changes in various matters, etc. associated with the reasonableness of the Provision can solely be a decisive reason for judging the distinction in

> terms of the statutory share in inheritance under the Provision. However, giving comprehensive consideration to circumstances such as the trends in society seen from the time of the 1947 Civil Code revision up until now, the diversification of the forms of family in Japan and the changes in people's perceptions resulting therefrom, the legislative trends in other countries as well as the content of the treaties ratified by Japan and the criticism given by the committees set up under these treaties, the changes in the legal system, etc. relating to the distinction between children born in wedlock and children born out of wedlock, and the problems, etc. repeatedly pointed out in the rulings handed down by this court thus far, it can be said to be an evident fact that respect for individuals in a family, which is a collective unit, has been recognized more clearly. Even if the legal marriage system itself is entrenched in Japan, it is now impermissible, as a result of such change in the recognition, to cause prejudice to children by reason of the fact that their mother and father were not in a legal marriage when they were born – a matter that the children themselves had no choice or chance to correct. Rather, it can be said that a notion that all children must be given respect as individuals and that their rights must be protected has been established. Putting all points mentioned above together, it must be said that even in consideration of the discretionary power vested in the legislative body, the distinction in terms of the statutory share in inheritance between children born in wedlock and children born out of wedlock had lost reasonable grounds by the time when P's inheritance commenced as of July 2001 at the latest. Consequently, it must be concluded that the Provision was in violation of Article 14, paragraph (1) of the Constitution as of July 2001 at the latest.
> (Supreme Court of Japan, 2013a).

This ruling reverberated around the Judiciary. It discussed, for example, the presumption of paternity when a spouse changed his/her legal gender, such as a husband who became legally a woman. (Machado, 2019; Supreme Court of Japan, 2013b). Japan allowed

people with Gender Identity Disorder (GID) – as the country, unfortunately, names it – to change their legal gender and marry those who genetically belong to the same gender. This permission may be noticed as an expression of pity, not as a genuine recognition of diversity. Nonetheless, the mentioned presumption does not apply when the conception is impossible, and assisted reproduction depends on topics like *post mortem* conception and surrogacy. (Japan, 2003; Mizuno, 2012, pp. 16-17; Supreme Court of Japan, 1969; 2006; 2007).

On December 16th, 2015, the Supreme Court (2015a; 2015b) took two – perhaps opposite – lines of argument, stating that: (i) the remarriage waiting period for women which exceeds 100 days was partially unconstitutional; and (ii) forcing married couples to have the same surname was not against gender equality or freedom to marry, and the Legislative shall be discretionary in this matter. The latter has been motivating more lawsuits and initiatives, like the New Selective Marital Proceedings (ニュー選択的夫婦別姓訴訟) website (2018). A demand was dismissed by the Tokyo District Court on March 25th, 2019, and the complainants have already appealed. (Tokyo District Court, 2019). Social movements nowadays want more than visibility; they very much push for judicial changes/better public policies and reject some analogies – as same-sex couples who demand recognition of marriage, not civil partnership. (Marriage for All Japan, n.d.).

3. Conclusion

Legislatives around the world tend to be chronically dysfunctional when copping with diversity in Family Law. So, many people end up relying on the Courts, which may foster powerful transformations and some questionable ones – like “pop-star” Judges, Lawyers, and Prosecutors. But will always the Courts meet the hopes of social movements? It is hard to say. The Brazilian Judiciary assured same-sex unions and, almost a decade later, criminalized homophobia/transphobia. Human Rights have been acknowledged, but they may be taken away: the Legislative often challenges the Judiciary, refuses to support same-sex relationships and other LGBT+ causes, and even try to overturn STF decisions. (Câmara dos Deputados

- Brazil, 2011; 2013; Notícias STF, 2019; Supremo Tribunal Federal - Brazil, 2013; 2019a; 2019b).

In contrast, Japanese Courts seem to operate at half capacity, sometimes failing to protect rights for the sake of public order and balance of power. At first sight, the 2013 Supreme Court decision – on discrimination against illegitimate children – and some National Diet positions would start an auspicious era in Japanese Family Law, but higher expectations were not met. We may notice that the Supreme Court in the country generally reflects what many lawmakers would propose, without robust divergences, creative interpretations, or preferences for judicial review. As Ramseyer (2015, pp. 2-9) affirms, the Japanese "second-best justice," designed to offer imperfection, may produce more effective results by doing less. The problem is that acknowledging gender equality, same-sex marriage, and other Human Rights causes may require more institutional proactiveness and – perhaps – boldness; social movements certainly appreciate it.

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Controversies in the digital era: An overview of the Online Dispute Resolution (ODR) development in Brazil and Japan

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Abstract: The increasing growth of digital communication gave rise to an intricate field of study: Online Dispute Resolution (ODR). It covers disputes that started online and are partially/entirely settled online, using Alternative Dispute Resolution (ADR) techniques – such as conciliation, mediation, and arbitration – and thus expanding access to justice at the pace of technological innovations. As ODR put aside in-person interactions, it is a new field of study relevant to our interconnected world. We present in this article the ODR development since the 1990s – with its main advantages and challenges – and its establishment in Brazil and Japan – comparing cases, potential, and scenarios. Despite the development of private and governmental projects in both countries, ODR is not yet fully integrated; it has been frequently applied only in consumer cases.

Keywords: Alternative Dispute Resolution (ADR); Brazil; Japan; Online Dispute Resolution (ODR); technology.

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1. Introduction

The Fourth Industrial Revolution may create value with disruptive technology, reshape cultural/social contexts and the way people interact. (Koizumi, 2019). These changes favor the development of the Online Dispute Resolution (ODR) methods, which implement the Alternative Dispute Resolution (ADR) ones in online communication. (Mania, 2015). The ADR methods flourished decades ago and avert the opposition that Courts traditionally establish between the disputants. Curiously, the ADR development in the USA has been pushed forward by the Judiciary, which has been facing more "hard cases" since the 2000s. Costs, delays, and inefficiency also play major roles in favor of ADR. (Singer, 2018). The USA and other countries may use "mediation" as a synonym of ADR, but it seems to be more appropriate to differentiate mediation – in which the neutral third party acts as a dialogue facilitator – from conciliation – in which he/she intervenes more, even to suggest solutions. (Yi, 2009).

Online Dispute Resolution (ODR) was born in the late 1990s, when the internet, e-commerce, and cross-border transactions spread worldwide, and complex conflicts emerged. In this context, the parties may be separated by thousands of miles, making ADR inadequate. (Wang, 2009). So, the ODR methods were elaborated, gained momentum, and became the mainstream choice for specific types of conflict. (Koulu, 2016). ODR, for example: (i) saves time and money, as it prevents in-person meetings; (ii) benefits neutrality, as the disputants can choose a neutral third party all over the world; and (iii) strengthens security, as service providers and technology play a pivotal role for settlement. (Latifah, Bajrektarevic, & Imanullah, 2019; Lodder, 2006; Ojiako, Chipulu, Marshall, & Williams, 2017; Wang, 2009).

Japan has already prepared itself for the Fourth Industrial Revolution, but the ODR mechanisms in the country seem to be poorly developed due to low public investments and cultural/political issues. (Habuka & Rule, 2017; Kim, 2018; Yun, Sze, Li, & Nagarajan, 2012). Cultural obstacles to ODR are clearly found in Brazil, as its people prefer judicial decisions to ADR solving their problems. (Fernandes, Rule, Ono, & Cardoso, 2018). This article aims to: (i) briefly present the ODR development since the 1990s, with its main advantages and

challenges; and (ii) analyze ODR in Brazil and Japan, comparing cases, potential, and scenarios. We present an overview, the ODR adoption in the countries, and final remarks.

2. About ODR

Until 1991, the internet was restricted to military, governmental, and academic sectors, with relatively few users. (Wang, 2009). Katsh and Wing (2006) state that two major moves in the early 1990s changed this scenario: (i) universities' networks became accessible to students; and (ii) the National Science Foundation (NSF) of the USA waived restrictions on the internet commercial use. With a larger and more global user base, online interactions – and, consequently, conflicts – have turned out to be increasingly significant in day-by-day life. Mania (2015) mentions four fast-paced periods for ODR: (i) from 1990 to 1996, when electronic solutions to larger publics were first tested; (ii) from 1997 to 1998, when commercial websites flourished; (iii) from 1999 to 2000, when IT services became very much demanded, and many companies joined online businesses – like the ODR ones –; and (iv) from 2001 onwards, when ODR is institutionally adopted, that is, used in public agencies, local authorities, etc.

Many ODR websites created in the late 1990s were replaced by new competitive platforms. A current market leader is Modria, which was established in 2011 and offers a vast range of intuitive tools. It partners with other platforms – such as eBay – and, since mid-2014, has been cooperating with the American Arbitration Association (AAA) to assist more than 100,000 "New York No-Fault Insurance" cases per year. (Mania, 2015). ODR has been taken as a relevant means for solving increasing numbers of conflicts and – more broadly – for development/progress in emerging economies. (Katsch & Wing, 2006; Schmitz, 2018).

E-negotiation	**Automated negotiation:** The parties successively submit to a computer their proposals. The computer then compares offers/demands, suggesting settlements using arithmetic means.
	Assisted negotiation: The parties remotely communicate with one another, using e.g. email and video conference.
E-mediation	It is the online version of traditional mediation, with a third neutral person who has no decision power and encourages the parties to reach an agreement; everybody communicates remotely.
E-arbitration	The online version of arbitration, i.e. a third person chosen by the parties renders a decision after analyzing arguments/evidence, all via the internet.

Table 1. Usually-employed ODR formats. (Wang, 2009, p. 40).

ODR allows different levels of human intervention to ensure communication between the disputants and the best possible outcome. For example, some ODR platforms rely on algorithms, and other ones reserve the rationale towards the outcome to a person – the latter are more expensive than the former, but preferable when the disputants are not familiar with technology. (Ojiako, Chipulu, Mashall, & Williams, 2017). Information and Communications Technology (ICT) may also be applied in ODR to record arguments, to appoint the neutral third party, to prepare/verify evidence, to help in hearings, debates, and decisions. (Cortés, 2011). It is also relevant to notice if communication is synchronous/real-time – Messenger, Skype, etc. – or asynchronous – e.g. emails. (Mania, 2015). Explaining these elements better:

ODR METHOD	Negotiation	Mediation	Arbitration	Med-Arb	Cyber-Court
PROCEDURE	Settlement	Settlement	Adjudication	Settlement/ adjudication	Adjudication
TECHNOLOGY	Email, software, bulletin, board, chat room	Email, list service, bulletin, boards, chat room	Email, video conference, streaming	Email, list service, bulletin, board, chat room, video conference, streaming	Med-Arb means
THIRD PARTY/ NEUTRAL	No role	Mediator	Arbitrator	Mediator/arbitrator	Judge/jury
PARTICIPATION	Voluntary	Voluntary/by agreement	Voluntary/by agreement	Voluntary/by agreement	By agreement only
WITNESS/ EVIDENCE	Seldom used	Seldom used	Allowed, but may be limited	Allowed, but may be limited	Often used
PRIVACY	Confidential	Confidential, unless the parties agree otherwise	Confidential, unless the parties agree otherwise	Confidential, unless the parties agree otherwise	Public
OUTCOME	Non-binding, unless the parties settle	Non-binding, unless the parties settle	The parties define if it is binding	The parties define if it is binding	Often binding
ENFORCEMENT	By contract	By contract	May happen in Courts	By contract/may happen in Courts	In Courts

Table 2. Comparing ODR methods. (Wang, 2009, pp. 46-47).

ODR is more convenient than litigation and ADR because it: (i) is comparatively cheaper and faster, as the disputants avoid travel and formalities; (ii) disregards geography, jurisdictions, or time zones, which fits the interests of global markets; (iii) improves certain ADR virtues, such as the engagement of the disputants throughout the processes; and (iv) may positively influence the Judiciary with its ICT. (Fernandes, Rule, Ono, & Cardoso, 2018; Lima & Feitosa, 2016; Ojiako, Chipulu, Marshall, & Williams, 2017; Schmitz, 2018). Although these advantages may offset other considerations, ODR lacks: (i) full trust and security, including standards on authenticity, privacy, and confidentiality; (ii) regulation and, thus, means of enforcement; (iii) in-person experience, which is sometimes essential to human cooperation; (iv) appeal in some generations and cultures; and (v) satisfactory implementation. (Aresty, 2006; Lima & Feitosa, 2016; Mania, 2015; Ojiako, Chipulu, Marshall, & Williams, 2017). ODR, growing outside the ADR framework, employs its own modern language but still needs official international acknowledgments. (Latifah, Bajrektarevic, & Imanullah, 2019).

2.1. In Brazil

The Latin-American legal tradition relies on the State for law enforcement and conflict resolution, but this tradition has not prevented the ADR/ODR mechanisms from flourishing in the region. (Amorim, 2017). Albornoz and Martín (2012) show that ODR has already proven its flexibility/efficiency/affordability compared to these countries' Judiciaries. Moreover, these economies have boosted online, mainly in their e-commerce sectors. To keep expanding its ODR, Latin America has to address the abovementioned lack of trust – regarding the face-to-face culture of dispute settling –, the reduced ICT employed – if compared with the means available in developed countries –, and the regulatory barriers.

Brazil, in line with Latin America, relucted to ADR but has been lately promoting it, with changes on how Brazilian legal practitioners see it. (Amorim, 2017). Some milestones of this shift are: (i) Resolution No. 125/2010 of the National Council of Justice (CNJ), which establishes a national policy for the Judiciary toward the "adequate

management of interest conflicts"; (ii) the Code of Civil Procedure (CPC) – Law No. 13,105/2015 –, promoting ADR methods and conflict settlement; and (iii) the Mediation Act – Law No. 13,140/2015 –, which sets guidelines for these methods. (Brazil, 2015a; 2015b; Conselho Nacional de Justiça - Brazil, 2010). These norms form a Brazilian ADR microsystem and enable its related ODR, as we see in the 2016 modification of the CNJ Resolution, in art. 334, § 7, of the CPC, and in art. 46 of the Mediation Act. It means leaving behind an analog/offline model to embrace a digital one. (Rosa & Spaler, 2018). Lima and Feitosa (2016) support that the lack of specific ODR regulations makes room for positive experimentation but also for insecurity, mainly in the public sector. This insecurity may fade away while ODR is promoted by Governments and perceived as a technological means among many others to connect people.

The development of Brazilian ODR platforms started in the 2000s and stimulated the country's legal market. The Brazilian Association of Lawtechs and Legaltechs (AB2L) was launched in 2017 and assembles 17 startups, namely: (i) Sem Processo; (ii) Concilie Online; (iii) Juspro; (iv) Leegol; (v) Find Resolution; (vi) Justto; (vii) Mediação Online (MOL); (viii) Métodos Integrativos de Soluções de Conflitos (MISC); (ix) Resolva Já; (x) Juster; (xi) Melhor Acordo; (xii) Acordo Fechado; (xiii) AcordoNet; (xiv) Mediartech; (xv) D'Acordo; (xvi) Itkos Mediação Inteligente; and (xvii) Quero Reclamar. They focus primarily on disputes involving consumption, in a context of high online shopping/transaction growth and, thus, of new "e-negotiations." (Fernandes, Rule, Ono, & Cardoso, 2018; Rosa & Spaler, 2018). "Consumidor.gov.br" was launched by the Brazilian Government in 2014 to meet consumers' demands; companies may join it and sign commitment terms to provide solutions within ten days. This platform has already assisted a reasonable number of disputes and displays its statistics about how satisfied the consumers are, how long companies take to reply to them, etc. By August 10th, 2019, there were 1,476,141 users, 546 companies, and 2,034,070 disputes solved on the platform. (Amorim, 2017; Ministério da Justiça - Brazil, n.d.).

The prevailing "litigation culture" in Brazil is a major obstacle to the expansion of both ADR and ODR. Watanabe (2005) explains that this culture is reinforced by Law professors and practitioners, who understand consensual methods as "less noble" and end up overloading

the Brazilian Courts. Fernandes, Rule, Ono, and Cardoso (2018) list other possible barriers: (i) insufficient training for professional e-mediators; (ii) scarce means to enforce settlements; (iii) high implementation costs of machine learning processes; (iv) few professionals to develop customized ODR platforms; and (v) inadequate hardware infrastructure. There is a slow change toward a "settlement culture" though, as Brazil: (i) has a continental territory, which makes in-person meetings often difficult; (ii) counts on a large legal market, with different viewpoints, interests, and demands; and (iii) has institutions – like the Judiciary itself – encouraging out-of-court methods. In the short/medium term, ODR in Brazil may reduce litigation volume/costs and provide fast/fair solutions.

2.2. In Japan

Contrasting with Brazil, Japan is a case of low litigation rates. (Cole, 2007; Feldman, 2009; Nottage & Weeramantry, 2012; Ramseyer & Nakazato, 1989). It is also one of the world's e-commerce and ICT leaders. (Wang, 2009; Yun, Sze, Li, & Nagarajan, 2012). Robust ODR practices, however, are not found in Japan: many of them are still experimental and considered by most users/providers consultation tools, not dispute resolution mechanisms. The country first discussed them in the early 2000s, testing two initiatives. The Electronic Commerce Promotion Council of Japan (ECOM) was launched in 2003 to offer advice, negotiation, and mediation for consumers. It was positively evaluated by nearly 80% of the consumers, but the respondents had not necessarily experienced its ODR. This initiative was deemed too expensive – because at least three expert mediators assisted each dispute – and discontinued in 2006; but its know-how helped e-commerce in the country. The second one was led in 2003 by a non-profit organization called Shirogane-Cyberpol, which has received demands for two months and offered negotiations with volunteer lawyers – six out of 36 cases were solved. Yahoo! Auctions – the largest platform of this type in Japan – took part in it, and the final report stated that the main ODR challenges are automation, cost, data security, and financing. (Habuka & Rule, 2017; Yun, Sze, Li, & Nagarajan, 2012).

