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THE IMPORTANCE OF PRESERVING THE NORMATIVE-PRINCIPLE STRUCTURE OF LABOR LAW AND PROCEDURE IN THE CONTEXT OF THE CONSTITUTIONAL RULE OF LAW[1]

Gabriela Fonseca de Melo
Master's Degree in Constitutional Law from the Instituto Brasileiro de Desenvolvimento e Pesquisa (IDP); Postgraduate in Systemic Law from the Faculdade Innovare e Hellinger Schule; Postgraduate in Labor Law and Procedure from the Faculdade Mackenzie de Brasília; Graduate in Law from the UDF Centro Universitário; Public Servant at the Superior Labor Court
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1. This essay has already been published in Portuguese in the Revista de Direito do Trabalho e Seguridade Social (RDT), ano 50, volume 235, mai./jun. 2024, p. 175-194.

Abstract: This essay investigates the formula "Rule of Law" and its transformation into the Constitutional Rule of Law in order to assert that in this last stage, when the process of constitutionalization of Law took place, there was the emergence of Labor Law and Procedure - equally constitutionalized - which developed and consolidated themselves imbued with their own principles and rules, as well as precedent norms calling for respect and consideration by the constitutional court. The second part of the research investigates three judgments handed down by the Supreme Court - ADIs. 5.766, 1.721 and 1.770 and RE 760.931 - with the aim of reflecting on the limits of its action, both in terms of hermeneutics and procedure. The first and second cases involved the problem of judicial interpretation, while the third case dealt with non-compliance with a fundamental procedural rule aimed at the preliminary phase prior to judgment - general repercussion. A bibliographic methodology was used, accompanied by the collection of court decisions that served as evidence of the Supreme Court's inappropriate interference in the normative-constitutional-labor structure.
Keywords: Constitutional rule of law. Federal Supreme Court. Interference. Limits of action. Normative-constitutional-labor structure.

INTRODUCTION

The Law is configured in such a way that there is a logical, coherent and comprehensible structure of procedural and substantive rules stemming from the Constitution and infra-constitutional legislation. Within this normative arsenal, it is possible to find a range of institutes and canons - which carry certain purposes in their composition - that also make sense if they are coherently ordered.

The process of constitutionalization of law has ushered in a new conception of law and a new constitutional court, which has taken on a major role and responsibility as a result of the expansion of its powers. It now acts as a court that can also create law based on the needs and specificities of concrete cases. This is because the context of societies, following the atrocities of the two Great Wars, has led to a change of vision: the focus is on humanity and the substantiality of its legal issues.

It was in this context of change that the construction of Labor Law and Procedure began, based on ethical-Kantian principles and norms to try to compensate for the fragility of the most vulnerable - the employee - in the legal relationship they establish with their employer. And so, over time, labor regulations were established based on legal rules and precedent norms, many of which are in force and operative in our contemporary times - because they are timeless.

Given the breadth of the constitutional court's powers, it has been noticed[2] that its actions often go beyond jurisdictional limits. This is detrimental to the jurisdiction from the point of view of: 1) the functionality of the normative structure of certain branches of law - such as labor law - by disfiguring or deconstructing this structure; and 2) the justice system, as it does not allow the apex court - such as the TST - to act, as it is in charge of judging specific issues that affect it and, for the most part, have already been established in precedent rules.

2. This situation has been noticed for a long time. The name "judicial activism" has been coined for it. "Even without using this expression, countless decisions in history have been criticized for being seen as abusive, going beyond the limits of judicial authority by disregarding legal boundaries, as well as political choices as legitimate. This issue became more burning after the founding of the United States and the adoption of constitutionality control. As early as the late 18th and early 19th centuries, Thomas Jefferson and members of the then Democratic-Republican Party criticized the actions of the judiciary for disrespecting the will of the people and undermining democracy. They also criticized the use of improper interpretive methods, with a weak analysis of written legal sources and a partisan approach to the Constitution. A few decades later, it was Abraham Lincoln's turn to fight a hard battle against decisions by the Judiciary that he considered, in addition to being mistaken, to be invasive of the legitimate space of the other constitutional powers responsible for governing the country" (ULIANO, 2022, p. 22).

When the constitutional court deviates from a well-defined and ordered normative structure, it can be said that it has exceeded its jurisdictional limits. This occurs through the "use of interpretation techniques that allow almost any order of judgment" or "through misunderstandings of institutional reading, which place on the Judiciary functions that are alien to it" (ULIANO, 2022, p.20).

This essay is divided into two parts. The first deals with the dogmatic-conceptual journey of the formula "Rule of Law" until it leads to its new configuration "Constitutional Rule of Law", when the structuring of Labor Law and Procedure and its subsequent consolidation emerges. In the second moment, space opens up to reflect on how far the constitutional jurisdiction goes. Are there limits to the constitutional court's actions, even with its powers expanded as a result of the constitutionalization process? What are these limits? These questions arose after analyzing three judgments (ADIs. 5.766, 1.721 and 1.770 and RE 760.931), which show that the Federal Supreme Court does not feel constrained to act far from the limits demarcated in the normative-constitutional-labor structure.

THE EMERGENCE OF THE PRINCIPOLOGY AND NORMATIVITY OF LABOUR LAW AND PROCEDURE FROM THE PROCESS OF CONSTITUTIONALIZATION OF THE RULE OF LAW

The rule of law, in its humanist conception and