Even though ODR is less expensive than face-to-face ADR, paying groups of consultants, mediators, advisors who actually intervene in the cases is still costly. In both initiatives, less than 20% of the sellers attended the sessions, considering their reduced means of enforcement. All in all, the initiatives performed poorly. In 2005, Japan was considered out of ODR further developments, which are not a priority for the country. (Habuka & Rule, 2017). However, Yun, Sze, Li, and Nagarajan (2012) present a successful Japanese initiative: EC Network, one of the most popular platforms for e-commerce disputes, managed to solve some cases via email.

The Japanese Ministries of Justice, of Public Management, Home Affairs, Post, and Telecommunications, and of Economy, Trade, and Industry try to foster ODR. (Habuka & Rule, 2017). In 2011, the country created the International Consumers Advisory Network (ICA-Net), offering cross-border ODR in Eastern and Southern Asia through secure chat rooms. (Schmitz, 2018). In 2015, the Japan Consumer Network (JACONET) asked the Government to implement an ODR working group, and the Government has recently announced that some civil disputes – like divorces and traffic accidents – may use ODR methods and their Artificial Intelligence (AI). The country is a potential ODR enhancer – which means possible innovations from market infrastructure to access to justice –, but wide discussions with the proper stakeholders are to be carried out. They should deal with their "social harmony-oriented culture" – perhaps occasionally imposed to prevent legitimate litigation – and with unsatisfactory/unfair settlements – almost 50% in Japanese e-commerce. (Habuka & Rule, 2017; Haley & Takenaka, 2014; Nikkei, 2019).

3. Conclusion

Cross-border transactions and e-commerce made room for ODR methods, which became a mainstream solution for specific types of conflicts – especially the internet-based ones. People in Brazil tend to judicialize their disputes and, in general, do not count on adequate structures to benefit from ADR/ODR, but norms from the 2010s and a diverse legal market have been changing this scenario – even in governmental services. Japan, in turn, is an ICT world leader and –

despite its culture – has recently engaged in cross-border ODR, which may positively impact its innovation. Therefore, ODR in both countries is yet to be fully implemented, faces similar challenges – cost, enforcement, etc. –, and has great potential.

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Data protection: 10 comparisons between Brazil and Japan

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Abstract: In May 2018, the General Data Protection Regulation (GDPR) entered into force in the European Union (EU). The motivations behind it are unclear: it may give EU citizens greater protection but may help cross-border transfers of their personal data. Norms on this matter have been enacted/amended around the world. Brazil sanctioned its General Data Protection Act/Law (LGPD) in August 2018, while Japan had already revised its Act on the Protection of Personal Information (APPI) – more specifically in 2015, introducing concepts like "sensitive personal information." The EU-Japan Economic Partnership Agreement (EPA) was negotiated and, in January 2019, the European Commission decided that the APPI was equivalent to the GDPR. It inspired both the Brazilian LGPD and the Japanese APPI, but they remain markedly different – e.g. personal data, data processor, data processing, and shared use of data. This article compares 10 fundamental aspects of these two regulations and may help practitioners, researchers, and companies to better navigate this recent legal field.

Keywords: Brazil; Comparative Law; data privacy; data protection; Japan.

1. Introduction

Many countries have been developing data protection/privacy norms. Brazil joined this international list in August 2018, when its General Data Protection Act/Law (LGPD) was sanctioned, seeking to follow the allegedly cutting-edge General Data Protection Regulation (GDPR) of the European Union (EU). The Brazilian LGPD enters into

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force in August 2020, but the Japanese Act on the Protection of Personal Information (APPI) was enacted in 2003 and extensively reformed in 2015 – thus predating the European GDPR. The commonalities between the APPI and the GDPR helped Japan and the EU to mutually acknowledge their adequate protections on the theme in early 2019. This article explores some normative background and makes 10 comparisons – about core concepts, proceedings, and sanctions – between the Brazilian LGPD and the Japanese APPI, pointing out some of their interfaces with the European GDPR.

2. Some background

The Japanese APPI (個人情報の保護に関する法律) is a milestone in Asian data protection, with its origins in the innovative 1980 Organization for Economic Cooperation and Development (OECD) *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. These Guidelines addressed automated means for information processing, individual freedoms, international data flows, and socioeconomic impacts. (Organization for Economic Cooperation and Development, 2011, pp. 11-14). Japan published in 1988 the Act on the Protection of Personal Information Electronically Processed and Held by Administrative Organs (行政機関の保有する電子計算機処理に係る個人情報の保護に関する法律), which did not apply to private companies but pushed for national regulations. They became a priority after information from more than 200,000 people in the City of Uji, Kyoto Prefecture, was leaked in 1999, exposing names, addresses, dates of birth, etc. The concerns grew in 2002, when Juki Net, or Basic Resident Registry Network (住民基本台帳ネットワーク), was adopted. (Personal Information Protection Commission - Japan, 2018).

The APPI was promulgated in May 2003 and come into force in April 2005, amid this turbulence. Companies had to implement data privacy measures, such as the ones on disclosure, deletion, and termination of use. However, the normative development in the EU made the APPI to be seen as outdated/inadequate. A deep APPI revision ended up occurring in 2015 – i.e. before the European GDPR was adopted, in April 2016 – and coming into force in May 2017, inspired

by some GDPR debates. New concepts – like "sensitive personal information" and "anonymization" – and an independent national authority integrated into the Japanese system. (Gerencser, 2018).

This APPI reform helped Japan and the EU to mutually acknowledge their regulations in January 2019, which gave room for personal data transferring between Japan and the European Economic Area (EEA) – the EU Member States plus Norway, Liechtenstein, and Iceland. Nevertheless, Japan was required to add safeguards to meet equivalent European standards, and its normative adequacy is to be periodically evaluated. Japan has been the first country to receive this EU acknowledgment since the GDPR became applicable. A similar move – involving trade issues – may occur between Brazil and Japan, perhaps driven by the 2019 Trade Agreement between the EU and the Southern Common Market (MERCOSUR) – where Brazil plays a major economic role. (European Commission, 2019a; 2019b, p. 2).

3. Comparing the APPI and the LGPD

3.1. Concept

While the Japanese APPI refers in its name to "personal information" (個人情報), the Brazilian LGPD – in tune with the European GDPR – uses the term "personal data." Art. 2, (1), of the APPI defines personal information as the one of a living individual which: (i) contains/collates a name, a date of birth, or other descriptions that identifies him/her; or (ii) has a digital code identifying him/her. Regarding "personal data" (個人データ), art. 2, (6), of the APPI treats it as any personal information that is entered in and constitutes a "database"[2]. The APPI mentions a specific type of personal data too: the "retained personal data" (保有個人データ). In art. 2, (7), it is the one possessed by a "personal information handling business operator" (個

[2] Complementing it: "Art. 2. [...] (4) A 'personal information database etc.' in this Act means those set forth in the following which are a collective body of information comprising personal information (excluding those prescribed by cabinet order as having little possibility of harming an individual's rights and interests considering their utilization method)." (Japan, 2003a).

人情報取扱事業者) – comparable to the GDPR "data controller" –, not deleted within six months, and that can be, for instance, disclosed, corrected, added, and deleted by this operator. (Brazil, 2018; Japan, 2003a).

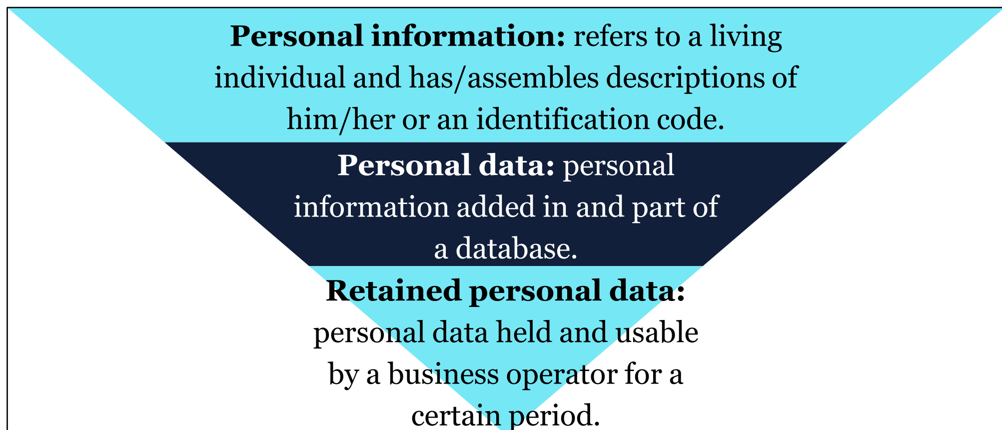

Figure 1. Sorts of personal information in the APPI. (Japan, 2003a).

More succinctly, the Brazilian LGPD defines personal data in its art. 5, I, simply as "information related to an identified or identifiable natural person." There is no further explanation on how a person is here portraited, and the National Data Protection Authority (ANPD) has not faced a robust set of cases yet. The Brazilian, European, and Japanese regulations share similar terms, but we may see a practical divergence in the "readily collated" of the Japanese APPI. The Personal Information Protection Commission (PPC) (個人情報保護委員会) understands that some data considered personal under the European GDPR[3] – and probably under the Brazilian LGPD, such as location,

[3] See, for example, these European norms: "Art. 4. Definitions. For the purposes of this Regulation: (1) 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person; [...]." (European Union, 2016b). "Whereas: [...] (21) The principles of data protection should apply to any information concerning an identified or identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the

cookies, IP address, and credit card number – is not personal in Japan. It means that the APPI could not be applied in these cases. (Brazil, 2018; Makino General Law Office & GK Legal Edge, 2019, pp. 100-101; Personal Information Protection Commission - Japan, 2018, p. 2).

3.2. Access

Art. 6, IV, of the Brazilian LGPD establishes "open access" as one of its core principles, and the "data subject" shall have easy and no-cost access – art. 18, § 5, and art. 19, I and II. Art. 9 guarantees the right to easy access to data processing – including its specific purpose, handler, and shared use –, while art. 18, § 4, says that the handler – if unable to take the required measures – shall point out that he/she did not process the data or factually/legally argue why he/she failed to comply with the regulation. Moreover, data shall be given via secure electronic means or in printed format, according to the request – art. 19, § 2, I and II. (Brazil, 2018).

In Japan, the right to data access is not mentioned. Art. 28 of the APPI states that a "principal" (本人, *hon'nin*) may request the disclosure (開示, *kaiji*) of retained personal data from a personal information handling business operator. The business operator may promptly disclose it or refuse to do so; refusing is allowed if the disclosure harms his/her activities, violates other norms, and threatens physical integrity, life, property, etc. Art. 34, (1), says that the principal may sue the business operator if there is no reply – even to deny – within two weeks. The APPI lacks norms on giving data copies to the principal and on no-cost disclosure, as we see in art. 33, (1). Note that the right does not refer to all personal information, but only to the retained personal data, that is, the business operator is not obliged to disclose the data if

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natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is no longer identifiable." (European Union, 2016a).

it is deleted within six months. So, this right is quite restricted in Japan. The APPI stipulated a one-year period for data to be considered retained personal information, but it was reduced to six months by art. 5 of the Cabinet Order to Enforce the Act on the Protection of Personal Information（個人情報の保護に関する法律施行令）.（Japan，2003a; 2003b). Because of EU requirements, the Japanese PPC announced supplementary rules in September 2018, making inapplicable to EU data the provision that personal data deleted within six months shall not be disclosed. (Personal Information Protection Commission - Japan, 2018).

3.3. Consent

The Brazilian LGPD defines consent as the "free, informed and unambiguous statement" via which a data subject agrees with processing his/her personal data for particular purposes – art. 5, XII. Consent is essential – art. 7, I –, must not be generic – art. 8, § 4 –, and may be revoked anytime – art. 8, § 5. Sensitive personal data follows these norms, including when children and adolescents are involved – art. 11, I, and art. 14, § 1. Another specific consent is required when a data controller who has already obtained consent from a data subject shares personal data with other controllers – art. 7, § 5; if data transferring is international, it must be also informed – art. 33, VIII. Art. 8 establishes that consent must be written or in other useful means to prove it; in contracts, nonetheless, the relevant clauses have to be highlighted. The burden of proof that the consent was given accordingly is on the data controller, and the data subject has the right to revoke his/her consent – art. 8, § 5 and § 6, art. 9, § 2, and art. 18, IX. Art. 7 makes consent inessential when data processing is based on: (i) regulatory/legal obligations; (ii) implementation of public policies; (iii) research purposes; (iv) execution of contracts; (v) regular exercise of rights in judicial/administrative/arbitral proceedings; (vi) protection of life or physical integrity; (vii) provision of health services; (viii) credit protection; (ix) legitimate interest of the controller – limited by fundamental rights and freedoms of the data subject –; and (x) data made public by the data subject. (Brazil, 2018).

The Japanese APPI is less strict: it states as a general norm that a business operator shall not acquire "personal information requiring special care" (要配慮個人情報), i.e. storing sensitive personal data without first obtaining the principal's consent – art. 17, (2). The Japanese APPI is similar to the Brazilian LGPD when mentioning the prior consent to transfer data to third parties, foreign or not – art. 23, (1), and art. 24. There is no general provision in the Japanese APPI on if consent is needed for processing personal information. Nonetheless, the principal must be informed about the specific intention of processing – art. 15 –, must give his/her consent if new intentions emerge – art. 16, (1) –, and is protected against business operators who obtain it by deceit/improper means – art. 17, (1). Implicit consent may be admitted in some cases. Arts. 16 and 17 waive consent when it is hard/inconvenient to obtain in cases of: (i) laws and regulations; (ii) human life, body, or fortune at stake; (iii) public hygiene or children; (iv) government cooperation; (v) special care-required personal information open to the public by a principal; and (vi) Cabinet Orders. (Japan, 2003a; Makino General Law Office & GK Legal Edge, 2019, pp. 105-106).

3.4. Purpose

In art. 6, I to III, of the Brazilian LGPD, we may see three core ideas: (i) "objective," that is, "carrying out the processing for legitimate, specific, explicit, and informed purposes to the data subject"; (ii) "adequacy," defined as the "compatibility of the processing with the objectives informed to the data subject"; and (iii) "necessity," i.e. "limitation of processing to the minimum necessary to achieve its objectives." In line with it, art. 15, (1) and (2), of the Japanese APPI stipulates that business operators must clearly express their purposes to the principal and may change them only if the original scope is preserved. If acquiring personal information, the business operator must immediately inform the principal about the processing purposes – art. 18, (1). (Brazil, 2018; Japan, 2003a).

3.5. Application

The Brazilian LGPD – like the European GDPR – treats "acquisition" equally to "processing," but the Japanese APPI focuses on "obtaining" (取得, *shutoku*), not on processing data. Art. 75 of the APPI says that some of the provisions are applied even if a business operator abroad acquires personal information from a person in Japan to provide him/her with goods/services. (Brazil, 2018; Japan, 2003a).

3.6. Sharing

One of the main differences between the two Acts is on sharing data with third parties. Under the Brazilian LGPD, sharing data with data controllers/processors is allowed, and the data subject must be informed about it and about its purpose – art. 9, V. Accordingly, a data controller must obtain specific consent from a data subject whenever communication/sharing with other data controllers is needed, except when consent is not demanded – art. 7, § 5. The same happens in the European system: arts. 13 and 14 of the GDPR say that personal data collection – from the data subject or not – must lead to information to the data subject, as the latter must know data controllers' identities and contacts. The data processor is not a mere third party but integrates the relation that emerges when data is involved. Art. 7, III, of the Brazilian LGPD accepts the shared use of data practiced by public bodies aiming at policies, and its art. 11, II, b, permits sharing sensitive personal data with no consent when it is needed for policies. The "sensitive personal data" theme was fiercely discussed during the elaboration of the LGPD. However, a solution seems to be reached in its art. 11, § 3, which states that obtaining this sort of data for economic advantage may be regulated. In healthcare activities, it is forbidden – including for risk management of private health insurance companies –, except when services are provided to the data subject – art. 11, § 4 and § 5. (Brazil, 2018; European Union, 2016b).

The Japanese APPI acknowledges personal data sharing involving public bodies with no consent from the principal in, for example, art. 16, (3), (iv), art. 17, (2), (iv), and art. 23, (1), (iv). Nevertheless, the APPI

does not use the word "sharing"; it uses, for instance, the term "providing personal data to a third party" – art. 24. Moreover, a definition for "data processor" does not exist in the APPI, which makes it differ from the Brazilian LGPD and from the European GDPR. Art. 26, (1), (i) and (ii), of the APPI establish that, when receiving personal data from third parties, the business operator must confirm these third parties' names and addresses, as well as the data acquiring circumstances. The norms of the PPC must be observed – art. 26, (3). It may be said that the Japanese APPI does not permit data sharing even when companies of the same business group do it. But art. 23, (5), creates exceptions, as it displays that a business operator receiving personal information from another one is not a third party if: (i) such information is within its intended use's scope; (ii) the transfer is due to business succession, including mergers; and (iii) the data subject was previously notified. (Japan, 2003a; Makino & Legal Edge, 2019, p. 126).

3.7. Anonymization

Art. 5, III, of the Brazilian LGPD defines anonymized data as "related to a data subject that cannot be identified, considering the use of reasonable and available technical means at the occasion of its processing." Anonymization, in turn, is the "use of reasonable and available technical means at the moment of processing, by which data loses its possibility of direct or indirect association with an individual" – art. 5, XI. Data anonymization gives greater protection to data subjects and helps companies to reduce their liabilities: art. 12 of the LGPD says that anonymized data is not considered a personal one, unless the anonymization process is reversed. For the Japanese APPI, "anonymously processed information" (匿名加工情報) is the one "that can be produced from processing personal information so as neither to be able to identify a specific individual," "nor to be able to restore the personal information" – art. 2, (9). So, Brazil and Japan adopted definitions of "anonymized data" that seem to be alike. (Brazil, 2018; Japan, 2003a).

There are striking differences, however, in pseudonymization. The Brazilian LGPD displays this topic in art. 13, about Public Health. Pseudonymization makes data and person lose their connection to each

other, but this connection may be recovered using "additional information kept separately by the data controller in a controlled and safe environment" – art. 13, § 4. If security breaches are detected, there will be an evaluation of the technical measures chosen to make personal data unintelligible to unauthorized third parties – art. 48, § 3. The Japanese APPI, in turn, has no concept of pseudonymization, which may affect academia. Although the term "statistical information" (統計情報) is not in the APPI, it was defined by the PPC as the one aggregated/tabulated, referring to many people, and generally unable to link with a specific person – which differs from personal information. Statistical information in Brazil and Europe may be framed as pseudonymized and, therefore, may be considered personal data; it means greater protection in Brazil and Europe than in Japan. The Supplementary Rules of Japan – related to the EU Adequacy Decision – demonstrated the concerns of the country on this issue. (Brazil, 2018; European Commission, 2019a; 2019b; Japan, 2003a; Personal Information Protection Commission - Japan, 2017; 2018).

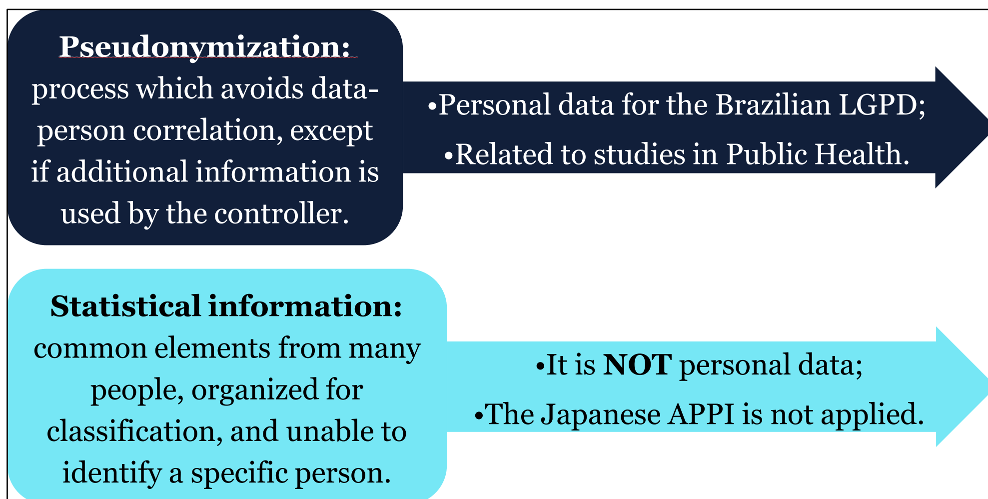

Figure 2. Pseudonymization in Brazil and statistical information in Japan. (Brazil, 2018; Japan, 2003a).

3.8. Recording

Art. 37 of the Brazilian LGPD expresses that both the data controller and the data processor shall record their personal data processing, without any detail on how it must be done. Diversely, the Japanese APPI does not oblige recordings, unless the personal information is transferred to third parties: the business operator shall then record at least the date of transfer, the third parties' identification, and other elements established by the PPC – art. 25. When the business operator receives personal information from third parties – art. 26, (1) –, he/she must comply with similar requirements – art. 26, (3). In sent and received information from third parties, such recordings must be kept for a minimum period set by the PPC. We may say that while the Brazilian LGPD is vague on this issue, the Japanese APPI emphasizes the acquiring of personal information over its processing. (Brazil, 2018; Japan, 2003a).

3.9. Leak

The Brazilian LGPD refers to data leaks as "security incidents" – arts. 46 to 49 – and oblige the processing agents to adopt technical, security, and management measures to prevent damages. Unauthorized access, as well as unlawful/accidental "destruction, loss, alteration, communication, or any form of improper or illegal processing," are addressed. If a security incident occurs, the data controller must report it to the data subjects and to the National Authority "within a reasonable deadline" – as defined by the mentioned Authority. The data controller must provide detailed information, including the mitigating actions that were/will be taken. The National Authority, in turn, may force the data controller to adopt certain measures, e.g. spreading this incident in the media – art. 48, § 2. As a novelty, art. 52, § 7, of the Brazilian LGPD – referring to Law No. 13,853/2019 – allows "direct conciliation between a data controller and a data subject." (Brazil, 2018).

Similarly, art. 20 of the Japanese APPI says that business operators must act diligently to prevent losses, leaks, and damages

regarding personal data. Further details about this norm were provided by the APPI Guidelines (個人情報の保護に関する法律についてのガイドライン): measures may fit the violation degree, the business type and size, and the nature/amount of personal data involved. The APPI Guidelines list technological and organizational suggestions to prevent data leaks, such as establishing: (i) a ready-to-respond system; (ii) security management of personnel – companies should monitor their employees within the limits of the APPI, art. 21 –; and (iii) methods by which destroyed personal information cannot be restored. However, neither the Japanese APPI nor its Guidelines set obligations or deadlines for communicating data leaks to the country's authorities. (Japan, 2003a; Personal Information Protection Commission - Japan, 2017, p. 86-98).

3.10. Sanction

Art. 42 of the Brazilian LGPD prescribes the civil liability of data controllers or of data processors who cause collective/individual damages – like moral ones – to data subjects. The Judge may reverse the burden of proof to preserve the allegations of the data subject, and data controllers directly involved in data processing are jointly liable. It resembles the Consumer Protection Code (CDC) – Law No. 8,078/1990. Arts. 52 to 54 of the Brazilian LGPD, in turn, list administrative sanctions to be applied by the National Authority, for example: (i) warnings; (ii) fines – which may be daily – of up to 2% of legal entities' revenues or of up to BRL 50 million – around USD 12.23 million in October 2019 –; (iii) publicly disclosing the violation; (iv) suspending/erasing the violated personal data; and (v) partial or total prohibition of data processing-related activities. Besides them, art. 52, § 2, of the LGPD makes criminal liability possible, based on the aforesaid CDC and on other norms. (Brazil, 2018).

In Japan, the sanctions seem to be milder than those in Brazil. Art. 40, (1), of the Japanese APPI authorizes the Personal Information Protection Commission, for example, to require documents about data processing activities and to inspect where they take place. Art. 85 says that if the investigated business operator fails to present said documents, lies, or obstructs inspections, he/she may pay a fine of up

to JPY 300,000 – around USD 2,800 in October 2019. While the Japanese APPI displays many rights for data subjects – arts. 28, 29, 30, 34, etc. – and some procedures for data processing – arts. 17, 20, 38, etc. –, it does not establish specific punishments for non-compliance. Three steps are observed when sanctioning: (i) the Commission notices a violation and indicates corrections/suspensions to the business operator – art. 42, (1) –; (ii) if the business operator does not observe the indications, the Commission may order him/her to adopt them – art. 42 (2) –; and (iii) if the business operator keeps non-compliant, he/she may be criminally sued for "violating administrative orders" (行政命令違反行為) and undergo imprisonment with labor for six months or pay a fine of JPY 300,000 – art. 84. (Japan, 2003a).

4. Conclusion

The Japanese APPI, lacking the concepts of data processor and of information to the data subject about sharing when data is acquired, allows data sharing only when the principal gives specific consent; the emphasis is on the legality of data acquisition, not on the legality of data processing. The Brazilian LGPD, having the concept of pseudonymization, does not consider anonymized some data that the Japanese APPI does. In Japan, the administrative sanctions are relatively light, which implies that remedying violations may lead to individual civil lawsuits against business operators. The Brazilian LGPD offers greater administrative protection to data subjects and imposes more obligations to data controllers and to data operators, but its effects on the country's legal system depend on the Brazilian Authority – i.e. the ANPD –, the Judiciary, etc. Nonetheless, the Japanese APPI may be amended to incorporate stricter rules on data leaks and the "right to be forgotten" – which is not regulated in the country. (Brazil, 2018; Japan, 2003a).

The Brazilian LGPD and the Japanese APPI – and even the European GDPR – are *prima facie* very similar. As the ANPD started its activities, the idea that the European norms would complement the Brazilian ones, whenever they were vague or silent, was proved wrong. We may see that these Laws are very different in definitions, procedures, and sanctions, a fact that should call the attention of

practitioners, researchers, and companies working in these world regions.

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Gig economy and Labor Courts: Notes about recent Brazilian experiences[1]

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Abstract: In 2016, Uber was elected the most valued private startup in the world, but had paid out almost USD 162 million to settle pending lawsuits since its foundation, in 2009. The most populous city in South America and Brazil, Sao Paulo, is where Uber has the highest number of users, with 150 thousand drivers working daily. Recently, the 15th Panel of the Regional Labor Court of the 2nd Region (TRT 2) – with its main office in Sao Paulo – has recognized the employment relationship between Uber and a driver, stating that the driver does not have "true autonomy" and must respect the Uber's code of conduct. However, the 8th Panel of the TRT 2 – the first addressing the theme – denied the employment relationship in a similar case. So, this Court – and many others throughout Brazil – still debates classification litigation regarding the company, as the country has no specific law on platform-based work. How does Uber direct its drivers' activities? Is employment the only way to socially protect workers in these asymmetrical relationships? This article aims to analyze mainly the employment

1 We thank Homero Batista, University of Sao Paulo School of Law (FD-USP) Professor, for his suggestions. Some of the questions presented here were debated in two papers: (i) *Regulating work in platform services: Legal protection and classification litigation considering recent decisions from Brazilian Labor Courts*, presented in the Law and Society Association (LSA) Annual Meeting 2019, which took place in Washington D.C., USA, from May 30th to June 2nd; and (ii) *Outlines on labor regulation in the field of the platform services: Some notes considering the classification litigation in Brazilian Labor Courts*, presented in the Labour Law Research Network (LLRN) Conference 2019, in Valparaiso, Chile, between June 23rd and June 25th.

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classification litigation in Brazil involving the gig economy, drafting possible regulatory strategies for workers' protection.

Keywords: classification litigation; Court; on-demand service; platform worker; regulatory strategy.

1. Introduction

In April 2016, Uber was elected the most valuable private startup in the world: USD 62.5 billion. But, with its two million drivers, Uber has paid huge sums in legal settlements around the world since its foundation, in 2009. Disrupting the traditional taxi businesses – and confronting politics to do so – led Uber, from 2009 to 2016, to pay out at least USD 62 million, to face more than 170 lawsuits in the USA alone, and to deal with pending cases totaling approximately USD 161.913 million. (Butler, 2018; Levin, 2016). The startup arrived in Brazil in 2014 and, three years later, set its footprint across the country, with 500 thousand drivers and more than 20 million customers. And Sao Paulo, the most populous South-American city, the 10th Gross Domestic Product (GDP) in the world, and the fourth global city on foreign investments, stood out: in April 2018, it was deemed – among cities of 65 countries – the most relevant market for Uber. Sao Paulo had 150 thousand drivers working daily and was mentioned by 52% of the city's wealthiest people as the best transportation app due to its comfort, practicality, prices, and reliability. (Lewer, 2018; Moraes, 2012).

Classification litigation is frequent and causes disagreements in the Brazilian Courts. One out of five legal cases involving Uber in the State Court of Sao Paulo (TJ-SP) demands compensation/indemnity for moral damages. In this Court, there are 622 cases, ranging from BRL 21 – USD 5.30 – to BRL 19 million – USD 4.8 million – and totalizing more than BRL 80 million – approximately USD 20.2 million. In the second-most costly lawsuit – BRL 7.5 million, or USD 1.9 million –, Uber argues that the City of Sao Paulo disrespected the principle of free competition when it created a pricing table for ride-hailing. The Judge considered Uber's services as private, not public, and ruled that the table violates the economic order. In the State of Sao Paulo too, there are 178 claims on the subject in the Regional Labor Courts (TRT) of the 15th Region

and of the 2nd Region – the latter had 174 new lawsuits from January 2018 to February 2019. The TRT 2 denied an employment relation in January 2018, as Uber was deemed a mere platform to connect drivers and passengers. However, in August 2018, a decision was rendered in TRT 2 to recognize another employment relationship, considering that a driver had no "true autonomy" and needed to comply with Uber's rules. (Valente, 2019).

Uber is worth our attention because it: (i) is frequently in the spotlight, challenging transportation agencies and taxi drivers; (ii) achieved tremendous success shortly after arriving in many countries; (iii) is highly demanded by its drivers in classification litigation cases, which means robust material for legal analysis; and (iv) symbolizes recent groundbreaking phenomena – e.g. "uberization," "Uber economy." (Freitas Júnior, Slosbergas, & Silva, 2018, p. 139). However, we should not disregard the big picture: Uber takes part in broader transformations, about the gig economy, regulatory strategies, app-based jobs, etc. In this article, we approach: (i) some core gig economy's and Uber's characteristics; (ii) their relations with Labor Law and precarious work; and (iii) regulatory efforts in some countries, focusing on the Brazilian classification litigation experience.

2. Gig economy and Uber

De Groot (2018) explains that "gig," when related to work, indicates the one performed in a certain period, for certain objectives. A musician who plays in a concert for his/her audience is an example. Problems emerge, however, when whole economic sectors suddenly become "gig": a plethora of workers are deprived of employment contracts and paid as self-employed/independent contractors, according to the specific activities they deliver. The gig economy may also be referred to as sharing/collaborative/platform economy; this third name is useful for us, as it highlights apps and their electronic/algorithmic management. Grouping these platforms:

Type 1	Passenger transportation: e.g. Uber, Lyft.
Type 2	Delivery of goods: e.g. Deliveroo, Foodora.
Type 3	"Traditional" gigs: e.g. TaskRabbit, Helpling – gardening, cleaning –, Fiverr, Upwork – marketing, advertising, translation, auctions.
Type 4	Microtasks offered online: e.g. Amazon Mechanical Turk.

Table 1. Classifying platforms. (Don't Gig Up! Project, 2019, pp. 4-5).

Some platforms do not intermediate labor activities – like Airbnb, a marketplace for businesses –, and not every casual/freelance activity is intermediated by platforms – for instance, translation. Nonetheless, technology has been fostering some activities as essentially platform-based: some policies address whole professional sectors as they were created by the digital economy. Types 1 and 2 of the table above seem to receive the greatest attention from research, debates, and initiatives, while Types 3 and 4 are sometimes ignored, perhaps because their workers are less mobilized/noticed. (Don't Gig Up! Project, 2019, pp. 4-5, 77). We may estimate the volume of money involved in the gig economy noticing Uber, the most emblematic Type 1 company. In October 2018, Uber Technologies Inc. reached an Initial Public Offering (IPO) of around USD 120 billion on Wall Street, which was nearly double its valuation in a fundraising round two months before the IPO. Even more surprising: this amount exceeds the ones of Ford Motor Co., General Motors Co., and Fiat Chrysler Automobiles N.V. combined. (Hoffman, Bensinger, & Farrell, 2018).

Few days after Uber's IPO, however, the six-year-old Chinese startup ByteDance – of Douyin/TikTok, the social media sensation, and of TouTiao, a news aggregator – became the most valuable in the world. ByteDance is a giant in China, intends to face its Western rivals using huge investments, and may negotiate with Facebook Inc. and Tencent Holdings Ltd. (Bloomberg News, 2018). In 2019, Uber suffered another setback: it went public at USD 45 a share – dropping after this to USD 41 – and had a USD 69 billion market capitalization, i.e. the debut with the most significant losses in the USA since 1975. One of the factors was the high competition of ride-hailing services in Latin America, which counts on generous resources from SoftBank and Didi Chuxing to, for example, 99 Tecnologia Ltda. in Brazil. (Isaac, De la Merced, & Sorkin,

2019). This gig economy dynamism inspired even a new terminology: “unicorn” companies/startups are the ones worth over USD 1 billion; in January 2019, there were 341 unicorns around the world. Variants like “decacorns” – over USD 10 billion – and “hectocorns” – over USD 100 billion – exist too, and the cumulative valuation of these 341 unicorns is approximately USD 1.149 trillion. (CB Insights, 2019). We highlight Uber in the table below:

NO.	COMPANY	VALUATION (BILLION)	DATE JOINED	COUNTRY	INDUSTRY	SELECT INVESTORS
1	TouTiao (ByteDance)	USD 75	Apr. 2017	China	Digital media/ AI	Sequoia Capital China, SIG Asia Investments, Sina Weibo, SoftBank Group
2	**Uber**	**USD 72**	**Aug. 2013**	**United States**	**On-demand**	**Lowercase Capital, Benchmark Capital, Google Ventures**
3	Didi Chuxing	USD 56	Dec. 2014	China	On-demand	Matrix Partners, Tiger Global Management, SoftBank Corp.
4	WeWork	USD 47	Feb. 2014	United States	Facilities	T. Rowe Price, Benchmark Capital, SoftBank Group
5	JUUL Labs	USD 38	Dec. 2017	United States	Consumer electronics	Tiger Global Management
6	Airbnb	USD 29.3	Jul. 2011	United States	E-commerce/ marketplace	General Catalyst Partners, Andreessen Horowitz, ENIAC Ventures
7	Stripe	USD 22.5	Jan. 2014	United States	Fintech	Khosla Ventures, Lowercase Capital, CapitalG
8	SpaceX	USD 18.5	Dec. 2012	United States	Other transportation	Founders Fund, Draper Fisher Jurvetson, Rothenberg Ventures
9	Epic Games	USD 15	Oct. 2018	United States	Gaming	Tencent Holdings, KKR, Smash Ventures
10	GrabTaxi	USD 14	Dec. 2014	Singapore	On-demand	GGV Capital, Vertex Venture Holdings, SoftBank Group

Table 2. Top 10 unicorns. (CB Insights, 2019).

Owning a car may become useless, while market leaders Uber and Lyft may unjustifiably establish ride-hailing prices. It may harm competitiveness, but authorities seem to avoid antitrust investigations

and lawsuits about the gig economy; they prefer highlighting its innovations. (Paul & Tankus, 2019, p. 6). Labor Law perhaps faces something similar.

3. Gig economy and Labor Law

Not only issues about wages, overtime, Social Security, vacations, etc. deserve attention in the gig economy, but also how workers organize in this context – e.g. trade unions, freedom of association, collective bargaining, and strikes. Precarious platform work should be addressed in its different aspects, averting sorrows about Labor Law's "golden eras" and anachronic solutions; by the way, legal norms can no longer keep pace with technological changes. Platform-based jobs may be precarious due to: (i) a "(purported) lack of clarity" on the legal status of their workers; (ii) wages far below minimum levels; and (iii) rating mechanisms, which always measure their workers' performances. Approaching "fundamental collective rights," platform workers may face more challenges because they: (i) tend to be more skeptical – and even hostile – about organizing, trying sometimes alternative ways of representation; (ii) do not have defined workplaces, but move all over cities/regions; and (iii) have specific needs, according to the platform we consider. (Prassl, 2018).

Nonetheless, there are efforts to make collective bargaining more flexible, to contact gig workers in person and online, to cover atypical and self-employed workers in general, and to provide them with legal advice. Movements outside the trade union framework have been flourishing too, mainly in food-delivery businesses. Regarding rating systems and payment calculations, companies should negotiate reasonable standards with their workers, taking into account that people may fail to meet all corporative requirements. Workers should have the right to express their point of view when customers complain about their performances, to data protection/privacy, and to be warned before they are "deactivated" – in line with traditional dismissal. Refusing calls – a right, in theory, of all gig workers – does not mean that the company will not exercise surveillance nor that the worker will not need labor protection. All in all, platform work should be more

predictable and open to dialogue. (Aloisi, 2018; Don't Gig Up! Project, 2019, p. 78; Prassl, 2018).

3.1. Some reports on precarious work

Uber's habitual strategy in major cities is: (i) gaining popularity through its low prices and high convenience; and (ii) increasing its activities as quickly as possible to become indispensable – perhaps not only for customers but also for some vulnerable workers. In London, taxi drivers – most of them white people – have to pass exams that assess memorization of streets. But Uber drivers in this city are usually migrants who rely on GPS and smartphones; it means that Uber may be a shortcut for labor integration and a source of problematic labor dynamics. (Satariano, 2018). A recent report about Uber in Washington DC, USA, found out that: (i) working conditions data is limited; (ii) its drivers do not know their exact losses/earnings – 100% of the respondents experienced some difficulty in calculating them –; (iii) 30% have safety concerns or suffered physical assaults; (iv) 33% took on debts; and (v) surprisingly, the "Uber workplace" is still attractive – 50% would recommend it to a friend, and 45% intend to keep working there for at least six more months. (Wells, Attoh, & Cullen, 2019, p. 2).

Precarious work covers not only Uber drivers, but also – quite ironically – its internal safety investigators, who were considered underpaid, overworked, "emotionally traumatized," vulnerable to mental health disorders and to suicide. The startup's Special Investigations Unit (SIU) counts on 15 leaders and 60 investigators, who attend an eight-week training involving sensibility/empathy and analyze about 1,200 cases weekly – including sexual/physical assault, verbal threats, theft, rape, and traffic accidents. These investigators are not unionized and earn approximately USD 18.50 per hour, a low amount if compared to the ones of bus/airline companies – at least USD 21.80 per hour for also non-unionized investigators. Nonetheless, Uber team members express their enthusiasm for having young colleagues and for collaborating with a "hot brand." Uber has been pushed to disclose its data on alleged sexual assaults/abuses, which may damage its reputation and lead to million-dollar losses. So, the startup tends to

highlight not only the USD 22 billion-plus venture capital it raised but also its commitment to safety. (O'Brien, Black, & Griffin, 2019).

4. Regulating gig economy

For the sake of legal certainty, countries try to regulate Uber and the gig economy as a whole. We describe below some important events – regarding different legal fields – in the USA, Europe, and Brazil to generate a tentative timeline; this is why we indicate news' exact dates.

4.1. In the USA

January 9th, 2018: Uber agreed to pay USD 3 million to settle a class action assembling 2,421 of its drivers in New York. They accused Uber of docking excessive fees from their fares, promoting unrealistic advertisements – "Drive & make $5,000 guaranteed," for instance. Uber denied the allegations but settled to avert the inconveniences and costs of litigation. The settlement's scope is curious: payment to drivers who have worked for the startup since December 29th, 2009, and who did not file arbitration proceedings against it. Uber had already agreed to pay more than USD 80 million to around 96,000 New York drivers, recognizing that it "accidentally underpaid" them for more than two years. (Stempel, 2018).

March 9th, 2018: a Federal Judge in California understood that Uber underpaid 9,602 drivers; the case involves USD 1.4 million in fares and the USD 1 per trip Safe Rides Fee, which started in April 2014 to promote, for example, safety campaigns. The startup argued that the Fee would not affect drivers' payments, which is a percentage of the fare – USD 4 per ride is the minimum fare. The Judge ruled that the terms between Uber and its drivers do not clearly indicate if the Fee applies to the minimum fare, so Uber breached the contract. (Steingart, 2018).

May 12th, 2018: some gig economy businesses accepted arbitration clauses with their workers to prevent them from litigating in "open court." Therefore, businesses can better control their problems and public opinion. Uber drivers may opt out within 30 days after the agreement is executed, but they are often unaware of it. Earlier in 2018,

the US Supreme Court ruled against classification litigation. It made 12,501 Uber drivers use their own terms of service – which sets that Uber shall pay arbitration costs – to file 12,501 arbitration demands. Uber has paid the initial filing fee in only six cases; it totals over USD 18.7 million. (Menegus, 2018).

May 29th, 2018: the California Supreme Court, on Dynamex's franchising operations, established the so-called "ABC test." It presumes that workers are employees – not independent contractors –, unless they: (i) are not supervised by the ones who hired them ("A"); (ii) perform activities that are "outside" their employers' usual businesses ("B"); and (iii) are traditionally linked with independent occupations, trades, or businesses ("C"). This case may impact gig economy as a whole. (Marks, 2018).

August 8th, 2018: the New York City Council passed Bills establishing minimum pay standards for app-based drivers and limiting them to 80 thousand vehicles. This measure may also protect the City's 14 thousand taxi drivers against further huge losses. The New York Taxi Workers Alliance played a relevant role, making app and taxi drivers unite as "for-hire transportation workers." App drivers there work one hour to receive 25-minute fares, spend USD 8.54 per hour to keep their cars functioning, and earn less than in 2014. (Smith, 2018).

November 30th, 2018: New York is Uber's largest North-American market, meaning USD 2 billion per year in revenue from fares – around USD 375 million of it are from fees and commissions. To reshape its brand in the city, Uber named 35-year-old executive Sarfraz Maredia – who was born in India, grew up in Texas, speaks Urdu and Hindi, and symbolizes the successful migrants – the General Manager for the Northeast. (Fitzsimmons, 2018).

March 12th, 2019: Uber settled with Massachusetts and California drivers who had demanded it to recognize them as employees. This coast-to-coast case started with a lawsuit in 2013, which was settled in 2016. At that time, Uber proposed USD 84 million plus an amount to be fixed after its IPO, but a Federal Judge ruled this agreement was "unfair to drivers" and terminated it. A Court of Appeals, sometime later, allowed Uber to utilize private arbitration. It agreed to pay USD 20 million to the drivers but kept considering them independent contractors. Uber committed itself to more transparent deactivation

procedures, instituting appeal mechanisms and classes on how to provide customers with better experiences. This settlement avoided problems in Uber's IPO, and Uber planned to offer IPO shares to its drivers. (Conger, 2019).

4.2. In Europe

June 26th, 2018: Uber recovered in London – its most lucrative European market – its "taxi license." The Government may apply stricter controls over Uber, and the license's period is of only 15 months – taxis usually have five years –, but its conciliatory CEO Dara Khosrowshahi obtained a fundamental victory. He replaced "the famously combative" Travis Kalanick and aims to change the startup's culture – e.g. no longer ignoring regulations – and to prevent other cities from canceling Uber's licenses. In September 2017, after many global scandals, Transport for London (TfL) affirmed Uber has no "fit and proper" business – meaning no authorization to operate. Moreover, a software called Greyball was allegedly used by Uber as its fake version to bypass public inspection and to enter prohibited markets. The startup intends, for example, to keep its tired drivers off the road, to better help the Police, to share traffic data with authorities, and to name a new independent UK board. (Satariano, 2018).

December 20th, 2018: the pivotal Yaseen Aslam/James Farrar case – of two Uber drivers who sued the startup on behalf of 19 others, arguing they were employees – had an appeal. It challenged an October 2016 decision that recognized the drivers as workers entitled to paid vacations and minimum wage. The Judges understood that the standard agreement between Uber and its drivers presents a "high degree of fiction," considering the latter as "self-employed independent contractors with few employment rights." (Butler, 2018).

In Italy, the Employment Court of Turin dismissed a demand of six Foodora – a food-delivery platform – riders who claimed to be employees. A Judge argued that the gig economy has some inherent elements that allow the company to establish, for instance, when/where a worker may perform an activity, his/her working conditions, and remote monitoring of him/her. The country's Ministry of Labor and Industry proposed new regulations and a national collective agreement

to include the “riders’ group.” Employment classification in France and Spain commonly entails administrative proceedings, food-delivery app Deliveroo in Germany initially adopted fixed-term employment contracts – not self-employment ones –, and Poland has perhaps no major gig-economy representative other than Uber. (Aloisi, 2018; Don’t Gig Up! Project, 2019, p. 77).

4.3. In Brazil

In this section, we present the recent Federal Act on ride-hailing services, the country’s Judicial Branch, and our list of Brazilian legal cases – in the Federal Supreme Court (STF), outside the Labor Courts, and inside them. We may see that, besides classification litigation *per se*, decisions that permit/prohibit the gig economy are central to platform workers.

4.3.1. Federal Act on ride-hailing

In March 2018, Law No. 13,640/2018 was enacted without vetoes to regulate ride-hailing activities. Its author is Deputy Daniel Coelho – Brazilian Social Democracy Party, State of Pernambuco (PSDB-PE) –, while Deputy Carlos Zarattini – Workers’ Party, State of Sao Paulo (PT-SP) – and other representatives wrote the original document, i.e. Bill (PL) No. 5,587/2016. In the Senate, the Act passed as Chamber of Deputies Bill (PLC) No. 28/2017. Distrito Federal (DF) and cities became exclusively competent to regulate and inspect transportation services. Their agencies, besides taxing the companies, may require that they provide insurance for passengers and register their drivers as individual ratepayers of the National Institute of Social Security (INSS). Drivers need to: (i) hold at least a “category B” – for cars – Driving License (CNH) indicating that it is for paid work; (ii) use vehicles that comply with traffic requirements; (iii) hold a Vehicle Registration and Licensing Certificate (CRLV); and (iv) have no criminal records. But they do not need to: (i) obtain previous authorizations by local Governments; (ii) own the vehicles; or (iii) use red license plates – taxis

display them. Failing to do so, the transportation of passengers is deemed illegal. (Agência Senado, 2018).

4.3.2. Judiciary's structure

Before talking about legal cases, it is useful to notice the structure of the Brazilian Judicial Branch:

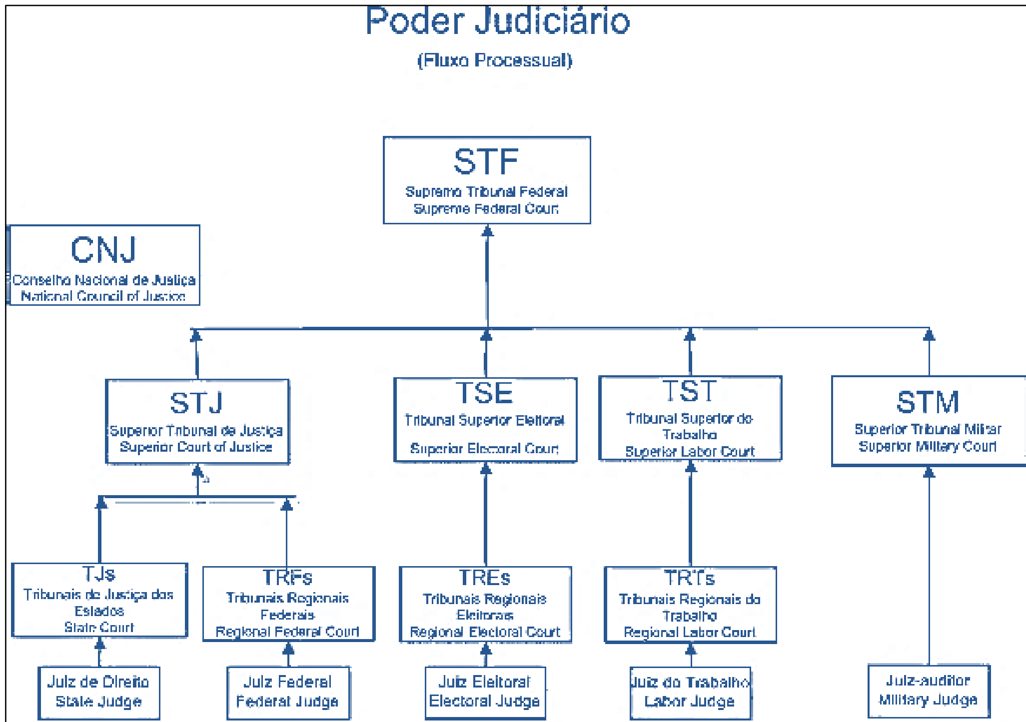

Figure 1. The Brazilian Judiciary. (Supremo Tribunal Federal - Brazil).

4.3.3. Legal cases

4.3.3.1. In the Federal Supreme Court (STF)

October 20th, 2017: the STF Plenary would judge "Extraordinary Appeal" (RE) No. 1,054,110, about ride-hailing. The City Council of Sao Paulo was against a decision of the State Court of Sao Paulo, which declared that Municipal Law No. 16,279/2015 was unconstitutional

because it prohibited ride-hailing services in the city. According to the TJ-SP, cities may regulate local transportation, but the in-force 1988 Federal Constitution (CF) protects private activities via principles of reasonability and free enterprise. The City Council argued in the STF that transportation services for passengers have a public scope and need previous authorizations to operate – otherwise they have "illegal taxi vehicles" and promote "unfair competition." (Migalhas, 2017).

December 6th, 2018: the STF would examine two lawsuits together, both against Municipal Acts that prohibited ride-hailing services. They were the abovementioned RE No. 1,054,110 and the "Claim of Non-compliance with a Fundamental Precept" (ADPF) No. 449, which was filed by the Social Liberal Party (PSL) against Municipal Law No. 10,553/2016, City of Fortaleza, State of Ceara. The PSL said this measure secured a market share for taxi drivers, breaching the constitutional principles of free enterprise, of work's social value, of consumers' protection, of free competition, and of pursuing full employment. Their Rapporteur Justices Roberto Barroso and Luiz Fux voted that the services are constitutional, but Justice Ricardo Lewandowski asked to postpone the judgment. (Migalhas, 2018c).

Lawyer Carlos Mario Veloso Filho, representing Uber, listed its social benefits, for example: (i) affordability; (ii) income growth; (iii) fewer traffic accidents caused by alcohol consumption; (iv) fewer vehicles on the streets; and (v) more functional transportation. He pointed out that Uber pays approximately BRL 972 million – around USD 248 million at that time – in taxes. Representing the Trade Union of Taxi Drivers of Porto Alegre (SINTAXI) – State of Rio Grande do Sul (RS) –, Lawyer Alexandre Camargo criticized the growth of "uberized" activities, that – with their low costs and their insults to regulations – risk passengers, drivers, and the society as a whole. Justice Fux understood that restricting these app services is unconstitutional because it violates the freedom to work and free enterprise. He presented studies pointing out that ride-hailing has not affected taxis, while many taxi licenses are irregularly transferred. Justice Barroso, in turn, considered ride-hailing as a private activity, not as a public one illegally offered. He further stated that Uber brought a technological revolution in transportation and that its impact on the "old economy" is inevitable. (Migalhas, 2018c; Richter, 2018).

May 8th, 2019: the STF Justices unanimously ruled that Municipal Acts prohibiting ride-hailing apps are unconstitutional. (Notícias STF, 2019). Although this decision may avert more lawsuits, there is already intense litigation across Brazil. The following is a tentative timeline according to cities.

4.3.3.2. Outside the Labor Courts

September 8th, 2018: Uber does not need to pay compensation for moral damages – related to pain/suffering – to a driver who had been unilaterally deactivated from the app. A Judge in the TJ-DF stated that the contract between these parties is ruled by the Civil Code, comprehending freedom and autonomy. (Migalhas, 2018f).

December 11th, 2018: a TJ-DF Judge made Uber send to a driver the personal data of a passenger who had mistreated him and damaged his car; the driver was considering filing a lawsuit against the passenger. The driver had asked Uber to do so, but it denied his request arguing that a judicial decision was necessary. (Migalhas, 2018d).

January 8th, 2019: in another case of unilateral deactivation, a TJ-DF Panel ruled that private/civil contracts guide Uber and its drivers – i.e. Labor Courts may not analyze them. For this Panel, the drivers have no "hierarchical relation" – and thus no employment relationship – with Uber because they do not earn fixed compensations and work occasionally. (Migalhas, 2019b).

November 13th, 2018: a TJ-RS Panel considered the robbery suffered by Uber drivers – even in a ride intermediated by the app – as an "event of force majeure." So, there is no causation between Uber and the damages suffered by its drivers; the problem here would be Public Security. The startup argued that its drivers are independent contractors, a status that makes them responsible for their activities' risks. (Migalhas, 2018g).

September 19th, 2017: the TJ-SP revoked Municipal Law No. 13,775/2010, City of Campinas, which had ordered traffic tickets and seizures for ride-hailing vehicles. The Rapporteur in the Court pointed out the Municipal Act breaches Federal Law No. 12,587/2012 – where

we see the distinctions between public and private transportation. (Luchete, 2017).

October 26th, 2018: the TJ-SP deemed Uber unrelated to a car accident suffered by a driver, who was registered with the app but not active there. Uber highlighted that its drivers are independent contractors. (Migalhas, 2018h).

December 3rd, 2018: a TJ-SP Judge in the City of Vergueiro ordered the reintegration of a driver who had been unilaterally deactivated and the compensation for moral damages of BRL 5,000 – around USD 1,306 – due to unfair/unreasonable treatment. The driver said that Uber does not debate ratings given by its passengers; he had canceled 27.02% of his rides. Drivers must have the right to defend themselves – even in a simplified/informal way – because deactivation harms their livelihoods. (Migalhas, 2018e).

January 23rd, 2019: a TJ-SP Panel ruled that the City of Sao Paulo may not prohibit cars with license plates of other cities in ride-hailing services. So, Resolution No. 16/2017 of its City Council – stricter than Municipal Decree No. 58,981/2016, a former regulation – breaches Law No. 13,640/2018, which regulates ride-hailing in the country. (Bomfim, 2019).

September 4th, 2019: the 2nd Chamber of the Superior Court of Justice (STJ) ruled that the State Court of Minas Gerais (TJ-MG) is competent to judge the case of a suspended Uber driver and declared that there is no employment relationship to be analyzed. The lawsuit was originally filed before the TJ-MG, but it sent the case to the Labor Courts; there were doubts about which Court was competent. (Superior Tribunal de Justiça - Brazil, 2019).

4.3.3.3. Inside the Labor Courts

November 26th, 2018: the 19th Labor Court of Brasilia – which integrates the Regional Labor Court of the 10th Region (TRT 10) – ruled there is no employment relationship between an Uber driver and the startup – which highlighted the commercial nature of their contract. The employment relationship permits the company to organize its economic activities, defining objectives, means, forms, days, and time

to its employees; the ones who do not comply with these orders may be sanctioned. An employee in Brazil must: (i) be a natural person; (ii) be paid to perform his/her activities; (iii) work regularly for his/her employer; (iv) observe the employer's orders; and (v) personally perform his/her work. The Judge stated that these elements do not exist in this case, which explains why the driver's contract was not registered in his Employment Record Book (CTPS). Moreover, the driver: (i) earned 75% of each ride's value, a high share compared to usual employment schemes; (ii) could reject calls; (iii) used to pay costs of gas, car maintenance, and insurance; (iv) could freely log off/log on to the app; and (v) was not directed, suspended, or warned by Uber, which only made suggestions to him. (Consultor Jurídico, 2018a).

The 33rd Labor Court of Belo Horizonte, State of Minas Gerais, said an uberization-type situation was an employment relationship, ruling that the company provides Christmas bonuses and pays on vacation, night shift, overtime, etc. However, the Regional Labor Court of the 3rd Region (TRT 3) overturned this decision. For the Rapporteur, there is an impersonal relation because other people may drive the same car, and the only required procedure is registering in the app. (Consultor Jurídico, 2018a).

October 3rd, 2018: the 37th Labor Court of Belo Horizonte did not recognize an employment relationship between the ride-hailing 99 app and a driver. The driver claimed that the Consolidation of Labor Laws (CLT) must be applied, but 99 app argued its drivers are independent contractors. The Judge highlighted the lack of subordination and of regular provision of services – payments to the driver are not sufficient elements – to indicate this condition, as well as the fact that the driver worked for other transportation platforms. (Migalhas, 2018b).

December 12th, 2018: the 23rd Labor Court of Belo Horizonte denied the employment relationship between the 99 app and a driver. The Judge stated that the driver bears his activity's risks – e.g. car maintenance – and, doing so, shows his "minimum economic condition." (Migalhas, 2018a).

February 26th, 2019: the 3rd Panel of the TRT 3 confirmed that there was no employment relationship between the 99 app and a driver. Current jobs rely on many technological evolutions, and Labor Courts should not generalize the employment relationship. (Migalhas, 2019a).

5. Conclusion

Curiously, taxi and Uber services are very much the same, but Uber's gig economy has been driving technological, institutional, social, political, economic, etc. changes. The contemporary precarious work affects workers' chances to earn their living and – more harmfully – relevant public debates. Workers used to engage in trade unions, and the habit to raise voices seemed to strengthen overall democracy; it has a quite limited appeal in our individualistic scenario… (Don't Gig Up! Project, 2019, p. 78; Dubal, 2017, pp. 134-135). In "Uber's world" everything changes quickly, and we do not know what comes next.

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Labor inclusion of people with disabilities: Comparisons between the regulations in Brazil and Japan

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Abstract: According to the International Labor Organization (ILO) and the Organization for Economic Cooperation and Development (OECD), there are approximately one billion people with disabilities in the world, but they experience higher rates of unemployment and discrimination. International norms try to provide them with better conditions, such as the United Nations (UN) Convention on the Rights of Persons with Disabilities, signed by 162 countries – including Brazil and Japan. Both countries have established norms to ensure equality, adding compulsory employment quotas for people with disabilities. This article debates if the current Brazilian and Japanese systems help to fight against discrimination by effectively including them in the labor market. Regarding Brazil, I approach its 1988 Constitution, Law No. 8,213/1991, and the Statute of the Person with Disability, while my focus about Japan are its 1946 Constitution and Law No. 123/1960. Brazil has more jobs for people with disabilities than Japan. There is progressive participation of these people in the countries' formal labor markets, but some companies keep ignoring mandatory quotas and people with more severe disabilities.

Keywords: Brazil; Comparative Law; person with disability; Japan; labor inclusion.

1. Introduction

Working means not only earning a living but also refers to professional/personal fulfillment, self-esteem development, social interaction/inclusion, feeling of belonging, etc. The International Labor

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Organization (ILO) and the Organization for Economic Cooperation and Development (OECD) point out that people with disabilities are around one billion in the world and that they experience higher rates of unemployment and discrimination. Although International Law has often cared about the inclusion of people with disabilities, regulations failed to encourage robust public policies on this issue – and incomplete welfare-biased approaches ended up leading to more segregation. The 1975 United Nations (UN) Declaration of Rights of Disabled Persons and the 1990 Americans with Disabilities Act (ADA) updated Civil/Human Rights and ensured equal opportunities, integration, and even reasonable accommodations. Other positive examples are the 1999 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities – which defined people with disabilities utilizing clinical and social parameters – and the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD). Art. 27 of the CRPD says that States Parties shall acknowledge the right of people with disabilities to work without discrimination, to choose freely their labor activities, to join trade unions, and to benefit from environments that are friendly to their particularities. ILO Convention No. 111 of 1958 had already guaranteed protection against discrimination, but ILO Convention No. 159 of 1983 strengthened it by mentioning vocational rehabilitation. Convention No. 159 was ratified by many countries – including Brazil and Japan – and underscored the role of trade unions and employers. Biased welfare views were fortunately no longer adopted, and effectively including these groups is a persistent challenge: legal protection is not enough, and wide engagement is required – trade unions, employers, government agencies, etc. (International Labor Organization & Organization for Economic Cooperation and Development, 2018).

Comparative Law may be taken as a research method that places two or more legal systems and makes us better asses each one of them. It is a useful instrument for analyses that value Law in context, with their different studies, statistics, and norms. (Vicente, 2014). Our comparison here is between Brazil and Japan, and its complexity may be seen in this situation: even though Japan has a better infrastructure for people with disabilities – ticket machines for wheelchair users, adapted toilets, indications on the streets for blind people, etc. – than Brazil, 2010 data shows that 45% of the people with disabilities are

employed in Brazil, while they are 22% in Japan. (Cezar, 2010; International Labor Organization & Organization for Economic Cooperation and Development, 2018; J.L., 2018). What are these countries' regulations on the theme? And their public policies to effectively include these groups?

2. In Brazil

The 2018 Annual Social Information Report (RAIS) indicates that 24% of the Brazilian population – about 45 million people – are considered people with disabilities. The 1967 Constitution – e.g. its art. 175, § 4, after the 1969 amendments – made clearer the objective of protecting these people. The in-force 1988 Federal Constitution (CF) left an old biased welfare viewpoint and started promoting social inclusion: every Brazilian has rights regarding freedom, education, health, leisure, and work, and people with disabilities must not suffer any kind of discrimination in terms of admission and salary – e.g. art. 7, XXXI. Moreover, the CF empowers the Social Security system and alludes to the adaptation of public buildings and transportation, as we may notice in art. 227, § 2. (Brazil, 1967; 1988; Vimieiro & Moreira Maia, 2011).

This new treatment led to new norms. Law No. 7,853/1989 created the National Coordination for the Integration of People with Disabilities (CORDE) and attributed to the Prosecution Service (MP) many legal activities related to the theme – art. 5 determines its participation in lawsuits. Art. 93 of Law No. 8,213/1991, in turn, introduced mandatory quotas for companies' positions according to how many employees they have; art. 36 of Ordinance No. 3,298/1999 further regulated it, obliging companies with 100 or more employees, for instance, to observe quotas between 2% and 5%. Ordinance No. 9,508/2018, art. 1, § 1, established a 5% quota minimum in the public sector. Law No. 8,899/1994 granted free passes in interstate public transportation to people with disabilities in economic need, and Law No. 10,098/2000 showed concerns about accessibility in public infrastructure – safe and autonomous use of furniture, equipment, etc. The Statute of the Person with Disability – Law No. 13,146/2015 – brought other improvements, such as a fixed percentage of resources to

the Brazilian Paralympic Committee (CPB) – art. 110. (Brazil, 1989; 1991; 1994; 1999; 2000; 2015; 2018).

Considering this detailed legal framework, we may assume that people with disabilities are effectively included in the Brazilian labor market. Formal hiring has increased, but these people generally face difficulties in education/training, in social insertion, in urban mobility, and in professional activities. The Labor Prosecution Service (MPT) in the 15th Region – headquartered in the City of Campinas, State of Sao Paulo – informs that complaints involving this public have grown 15% since 2017. Companies often fail to observe quotas/equal-opportunity policies and refuse to hire people who face severe cases of disability. Workers with disabilities usually perform basic functions, earn low remunerations, count on no/limited career plans, and are excluded from other employees' training. In the City of Bauru, State of Sao Paulo, only three out of 10 companies meet the quota requirements. (Toldrá, Marque & Brunello, 2010; Zuhben, 2018).

3. In Japan

Like Brazil, Japan has a significant number of people with disabilities: out of a population of 127 million, around 3.5 million people have physical disabilities, and 3 million have mental ones, i.e. one in 20 people has some type of limitation. (Otake, 2006). The Japanese social protection is different from the Brazilian one because – among other factors – the former society prioritizes mutual understanding and non-written norms – e.g. *on* and *giri*, corresponding to moral duties of gratitude, harmony, and respect. In the Middle Age, the ones who worked with Massage/Acupuncture in Japan were almost all visually impaired/blind: an Emperor's son, Hitoyasu, had lost his sight, which motivated professional opportunities for this public and encouraged other forms of inclusion – broadly involving people with other disabilities. (Ninomiya & Tanaka, 1999).

The in-force 1946 Constitution guarantees equality for everybody, as its art. 14, which describes that all people are legally equal, giving no room for discrimination based on creed, ethnicity, social status, gender, or family origin. Art. 27 says that everyone "shall have the right and the obligation to work," so people with disabilities may have opportunities

to work with other people in common activities/professions. (Genofre, 2013; Japan, 1946). The 1960 Act on Employment Promotion etc. of Persons with Disabilities – Law No. 123 – set comprehensive standards for integrating people with physical, mental, and intellectual disabilities, and the 1966 Employment Measures Act – Law No. 132 – deepened this effort – e.g. art. 4, (1), (viii). In 1976, private sector employers became obliged to hire people with disabilities, observing quotas and later expansions to cover people with mental/intellectual disabilities; public bodies took part in it too. The general schemes are 2.5% for local/national public bodies and 2.2% for private companies. In April 2016, another law was passed to ban discrimination against people with disabilities, reaffirming that employers shall hire them and care for their specific needs in the workplace. (International Labor Organization, 2003; Japan, 1960; 1966).

Josh Grisdale, the founder of Accessible Japan, says that people with disabilities' employment rates have been growing, but some big companies insist to meet their quota requirements only; less relevant departments are sometimes created to employ this public, without any meaningful task. Companies face accusations of ignoring the admission of people with more severe disabilities, and only 45.9% of them observe the quotas. Including/protecting people with intellectual/mental disabilities is another challenge: physical disabilities have always been prioritized. From the 1970s to the 1990s, Japan sadly saw people with mental disabilities being compulsorily isolated in hospitals – as asked by their families and ordered by local bodies. If these people left the hospitals, they might be monitored for the rest of their lives. Therefore, employment inclusion programs seem to be insufficient for their protection. (Otake, 2006; Rego, 2005).

4. Conclusion

Both Brazil and Japan have been advancing the inclusion agenda about people with disabilities, as their international ratifications and national norms demonstrate. Mandatory quota systems help to include this group in private companies/public bodies and foster its participation in labor markets: its employment rates happily keep

rising. However, wider full compliance with these policies and real day-by-day respect for these people's capacities are yet to be achieved.

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Lawyers and litigation in Brazil and Japan: Is there any relation?

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Abstract: Brazil is a case of high litigation in the world, while Japan presents the opposite scenario, with few demands in its Courts. Among the possible explanations for this difference, one called our attention: is there any relation between the number of lawyers in a country and its index of litigation? Investigating it is our goal in this article.

Keywords: Brazil; culture; Japan; lawyer; litigation.

1. Introduction

Brazil has remarkable litigation indexes, but Japan follows the opposite path. Why is it so? Explanations may focus on cultural traces, institutional routines, social choices, etc. However, something stands out: the number of lawyers in each country. Brazil is approximately 1.7 times more populous than Japan – a small number compared to their territorial extents –, but the ratio is quite diverse if we consider only lawyers; there are plenty of lawyers in Brazil. So, is the number of Court cases in a country related to the number of lawyers there?

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2. In Brazil

The country had 77.1 million lawsuits in 2019, of which 14.2 million were suspended or provisionally at a standstill. In other words, Brazil has 62.9 million ongoing lawsuits. Using approximate numbers and the year 2018 as our reference, the Brazilian Bar Association (OAB) had 1.1 million lawyers, and the country had 210 million inhabitants, which means one lawyer for every 190 inhabitants. And 70 lawsuits per lawyer. But how does a person become a lawyer in the country? (Conselho Nacional de Justiça - Brazil, 2020; Migalhas, 2019; Ordem dos Advogados do Brasil, 2021).

Before the Independence of Brazil, in 1822, Portuguese Ordinances stated that only those who had attended the University of Coimbra, in Portugal – more specifically the course of Canon Law or of Civil Law for eight years –, could work as lawyers. The OAB was created almost 100 years after the Independence, through Decree No. 19,408/1930. The OAB Exam, in turn, is due to Law No. 4,215/1963, but it was optional, as a student would receive a license via his/her professional training only. Law No. 8,906/1994 made the OAB Exam mandatory, and, until 2009, each Brazilian State carried out its own Exam. Nowadays, there is a unified OAB Exam, which consists of two stages and is applied throughout the country. Law students in the 9th semester – i.e. in the last one, as Law courses usually take 10 semesters – and people who hold Undergraduate degrees in Law may be evaluated. An approved candidate may register in the OAB if he/she shows legal capacity and moral integrity, takes an oath, and hands in the required documents. The OAB Exam safeguards society because it establishes a minimum quality for legal services. (Brazil, 1930; 1963; 1994; Ordem dos Advogados do Brasil, n.d.).

Law courses in Brazil foster a pro-litigation mindset. Watanabe (2005) highlights that mandatory Undergraduate subjects aimed at Alternative Dispute Resolution (ADR)-type methods are few and have almost no appeal among the students; it deepens a "culture of the sentence" instead of a "culture of peace." In this sense, Takahashi and Nunes (2016) doubt that this plethora of lawyers is positive for the country, as lawyers may litigate just to raise money using *ad exitum* contracts with their clients – i.e. according to his/her success in the

Courts. Many judicial cases would be better coped with and solved outside the Judiciary, but lawyers and their clients often resist understanding it. This pro-litigation atmosphere seems to validate the "more lawyers, more lawsuits" assumption; a labor market of 1.1 million people would not survive otherwise.

3. In Japan

In 2018, Japan had about 200,000 ongoing civil/administrative lawsuits:

	Commenced	Terminated	Pending
Supreme Court	4,750	4,716	1,198
High Courts	20,022	20,498	7,169
District Courts	157,399	157,931	105,841
Summary Courts	354,721	352,491	74,793

Table 1. Civil/administrative cases in Japanese Courts in 2018. (Supreme Court of Japan, 2021).

According to the Japan Federation of Bar Associations (JFBA) (2018), also in 2018, there were 40,066 lawyers in the country. As its population is around 126.5 million people, there is one lawyer for every 3,157 people. And approximately 4 cases per lawyer. The JFBA was established in September 1949 with the Attorneys Act – Law No. 205/1949 – and assembles the lawyers and law offices of the country – without discarding their registration in local Bar Associations. To become a lawyer, a person needs to complete Law School – which lasts two to three years –, to pass the Bar Exam (*shihou shiken*), and to work for one year as an apprentice in the Legal Training and Research Institute of Japan. Those who have financial or other difficulties in attending college may count on a preliminary test – *yobi shiken*, introduced in 2011 – and take the Bar Exam. (Japan, 1949; Japan Federation of Bar Associations, n.d.).

Haley (1978) affirms that the lack of legal practitioners in Japan is an institutional matter and that access to justice should be much easier, averting litigation costs and delays to be obstacles. If the Judiciary is

more open to the population, more lawsuits are filed, and more lawyers are demanded, promoting access to justice. However, Ramseyer (1988) understands that the low litigation may be a positive aspect induced by the own Japanese institutions: as institutions usually work well, there is no need for lawsuits. The outcome of a Court case is predictable in the country, which may lead to an early agreement. If the parties may achieve similar results inside and outside the Judiciary, it is worth relying on agreements – which are much cheaper and faster than waiting for sentences. The Japanese legal system ultimately proves its success. The aforementioned predictability may occur because: (i) judges decide *de facto* and *de jure* matters, preventing the uncertainties caused by juries; (ii) the Court sessions of a case are discontinuous and may give clues about the way the judge will decide, favoring agreements before the sentence; and (iii) judges try to standardize their judgments.

4. Conclusion

Brazil shows a large lawyers-population ratio, and it seems that the high litigation in the country is a byproduct of this ratio. Japan, on the other hand, counts on 27 times fewer lawyers than Brazil, which is perhaps a factor for really lower litigation numbers. So, yes, there may be a direct relation between the number of lawyers and the litigation rates in both countries. Nevertheless, assessing whether one model is better than the other is a complex task and should consider each history, culture, legal system, etc.

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Legal Realism, hard cases, heuristics, judgment: Ideas on conflict and mediation in less complex labor conflicts

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Abstract: This brief article aims at analyzing and proposing guidelines for mediation in less complex labor conflicts, considering relevant historical and theoretical themes on decision-making processes: Legal Realism, heuristics, hard cases, judgment, etc. Observing how judges usually decide – or should do it –, I share some thoughts on adjudication and mediation.

Keywords: conflict; hard case; judgment; Labor Law; mediation.

1. Introduction

Conflicting is a form of interaction between individuals, groups, and organizations that implies shocks to access the distribution of scarce goods. It refers, for example, to situations in which two or more people diverge because of individual goals, interests, or goods perceived as mutually incompatible. A conflict may be solely individual – intrapsychic – but may occur between people – interpersonal – and between groups – intergroup. Moreover, conflict is endemic and may cause worries about constant antagonisms, motivating aggressions, oppressions, and even deaths; the main challenge of our century is perhaps coexisting. Conflict is rarely suppressed, and its causes, tensions, and contrasts are often enduring. However, conflict may bring positive moves: if well-conducted, it can develop and integrate capacities and empathy. (Fantini & Soares, 2015; Micklethwait & Wooldridge, 2015; Rodrigues, 2015).

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Mediation, a method of conflict resolution present in human relations since the dawn of society, is conceptualized in the Brazilian Mediation Act[2] – Law No. 13,140/2015 – and integrated into the Alternative Dispute Resolution (ADR) effort. In turn, the Civil Procedure Code (CPC) – Law No. 13,105/2015 – characterizes the mediator in its art. 165, § 3, who is useful for restoring the communication between the parties and for leading to consensual solutions – identified by themselves – with mutual benefits. It is not clear whether the Mediation Act and the CPC may be applied in labor relations. Art. 42, single paragraph, of the Mediation Act states that mediation in this field shall be regulated by a specific law. The CPC, art. 175, allows "other forms of extrajudicial conciliation and mediation linked to institutional bodies" and the participation of "independent professionals," but also mentions a specific law to be promulgated. And the 2017 Labor Reform – Law No. 13,467/2017 – offers us no conclusive answer. (Brazil, 2015a; 2015b; 2017; Gravatá, 2015). An analysis of how judges deal with cases in general – approaching useful theoretical landmarks – and then the identification of cases that should be sent to mediation may give us insights into this future regulation.

2. Legal Realism

In the 1930s, the Realistic Movement arose in the USA reacting to the prevailing formalism in academia, courts, and politics. It was formed accidentally via correspondences of Jerome Frank, Karl Llewellyn, and Roscoe Pound, who had experiences at prestigious universities – like Harvard and Columbia – and ended up developing some ideas of Oliver Wendell Holmes Jr. Having an instrumental view about Law, this Movement introduced itself as a theory on judicial decision. Christopher Columbus Langdell, a symbol of the formalist perspective, used to refer to Law as a Science with strict methods to be

2 "Art. 1. This Law provides for mediation as a means for resolving disputes between individuals and about the solutions elaborated and agreed upon by the own disputants in the scope of the public bodies. Single paragraph. Mediation is considered to be the technical activity performed by an impartial third party without decision-making power, who, chosen or accepted by the parties, helps and encourages them to identify or develop consensual solutions to the dispute." (Brazil, 2015).

practiced, making it determined/determinable. Thus, the lawyer should analyze case studies and deduce rules and principles that guide decisions; Law would be closed and logical. However, for realistic thinking, case studies alone do not explain what is really going on in the courts. A judge, although he/she is committed to impartiality, is influenced by personal motivation, background, education, and other factors that built his/her personality. Against the Langdellian thought is the difficulty to frame the legal field: (i) Langdell's method may lack the scientific rigor that empirical research seems to claim; (ii) analyzing a small number of cases would make it impossible to generalize conclusions; (iii) psychosocial factors would influence court decisions, making their predictability difficult. In Realism, with its instrumentalist approach, Law is the result of judicial decisions in the real world. Hence the importance of decision-making processes. Concepts such as contract, responsibility, and legal personality should all be defined by the real outcomes of court decisions. And judging is based on two activities: (i) searching previous decisions; and (ii) pointing out plausible justifications for the decision. So, theoretical realism does not intend to conceptualize Law, but how Law works. (Tamanaha, 2008; 2014).

Realists are divided into two groups, i.e. skeptical-conceptualists and skeptical-empiricists. For the former, the enactment of laws is not part of the Law; Law would be the prediction of what the court will decide. For skeptic-empiricists, in turn, legal rules may make no difference in a judgment, but they take part in Law. Realistic thinking in the USA may be roughly described like this: what the judge ate for breakfast would determine his/her decision. The critics affirm that it departs from the right assumption, but arrives at the wrong conclusion – namely, that Law is what the courts actually decide. Law does not depend on a court decision; it exists regardless of predictions or judges' decisions. The realists ended up fighting against "formalist *laissez-faire* judges" and paving the way for the New Deal. (Tamanaha, 2008; 2014). Unfortunately, there are few Brazilian studies on Legal Realism, but it is quite valuable regarding the deep legal insecurity in the country – which daily sees external, and perhaps frivolous, factors modifying court decisions.

2.1. The New Legal Realism

The New Legal Realism emerges in the USA too as a theoretical perspective on Law, treated as a social field. It tries to understand the sources of court decisions based on testable hypotheses and on large data sets. Starting from the idea that the legal system does not oblige the results of specific cases and is in itself contradictory, new realists discovered models showing relevant differences between Republican-type and Democrat-type rulings. Referring to empirical research as a subfield of Political Science and to qualitative/quantitative techniques for a better understanding of Law in real life, judicial behavior and institutional influence have been studied. New realists often face questions like: How do judges decide on their own? How did judges approach similar cases when they were in college? How similar are the characteristics of the judges in a specific court? If friends of the parties are in the court session, will judges decide the same? (Tamanaha, 2008; 2014).

When a judge deals with controversial subjects of great popular commotion, he/she generally decides based on his/her own convictions and is not influenced – at least in his/her conclusions – by other judges. Aspects that may define a judge's ideology are the place of origin, ethnicity, and gender: (i) female judges are more likely to decide in favor of women, while male judges often rule in favor of women if there are female judges in the court; (ii) white judges tend to decide in favor of parties who are black if there are black judges in the court. From this point of view, judicial reasoning would be nothing more than a "facade of justification" built to legitimize the ruling previously made. As we may notice, New Legal Realism refers to the impacts of many aspects in the Law, especially on court decisions. The rationality of a decision is now evaluated on its quality, correctness, and discourse/rhetoric. So, empirical studies in this perspective involve arguments, norms, analogies that are employed in decisions. Law is considered a discursive-argumentative practice, and the judicial decision is part of this intersubjective discursive construction. Legal realism may also be seen as part of the theory of rational choice: Does this specific decision comply with the strategic ideological/personal objectives of the judge? (Tamanaha, 2008; 2014).

3. Hard cases and heuristics

Much has been discussed about how judges decide the so-called "hard cases," which are unusual in the legal system. The discussion revolves around the balance of interests and principles. To some extent, the legal language would permit the transmission of patterns that constantly reappear in similar contexts. General formulas become clearly applicable in these contexts. A structure composed of a factual assumption and a legal consequence solves the "easy cases." In hard cases, the rules to be applied are unclear; there is a high degree of indetermination, and the available legal means are insufficient. When abstract rules cannot satisfactorily solve a particular case, a hard case arises. A judge cannot cope with this kind of problem without relying on elements that go beyond the Law, as there is no single correct solution. Unequivocally, hard cases involve "moral dilemmas," in terms of ideology and subjectivity. In these situations, judges tend to decide based on the positive effects that their decisions would produce in the legal system. So, they adopt an ideological/strategic second-best decision model. The criticism that is made is about the lack of pure rationality arising from the "confirmation bias," which is the tendency to interpret information to confirm prejudices – e.g. risk/loss aversion. (Struchiner, 2005).

Heuristics, mental shortcuts that facilitate decision making, are common, as well as practical rules, absurd moral judgments, and intuition based on day-by-day generalizations. Nevertheless, problems emerge when norms are used out of context and treated as autonomous or universal principles, being applied in situations where their justifications cease to operate. Moral heuristics play a worth-noting role in morality, and also in political and legal judgments, but they produce serious errors. One of them is disregarding basic data, a process known as the "representativity heuristic." The result is a bias, an illusion. Both utilitarianism and Kantianism are types of moral heuristics. The heuristic may also lead to statistical biases in decision making, in which the data chosen by a judge is insufficient to understand a scenario. This is closely related to "anchoring biases" and is useful to establish compensation for moral damages. Understanding these biases may help us develop argumentative rationality, not pursue truth – making

us justify our choices with "cognitive illusions." Anchoring biases may either attract us or move us away from the truth. These judgments are relevant to Law and policy. Rationality is limited in Law, although Law has always been shown as extremely rational: when deciding, judges are impacted by their emotions. Rationalist theories do not solve, for example, feminist questions. Empathy, "putting yourself in another's shoes," is also needed. A relevant question here is whether empathy and moral intuition should be an element in decision-making processes, especially in hard cases. (Tversky & Kahneman, 1974).

4. Judgment

In universities, people are trained to take Law as a system of rules and precedents, of categories and concepts, while judges are seen as stern, remote bureaucrats whose intellect is a "cold logic engine." However, Law is flawed, and intuitive reasoning is required for fair decisions. It is the intuitive reasoning that makes the connection between the question posed and the decision taken, shining light along the way, facilitating the elaboration of conclusions. A philosopher is not content to describe the facts; he/she wishes to ascertain their connections, experiment, and thus come to their meanings and to worthwhile visions. Science is description. Philosophy is summarized interpretation. Science without Philosophy is fact without perspective, and its assessment cannot save us from chaos and despair. Science gives us knowledge, but only Philosophy can give us wisdom. The facts are sterile until there are minds able to choose between them, to discern those that hide something, to recognize what is hidden. It is about collecting all available evidence and submitting them for examination. (Haidt, 2013; Tversky & Kahneman, 1974).

Judges act like lawyers when working on their cases, with only one difference: lawyers consider only the thoughts that keep them on the path they chose, while judges should follow different paths until they find solutions. The impulse to bring success to clients makes lawyers indicate certain approaches to judges, who, in turn, try to appear reasonable, listening to the disputants, quoting experts, using data, etc. Judges rely largely on intuition, but they sometimes replace it with deductive reasoning: there is a previous intuitive judgment – System 1

– that they may use in deliberation – System 2. System 1 quickly proposes intuitive answers to judgmental problems as they arise, and System 2 monitors the quality of these proposals, endorsing, correcting, or replacing them. The judgments eventually expressed are called intuitive if they hold the initial hypothetical proposal without much modification, in spontaneous ways: they are automatic, effortless, fast, based on heuristics and open to emotions. Deliberative processes, in turn, are mental operations that require effort, motivation, concentration, and enforcement of learned rules; associated with controlled processing, they are laborious and slow. Admittedly, deliberative judgment is preferable to the intuitive one, but eliminating intuition from rulings is both impossible and undesirable – given how the human brain works. Intuition is dangerous not because people trust it, but because they trust it when it is inappropriate to do so. Although there are conflicts whose best solution model is not adjudication, models of judgment indicate mechanisms that require deliberation after intuitive thinking. Examples are giving judges more time to decide, allowing peer review when a judge did not have direct contact with the parties, constantly training deliberation processes, and giving feedback to judges about the way they decide. However, there is no guarantee that intuitive judgment will be free from biases. (Haidt, 2013; Tversky & Kahneman, 1974).

5. Mediation

Nowadays, parties in conflict feel that they need an authority guaranteeing legal certainty, which makes "autonomy" a word to be avoided. It is so due to historical and social constructions establishing parameters for conflict management, greatly focused on litigation. Legal orders are fundamental for coexistence and equilibrium in any society. However, judicial procedures approach conflicts as mere legal phenomena, dealing exclusively with legally protected and requested interests; other aspects – that may be as important as or even more important than the judicialized ones – tend to be forgotten. Effective access to justice means demanding the Judiciary, but also protecting vulnerable social groups and promoting communication between parties in conflict. Mediation gives people "the authorship of their own

decisions," inviting them to reflect on their alternatives. It is non-adversarial and helps to remove obstacles to dialogue, which transforms a confrontational context into a collaborative one. Moreover, mediation is confidential and voluntary, uses an impartial third party to facilitate this contact, and sees mutually accepted agreements as merely possible outcomes – not as the main objective. So, mediation fosters creativity and citizenship. Robert Baruch Bush and Joseph Folger use the term "transformative mediation," arguing that its objectives should be training and empowering people to solve their own conflicts. Mutual acknowledgment of feelings and interests, via empathy and humanization, may lead to reconciliation for real. Mediation may ultimately change cultures based on adjudication. It is in tune with Edgar Morin's ideas, who called for changes in people's habits and attitudes to make them active in their own reality and, therefore, in the construction of desirable societies. (Micklethwait & Wooldridge, 2015; Silva, 2015; Silveira & Ferraz, 2018).

5.1. MEDIATION IN LESS COMPLEX LABOR DISPUTES

Developing agreed solutions for less complex labor conflicts may be more relevant than decisions issued by judges – which simply use the relation "factual affirmation/legal consequence." Judges should focus on solving hard cases, in which norms are vague/nonexistent and generate doubts. (Haidt, 2013; Struchiner, 2005). The Brazilian Mediation Act, the CPC, and the 2017 Labor Reform may give room for mediation in labor relations; ADR was granted special importance in these norms. The range of the ADR, however, is still a disputable matter in Brazil, mainly when they involve labor rights – as some jurists consider them absolutely or relatively non-negotiable. The physical and mental well-being of workers, protection against discrimination, and harassment are perhaps widely treated as non-negotiable, but there is no consensus on other provisions – including the constitutional ones. It would be useful that new norms display which labor rights may be negotiable, the possible ranges of negotiation, and when it may occur – before, during, or after the termination of a labor contract. (Brazil, 1988; 2015a; 2015b; 2017; Gravatá, 2015; Rodrigues, 2015).

6. Conclusion

All in all, labor disputes concerning relatively negotiable rights should be tagged as easy cases – for which intuitive judgment is more commonly noticed –, while those dealing with non-negotiable rights should be the hard cases – when deliberative judgment is predominant. Norms about mediation in labor relations should use this paradigm.

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Non-regular work in Brazil and Japan: Comparing its adoption and norms

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Abstract: This article intends to briefly analyze the current situation of non-regular work/employment in Brazil and Japan, approaching themes regarding, for example, part-time/intermittent/temporary jobs, fixed-term contracts, and unequal treatment in the countries. The balance between deregulation and inflexible norms may be the path to avoid both precarious work and unemployment.

Keywords: Brazil; fixed-term contract; Japan; non-regular work; precarious work.

1. Introduction

A regular employee/worker is anyone directly hired by an employer to perform activities in scheduled hours and without a termination date in his/her contract, i.e. anyone who signs an open-ended contract directly with his/her employer to work full-time. The core elements here are: (i) open-ended contract; (ii) full-time dedication; and (iii) direct hiring. A non-regular/non-standard/atypical employee/worker, in turn, fails to meet at least one of these elements. For instance, a person who counts on an open-ended contract, works part-time, and is hired directly by his/her employer is a part-timer. International Labor Organization (ILO) Convention No. 175, by the way, defines a part-time worker as an “employed person whose normal hours of work are less than those of comparable full-time workers.” (International Labor Organization, 1994).

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The recent Labor Reform – Law No. 13,467/2017 – in Brazil created and extended forms of non-regular work, usually cheaper than regular employment, arguing that its labor legislation – mainly the Consolidation of Labor Laws (CLT), Decree-Law No. 5,452/1943 – was too rigid, overprotective to workers, and unable to help the country against the economic downturn/stagnation that started in 2015 – different from early-2010s, when Brazil had a quite intense development. In the first quarter of 2017, the unemployment rate was 13.9% – more than 14 million people –, an astonishing number if compared to the 2013 last-quarter rate, of only 6.3%. (Brazil, 1943; Instituto Brasileiro de Geografia e Estatística, 2019).

Japan, perhaps in an opposite direction, has been fostering the conversion of non-regular work into regular one – e.g. art. 18, (1), of the Labor Contracts Act (LCA), Law No. 128/2007. The traditional Japanese employment style shaped the country's economy and society: it was founded on lifelong commitment/job security and is still seen in large manufacturers essentially. But the First Oil Crisis, in 1973, stopped the country's exponential economic growth and made women seek jobs – mainly part-time ones because they kept housework and child-rearing obligations – to supplement their households' income. The early-1990s Japanese Bubble, the 1997 Asian Crisis, the 2000 Dot-com Bubble, the 2008 Financial Crisis, and the shift towards a service-based economy imposed more difficulties on the traditional style. A 2018 survey indicated an increase by 530 thousand regular employees in one year – totaling 34.76 million people or 62.11% of the workers –, but, in the same period, 840 thousand people were added to non-regular employment schemes – 21.20 million employees, or 37.89%, in this situation. Among the non-regular, around 6.68 million (31.5%) are men, and 14.52 million (68,5%) are women. (Brasor & Tsubuku, 2019; Japan, 2007; Kanki, 2019, p. 4; Takahashi, 2018, pp. 6-7).

This article intends to provide an overview of these debates involving Brazil and Japan. May non-regular work coexist with "equal work, equal pay" ideas? Is non-regular work all about cutting production costs? In which sectors and under which circumstances should non-regular work be adopted?

2. Brazil

The CLT supports equal-pay initiatives[2] but makes room for different sorts of non-regular work. It used to limit part-time work[3] to 25 working hours per week, with no mention of overtime, but the 2017 Labor Reform instituted a more flexible scheme. The idea behind intermittent work[4] was the same, which raised concerns on to what extent companies could adopt it to replace their regular workers. Nonetheless, art. 452-A of the CLT indicates that intermittent labor contracts must clearly express their terms. An employer may demand his/her employee observing at least three consecutive days in advance, and the employee may reply to it within one business day; failing to do so is deemed a refusal. When a working period ends, the employer must pay for the proportional labor contract's amounts, such as his/her salary, Christmas bonus, weekly rest, Severance Pay Fund (FGTS), and Social Insurance contributions. This requirement may prevent employers from frequently demanding their employees, which makes intermittent work perhaps worse than the traditional one. Intermittent contracts do not guarantee a routine of activities, but expectations of it, leading to relationships in which entrepreneurial risks may be transferred to employees. A very positive aspect of intermittent work is eliminating permanent costs with employees, as they will be demanded only when their services are needed – which may impact seasonal-type

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2 "Art. 461. If the functions are identical, the activities of equal value, provided to the same employer, in the same business establishment, shall correspond to the same salary, regardless of gender, ethnicity, nationality, or age. [...] § 1. An activity of equal value, for this Chapter, is the one done with equal productivity and with the same technical perfection, among people whose difference working for the same employer is not more than four years and whose difference working in the function does not exceed two years. [...]" (Brazil, 1943).

3 "Art. 58-A. Part-time work is considered the one whose duration does not exceed thirty hours per week, with no applicable supplementary weekly hours, or, moreover, the one whose duration does not exceed twenty-six hours per week, with applicable six supplementary hours per week maximum. [...]" (Brazil, 1943).

4 "Art. 443. The individual labor contract may be agreed upon tacitly or expressly, orally or in writing, for a defined or undefined period, or for the provision of intermittent work. [...] § 3. The labor contract is considered intermittent when the provision of services, with subordination, is not continuous, occurring with alternating periods of service provision and of inactivity, determined in hours, days, or months, regardless of the type of employee's and employer's activity, except for airline crew members, governed by their own legislation. [...]" (Brazil, 1943).

jobs, by the way. Provisional Measure (MPv) No. 808/2017, terminated shortly after its elaboration, provided interesting details, e.g.: (i) if the intermittent worker is not demanded within one year, the contract is automatically finished; and (ii) employers who fired regular employees must not hire them as intermittent ones within 18 months. (Brazil, 1943; Delgado & Delgado, 2017).

Regarding fixed-term contracts, their activities must have a duration no longer than two years and are usually adopted for specific business needs – CLT, arts. 443, § 2, and 445. And a fixed-term contract is obligatorily converted into an open-ended one when, for example, it is renewed without respecting a six-month break and more than once – arts. 451 and 452. Ruled by Law No. 6,019/1974, temporary work refers to extraordinary situations too: replacing regular employees who are on leave or coping with relevant increases in workload – art. 2 of this Act. A temporary worker is an employee of a temporary work company, not of the "user company" (*empresa tomadora*). The duration is 180 days but may have additional 90 days – art. 10, § 1 and § 2; considering that maternity leaves, for instance, offer at least 120 days – art. 392 of the CLT –, companies may successfully adopt temporary work. (Brazil, 1943; 1974).

3. Japan

The country has a specific 1993 Act for part-timers[5] and the 2007 LCA[6] fostering equality. To avert confusion, the 2016 Plan for

5 "Art. 2. The term 'Part-Time Worker' as used in this Act mean a worker whose prescribed weekly working hours are shorter than those of ordinary workers employed at the same place of business [...]. [...] Art. 8. (1) With regard to a Part-Time Worker for whom the description of his/her work and the level of responsibilities associated with said work [...] are equal to those of ordinary workers employed at the referenced place of business [...], the business operator shall not engage in discriminatory treatment in terms of the decision of wages, the implementation of education and training, the utilization of welfare facilities and other treatments for workers by reason of being a Part-Time Worker." (Japan, 1993).

6 "Art. 20. If a labor condition of a fixed-term labor contract for a Worker is different from the counterpart labor condition of another labor contract without a fixed term for another Worker with the same Employer due to existence of a fixed term, it is not to be found unreasonable, considering the content of the duties of the Workers and the extent of responsibility accompanying the said duties [...], the extent of changes in the content of duties and work locations, and other circumstances." (Japan, 2007).

Promoting Dynamic Engagement of All Citizens declared that: (i) legal revisions shall enable "equal pay for equal work"; and (ii) guidelines about "reasonable or unreasonable" treatment shall be elaborated. (Japan, 1993; 2007; Kanki, 2019, p. 7). An example of guideline:

> For base salary, when paying according to employee's abilities or experience, a part-time or fixed-term employee with the same ability or experience as a normal employee, must be paid the same base salary as a regular employee for work that relates to this ability or experience. Also, in cases where ability or experience differ, a base salary corresponding to the difference must be paid.
> (Kanki, 2019, p. 8).

The Supreme Court clarified art. 20 of the LCA in the Hamakyorex Case and in the Nagasawa Un'yu one, understanding it as "a provision requiring balanced treatment in accordance with employees' differences in job content" – i.e. balanced treatment is not unreasonable. (Kanki, 2019, p. 9). Different non-regular workers are hired for different reasons, which reminds us that this issue is not only about converting them into regular workers:

	Part-time	**Fixed-term**	**Dispatched**
To reduce labor costs	53.6%	36.3%	32.6%
To meet workers' needs	33.5%	14.3%	8.3%
To cope with work volume within a day/week	27.5%	5.7%	8.0%
To secure work-ready and skilled human resources	24.3%	36.8%	29.9%
To handle specialized tasks	23.0%	38.7%	30.2%

Table 1. Reasons why employers hire non-regular employees in Japan. (Asao, 2011, p. 10).

Part-timers were 16.6% of all employees in Japan in 2007 and 17.9% of them in 2012, which follows the move towards non-regular work. In 2012, part-timers mostly connected to accommodation/meal (35.1%), retail/wholesale (28.1%), and personal/amusement (26.9%) services. And while only 3.5% of the men work part-time, 35.2% of the women are in this situation. (Statistics Bureau of Japan, 2012, [p. 19]).

Tradition again: men are supposed to be the breadwinners in Japanese society. Ikeda (2019, pp. 48-51) shows that, after the 1985 Equal Employment Opportunity Act was passed, married women chose to become either full-time housewives or part-time/temporary workers. This scenario markedly changed in the early 2000s, when economic crises forced many women to enter the labor market. The 2016 Act on Promotion of Women's Participation and Advancement in the Workplace was an important measure here. Nevertheless, women in the country seldom develop their careers throughout their lives; they end up leaving full-time jobs and engaging in part-time ones after marriage/childbirth:

> It is true that there are some women who prefer housework to a vocation, but other women who prefer a vocation to housework are not willing to undertake the breadwinner role, which is a typical gender role of husbands. The breadwinner ideology might restrict women's labor participation as wives might regard themselves as workers who do not have to insist on employment opportunities to earn income while they expect their husbands to be the breadwinner.
> (Ikeda, 2019, p. 50).

4. Conclusion

"Equal work, equal pay" ideas play a relevant role in both countries. In Brazil, non-regular work extended its possibilities through the 2017 Labor Reform, pursuing more deregulation/flexibilization of old employment-centered norms that end up preventing hiring. Japan, in turn, witnesses the increase of non-regular work – with its gender characteristics – and tries to stop its uncontrolled spread. Nonetheless, there is perhaps one common main challenge: finding a balance between regular and non-regular work types to avoid not only inflexibility and obstacles to development but also precariousness and social inequality.

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The *Karoshi* phenomenon: Scenarios from Japan and Brazil

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Abstract: After the Second World War, the Japanese commitment to hardworking made the country recover from the destruction and emerge as an economic world power. This sort of commitment, added to the country's traditional values and strict culture – symbolized, for example, by the *Bushido* of the *samurai* –, ended up affecting workers and led to relevant Public Health issues. Some Japanese people faced "death from overwork," also known as *Karoshi*. Although Brazil is different in almost all aspects – e.g. social inequality –, some deaths may be categorized like this. In this article, we aim to analyze the labor regulation in key Japanese and Brazilian norms, and the general impacts of *Karoshi* in these countries.

Keywords: Brazil; culture; Japan; *Karoshi*; labor regulation.

1. Introduction

39-year-old Brazilian worker Juraci Barbosa died on June 29th, 2006, after working almost non-stop from April 15th to June 26th, 2006.

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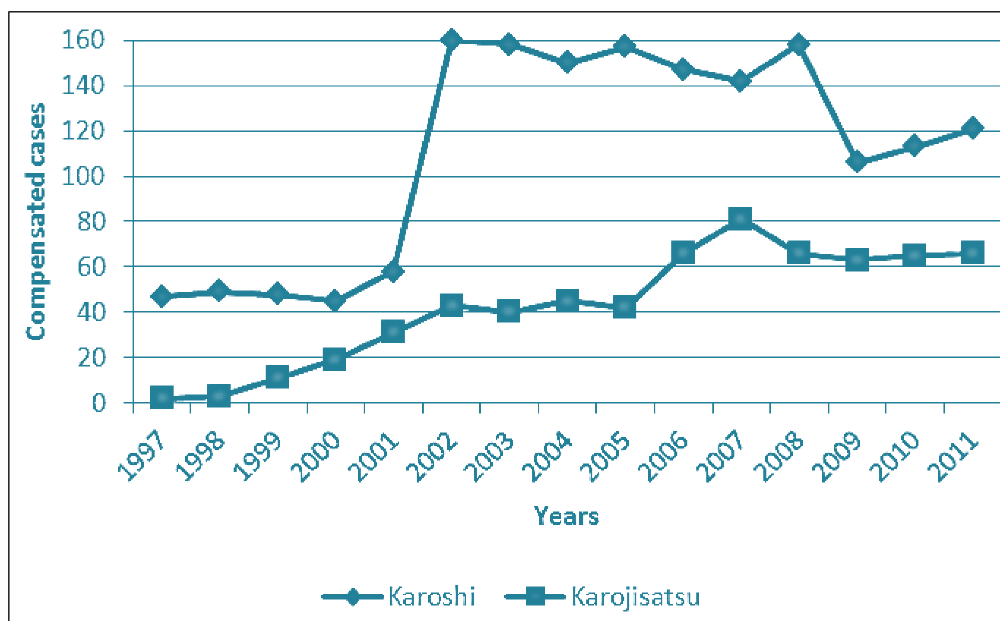
In one month, he managed to cut more than 10 tons of sugarcane daily, but his death certificate stated that he passed away due to "unknown causes." (Folha Ribeirão, 2007). 31-year-old Japanese reporter Miwa Sado died from a heart attack after more than 150 overtime hours in a month. Her corpse was holding a cell phone in her bed when it was found. She had recently covered two elections. (Ma, 2017). 27-year-old Naoya Nishigaki, a telecom company worker, died from a medication overdose in Japan. He had "workdays of 37 hours" and used to sleep in the office when he missed the last train home. (Lane, 2017). 26-year-old Tian Fulei worked 12-hour shifts every day and died at a Pegatron factory in China, where he used to produce Apple iPhones. However, except in particular cases, Apple's guidelines seem to forbid more than 60 working hours weekly. (Gasparini, 2015). 24-year-old Matsuri Takahashi worked more than 100 overtime hours within a month for the advertising agency Dentsu and committed suicide. (Lane, 2017). 14-year-old Russian model Vlada Dzyuba intensely worked for 13 hours, suffered two days from chronic meningitis, fell into a coma, and died in China. It was said that her agency had not paid for health insurance and had imposed her longer working hours. (Estado de Minas, 2017).

What do all these tragic stories have in common? They were all framed as *Karoshi* – "death from overwork" – or as associated phenomena. Work-related deaths became widely known in Japan after the Second World War. The Japanese people committed themselves to the reconstruction of their country, which was based on deep and strict cultural traces. Although Japan became a prosperous world leader in relatively few years, Public Health issues emerged. Via diverse paths, other countries also worriedly noticed that people were dying because of work. One of these countries was Brazil, which is different from Japan in almost all aspects – e.g. social inequality. This article seeks to analyze key Japanese and Brazilian labor norms and the impacts brought by the *Karoshi* phenomenon in these countries.

2. Concepts

The type of strenuous work which leads to *Karoshi* is not necessarily equal to slave labor. In general, *Karoshi* occurs when an activity has quite harmful conditions to physical and mental health: too

many repetitions, too much readiness, too much productivity, too much fatigue, even if there are not too many working hours. Confusion, memory lapses, depression, brain/heart diseases, and anxiety may become part of workers' routines in this situation. (Chehab, 2013; Darli, 2016). The International Labor Organization (ILO) (2013) makes a differentiation: the 1970s worldwide adopted term *Karoshi* is the death caused by often sudden cardiovascular attacks – myocardial infarction, acute cardiac failure, brain strokes, etc. – in a context of overwork, while *Karojisatsu* is the suicide motivated by overwork – so it is intimately associated with burnout and other mental health issues. Related compensation tends to increase:



Graph 1. Compensated cases in Japan due to *Karoshi* and *Karojisatsu*. (International Labor Organization, 2013).

3. Labor and *Karoshi*

Every human being has dignity. This is the tone of the international norms that emerged after the Second World War (Bobbio, 2004), as we see in the Preamble of the 1945 Charter of the United Nations (UN). The International Labor Organization (ILO) promotes

measures to protect workers holistically, so health issues are part of its concerns. ILO Conventions No. 29 – on forced/compulsory labor[4] – and No. 161 – on occupational health services –, as well as the Declaration of Philadelphia – with its "labor is not a commodity" clause, correlating "lasting peace" and "social justice," and defending "freedom and dignity" – and the 1998 Declaration on Fundamental Principles and Rights at Work[5] are good examples. (International Labor Organization, 1930; 1944; 1985; 1998; United Nations, 1945).

3.1. Japan

Labor norms existed in Japan before World War II but only to complement Civil Law. The in-force 1946 Constitution, having the

4 "Art. 2. 1. For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. 2. Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include: (a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character; (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country; (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations; (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population; (e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services." (International Labor Organization, 1930).

5 "2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation." (International Labor Organization, 1998).

decisive influence from Western liberal democracies, places labor as a right/duty of every citizen and prohibits child exploitation – art. 27. The Labor Standards Act, in turn, fixes work of 40 hours per week and eight hours per day, annual vacations of 10 to 20 days, etc. The Japanese Labor Law has three pillars: (i) long-term/lifetime employment; (ii) direct relation between remuneration and period working for a company; and (iii) trade unions and company-level negotiations. Lifetime employment consolidated itself in the country from the late 1940s to the mid-1960s and helped to recruit skilled workers, usually newly graduated. The idea was to cultivate loyalty between the company and its worker until his/her retirement. (Japan, 1946; 1947; Ninomiya & Tanaka, 1999). However, Araki (2007) affirms that well-secured regular employment has been declining because of recent social transformations in the country and of the worldwide tendency to promote flexible labor systems.

The Japanese mindset is strongly marked by tradition and rule obedience, a fact that comes from the influences of Buddhism, Confucianism, and Shintoism – instituting behaviors towards "social harmony." Confucianism, for example, makes the Japanese State norms only supplementary, as the society naturally respects them; a person understands he/she is only a part of the whole, an agent for social prosperity and stability. Considering work as an extension of his/her family and a contribution to the country, the Japanese worker tends to voluntarily embrace more duties than rights – in line with the *Bushido*, the *samurai*'s code of conduct. *Arigata-meiwaku*, that is, the unasked favor done and which deserves appreciation, is another deep Japanese trace. (Kretschmann, 2008; Ninomiya & Tanaka, 1999).

There are about 2,000 deaths per year in Japan related to overwork. Japan was the first country to ratify ILO Convention No. 187, expressing its effort to strengthen the occupational health and safety system, as well as to change the "overtime culture" in the country. Companies and the Government have taken steps, e.g.: (i) more flexible hours; (ii) power cuts in offices after certain periods; (iii) unexpected inspections; (iv) public exposure of companies that impose abusive overtime and relate to *Karoshi* cases; (v) counseling to companies; and (vi) the "Premium Friday" program, which encourages finishing work at 3 p.m. on the last Friday of each month. (Carreiro, 2007; EFE, 2016; Paterson, 2017).

3.2. Brazil

Arts. 5 to 11 of the in-force 1988 Federal Constitution (CF) list a plethora of social rights, including labor ones. The Consolidation of Labor Laws (CLT) – instituted with Decree-Law No. 5,452/1943 – provided, in its art. 58, that regular working hours shall not exceed eight hours per day. Art. 67 says, in turn, that the employees shall have a weekly break of 24 consecutive hours, usually on Sundays. Nonetheless, Order No. 417/1966 of the Ministry of Labor Affairs and Social Welfare establishes that companies operating on Sundays must grant – observing the norms on working hours and weekly breaks – their employees at least one Sunday of rest every seven weeks of work. Many companies then adopt the so-called "6x2 scheme," i.e. six days of work followed by two days of rest. Order No. 1,293/2017 of the Ministry of Labor defines that a worker is in a "slave-like condition" if he/she is submitted to: (i) exhaustive working hours; (ii) forced labor; (iii) restrictions in his/her right to come and go; (iv) degrading working conditions; (v) seizure of personal documents and belongings; and (vi) overt surveillance. Although this framework may be positive to fight against slave labor, conceptualizing ends up narrowing the possibilities to repress it. (Brazil, 1943; 1988; Ministério do Trabalho - Brazil, 2017; Supremo Tribunal Federal - Brazil, 2012).

Out of the 711,161 cases of labor accidents registered in 2011, 6,482 refer to psychological issues, disorders, severe stress. The Superior Court of Labor (TST) ruled that a truck driver – who used to work 17 hours daily and passed away in a traffic accident – was a victim of a work-related event, forcing his former employer to pay compensation to his heir. Some sugarcane workers in the State of Alagoas, making repetitive strong movements all day long, suffer from a condition known as *canguru* or *birôla*. It is the lack of control over their own bodies, as they experience cramps in their arms, legs, bellies, tongs, etc. These pains may precede muscular, joint, and respiratory conditions, as well as death. These workers – mainly the ones in the State of Sao Paulo – displayed some of the most important news reporting cases of *Karoshi* in the country. (Chehab, 2013; Tribunal Superior do Trabalho - Brazil, 2017; Verçoza & Moraes, 2017).

4. Conclusion

As we notice, workers in some situations may die from overwork – suicide, cardiovascular conditions, etc. – and, thus, need protection. Factors like exaggerated commitment, strict culture, and deep social inequalities may be catalysts for these deaths. With effective inspection/sanctions from public bodies, companies tend to give proper attention to this theme. We should rethink the mainstream behavior: complying with occupational health and safety standards is not only a matter of fees/lawsuits but also positive for society as a whole.

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Uberized workers and dispute resolution in Brazil: Which path to follow?

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Abstract: Technological progress, Industry 4.0, and the gig economy have been causing deep changes in the world of work: some jobs are extinct via automation, and other ones are created via digital platforms – which means a new system of labor contracts, not always perfectly fit in with the traditional Labor Law. Drivers working for Uber Advanced Technologies Group – or for Uber do Brasil Tecnologia Ltda. –, the most popular digital platform for passengers, is a major example. Operating in more than 60 countries and with more than three million drivers registered worldwide, Uber says these workers are partners and considers itself a technology platform – not a transportation company. Even if presented this way, the legal relationship between drivers and Uber is vague and leads to a plethora of disputes. In Brazil, employment relationships between them have been often denied by Labor Courts, which indicates that judicialization is not so useful. This study aims to point out alternatives to classification litigation for them in the country.

Keywords: Brazil; classification litigation; digital platforms; dispute resolution; uberization.

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1. Introduction

"New forces are transforming the world of work. The transitions involved call for decisive action." The International Labor Organization (ILO) identifies challenges and opportunities but also suggests actions to be taken by all related players, including governments, employers, and workers' organizations. Technological progress – especially Artificial Intelligence (AI), robotics, and automation –, Industry 4.0, and the gig economy shape another reality. Such transformations pose worrisome challenges as they terminate a large number of jobs. It is so due to: (i) automation and replacement of human labor; (ii) the demand for better trained, qualified workers; (iii) new types of labor contracts; and (iv) the flexibilization of labor rights. However, innovations may create opportunities due to: (i) decent work – which may be easily achieved through safer equipment, automated unhealthy/dangerous activities, improved communication among workers, etc. –; (ii) productive efficiency; and (iii) new forms of work. (Global Commission on the Future of Work, 2019, p. 10).

New labor morphologies seldom fit in with the traditional Labor Law and may show more job opportunities alongside flexible labor rights. The main example is the routine of drivers working for Uber Advanced Technologies Group – or for Uber do Brasil Tecnologia Ltda. –, which connects around three million drivers and millions of passengers in more than 60 countries. Uber describes itself as a technology company – not a transportation one – and treats its drivers as partners – not as employees. This situation raises questions about their labor status, leading to numerous legal disputes, as in Brazil – where employment relationships between them have been often denied by Labor Courts. Therefore, classification litigation here seems to be not so useful. A factor for this is the all-or-nothing logic permeating the Brazilian Labor Law: if the employment relationship is recognized, the worker is protected by all labor rights, but, if not, he/she is covered by Civil Law. This study aims to indicate alternatives to classification litigation in Uber-driver conflicts in the country.

2. Uberized drivers

"Uber is a technology company that has been transforming the way people move. With the Uber app, you may find a partner driver to take you wherever you want." This is how Uber introduces itself on its Brazilian website. In the country, Uber started offering its services in the cities of Rio de Janeiro, Sao Paulo, Belo Horizonte, and Brasilia in 2014. Less than six years later, Uber operates in more than 100 Brazilian cities, reaching 600 thousand "partner drivers" and 22 million users. (Uber, 2016; 2019).

As there was no specific regulation on Uber in Brazil, different legal approaches were debated on its legality, on classification litigation, on unfair competition against taxi drivers, and on no/less protection for consumers. In May 2019, the Federal Supreme Court (STF) said – in Claim of Non-compliance with a Fundamental Precept (ADPF) No. 449 and in Extraordinary Appeal (RE) No. 1,054,110 – that Municipal Acts prohibiting app-based individual transportation services are unconstitutional. Measures like them violate the principles of free enterprise, of work's social value, of free competition, of professional freedom, and of consumer protection. (Supremo Tribunal Federal - Brazil, 2019a; 2019b). However, the Uber drivers' status remained unsettled. It is "work-on-demand via apps," i.e.:

> jobs related to traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, are offered and assigned through mobile apps. The businesses running these apps normally intervene in setting minimum quality standards of service and in the selection and management of the workforce.
> (De Stefano, 2016, p. 474).

Uber drivers transport passengers when they are called via its app, which retains 20% to 25% of the rides' amounts. (Abílio, 2017; Franco & Ferraz, 2017, p. 3). This fluidity directly impacts working conditions, as there is no tangible projection to remuneration. Drivers may work harder expecting a greater payment, a situation that exposes them to longer working hours – sometimes more than 10 hours daily. Their complaints are many: (i) Uber charges abusive percentages to make its app available to its drivers; (ii) the costs for vehicle maintenance are

high; (iii) the lack of regulation leads to job insecurity; (iv) the drivers depend too much on the evaluation submitted by the consumers – the so-called "five-star rating system" –; (v) urban violence frightens their work; (vi) refusing rides is not simple; and (vii) the drivers may be sanctioned – even having their profiles canceled – by the app. (André, Silva, & Nascimento, 2019; Uber, 2016). The gig economy is founded on short-term engagements of workers, employers, and customers (Kalleberg & Dunn, 2016, p. 10), and uberization:

> allows shedding not only potential vicarious liabilities and insurance obligations towards customers but also a vast series of duties connected to employment laws and labor protections, including – depending on the jurisdiction – compliance with minimum wage laws, contributions to social security, antidiscrimination regulation, sick pay and holidays.
> (De Stefano, 2016, p. 479).

Classification litigation has been disseminated in the country, and norms try to resolve this issue: (i) Resolution No. 148/2019 of the Steering Committee of the *Simples Nacional* Tax Scheme (CGSN), which included "independent app drivers" in the National Classification of Economic Activities (CNAE) – CNAE No. 4929-9/99 – and allowed Uber drivers to be individual microentrepreneurs (MEI); and (ii) Law No. 13,640/2018, which altered the 2012 National Policy on Urban Mobility Act[3]. (Brazil, 2018; Comitê Gestor do Simples Nacional - Brazil, 2019). Although these norms indicate that Uber drivers may be considered independent contractors, the discussion remains.

3. In the Courts

Taking into account the Brazilian labor principle that makes the real conditions prevalent over the contractual form, Uber drivers are employees because the elements of the employment relationship – i.e. the worker is subordinated, economically dependent, personally hired,

3 "X - individual private paid transportation of passengers: paid transportation service of passengers, not open to the public, for individualized or shared rides requested exclusively by users previously registered in apps or in other platforms of network communication." (Brazil, 2018).

and designated to habitual activities – are verified. Art. 2 of the Consolidation of Labor Laws (CLT) must then be applied. (Rodriguez, 2000). However, these elements may not be recognized in the relation, and the drivers may be deemed independent contractors. (Consultor Jurídico, 2018; Migalhas, 2018).

Aquino and Pasqualeto (2019, p. 78) analyzed all sentences about Uber-driver relationships in the Regional Labor Courts (TRTs) and in the Superior Labor Court (TST) issued until September 2018. In 81% of the cases, the employment relationship was denied and, therefore, the uberized drivers were entitled to no labor rights. Nonetheless, a decision from the Superior Court of Justice (STJ) – which is not specialized in labor matters – called our attention: the one in Conflict of Competence (CC) No. 164,544, State of Minas Gerais (MG), between the City of Pocos de Caldas 1st Labor Court and its Special Civil Court. The STJ declared that Uber drivers are independent contractors:

> 1. The *ratione materiae* competence, as a rule, is a matter prior to any judgment on other types of competence and, being determined according to the legal nature of the claim, arises directly from the request and the cause of action deducted in court. 2. The factual and legal grounds of the case do not concern any employment relationship between the parties, nor do they convey the claim to receive labor amounts. The claim stems from the contract signed with a company that owns a mobile application, of an eminently civil nature. 3. The technological tools currently available have made it possible to create a new form of economic interaction, giving rise to the sharing economy, in which the provision of services by owners of private vehicles is mediated by apps managed by technology companies. In this process, the drivers, who carry out the activity, act as individual entrepreneurs, with no employment relationship with the company that owns the platform. 4. It is incumbent upon the State Court to judge the action on the obligation to do [something] combined with the compensation for material and moral damages filed by an app driver, who intends to reactivate his UBER account so that he can use the app again and perform

> his services. 5. The conflict is acknowledged to declare that the State Court is competent.
> (Superior Tribunal de Justiça - Brazil, 2019).

This STJ decision reaffirmed the trend shown by the Labor Courts, i.e. leaving Uber drivers outside the Labor Law protection.

4. Alternative paths

Considering that the Judiciary has not been offering adequate protection, we search for alternative paths. For instance, there are Federal Bills (PLs) aiming to: (i) classify app-based drivers as employees; and (ii) limit the fees that drivers have to pay to the apps. PL No. 5,069/2019 – which incorporated many other PLs – was elaborated by Federal Deputy Gervásio Maia – Brazilian Socialist Party, State of Paraiba (PSB-PB). This PL tries to frame the app provider related to land transportation as an employer and its driver as an employee if he/she:

> carries out the activity of a driver, in a personal, onerous, habitual, and subordinated way, via companies that operate land transportation apps, except for those who carry out his/her activity occasionally.
> (Câmara dos Deputados - Brazil, 2019b).

According to the Justification of this PL:

> The California State Senate passed a law on Tuesday, September 10th, 2019, that may radically alter the labor relations on ride-hailing app platforms, like Uber and Lyft, recognizing the employment relationship between the drivers of these apps and the companies that operate the transportation app system. However, the matter is far from being settled in Brazil. In a recent decision, the Second Section of the Superior Court of Justice - STJ understood exactly the opposite, when establishing the competence of the Common [State] Court and not of the Specialized Labor Court to judge the causes arising from these labor relationships, deciding that the app driver is an independent contractor, with no employment relationship, creating a real atmosphere of legal uncertainty. It is precisely

> because of this legal uncertainty that we choose to present this proposal to be led to the Parliament, a genuine stage of democracy. According to *Agência Brasil* in an article published on August 30th, 2019 (agenciabrasil.ebc.com.br), in Brazil there are already more than 1,500 drivers of apps like Uber, Cabify, and 99 registered as individual microentrepreneurs (MEI). App drivers were allowed to join the MEI scheme in August, in the category of other unspecified road transportation of passengers.
> (Câmara dos Deputados - Brazil, 2019b).

Another initiative is PL No. 448/2019, authored by Federal Deputy Igor Timo – Podemos Party, State of Minas Gerais (PODE-MG) –, which sets a maximum fee to be charged by individual private paid transportation companies. This PL resumes a proposal of Federal Senator Lindbergh Farias – Workers' Party, State of Rio de Janeiro (PT-RJ) –, who pointed out the following:

> The company Uber, a large multinational whose market value has already exceeded USD 70 billion, higher than that presented by Ford or by General Motors, usually argues that it is not a transportation company, but a technology one, and that its "workers" are, in reality, "partners," who are free to define how many hours and when they want to work. It also usually declares that the company does not hire drivers; the drivers are the ones who hire Uber services. Toward an atypical, and why not predatory, market situation, the proposal aims to limit the transfer that the drivers are currently obliged to make to the companies, a real spoliation of 20% to 25% of the ride's price. By the new law, it is intended that, in any circumstances, such transfer does not exceed 10%. It should be noted that the maintenance costs of Uber, as well as other similar companies, are very low, as it is intermediation automated by the software itself provided to the drivers.
> (Câmara dos Deputados - Brazil, 2019a).

After this Legislative analysis, we focus on any other legal institution that plays meaningful roles in this scenario. The Labor Prosecution Service (MPT), through its National Coordination to Fight

Against Frauds in Labor Relations (CONAFRET), created a study group on Uber (GE Uber) to better understand its challenges. The GE Uber states that employment relationships should be recognized when the requirements of the CLT, art. 3, are met. (Weissheimer, 2019).

Finally, we look around own drivers' initiatives and find self-declared trade unions and other associations to represent them. In 2017, the Trade Union of the Self-employed Drivers of Individual Private Transportation by Apps (SINDMAAP) was founded in Distrito Federal, perhaps the first trade union of this type; its success in negotiations remains nonetheless to be seen. Also noteworthy are the Association of App-based Drivers of Pernambuco (AMAPE), the one of Sao Paulo (AMASP), and the one of Brazil (AMPAB). They inform drivers about relevant issues in their routines – for example, car insurance. (Associação dos Motoristas de Aplicativo de São Paulo, 2019; Sindicato dos Motoristas Autônomos de Transporte Privado Individual por Aplicativo no Distrito Federal, 2017).

5. Conclusion

Although the Judiciary recognizes in some cases the employment relationship between Uber and its drivers, and we see great initiatives in the Legislative and among drivers – which is certainly very much welcomed –, firmer social protection addressed to them does not exist. Registering as MEI – which is not so convenient because the drivers tend to be seen as independent contractors – may be positive too. Besides extending the employment protection and promoting better legal/economic balances – e.g. via lower app charges –, the Legislative may be essential even to create a "third status," between independent contractor and employee. Limiting app use by eight hours daily – but permitting the work for different apps –, establishing rest breaks – as we notice in the routine of some truck drivers –, and fostering the role of trade unions are other good measures. Supiot (1999) shows that Labor Law is a guide even to workers who are not employees, which means that the protection it offers may be adapted to specific situations. We support this reasoning applied to uberized workers.

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This book is an initiative of the Superior School for Lawyers of the Brazilian Bar Association, Sao Paulo Branch (ESA-OAB-SP) in partnership with the Research Group on Migration and International Labor Law (GEMDIT), School of Law, University of Sao Paulo (FD-USP). Its coordinators and editors are Prof. Antonio Rodrigues de Freitas Júnior – the ESA-OAB-SP Pedagogical Coordinator and the GEMDIT Leader – and Prof. Jorge Cavalcanti Boucinhas Filho – a former ESA-OAB-SP Director and the GEMDIT Vice-Leader. The authors of the articles are professors, researchers, and students, with academic and practical experiences. The topics covered are various, such as Environmental Law, Comparative Law, Family Law, Digital Law, Labor Law, International Law, and Alternative Dispute Resolution (ADR). Many articles written for this publication refer to the "Brazil-Japan Litigation and Society Seminar 2: Cultural Diversity and Global Challenges," which took place on September 16th-17th, 2019, at the FD-USP (https://sites.usp.br/gemdit/eventos/brazil-japan-2/).

ISBN: 978-65-87351-46-9
9 786587 351469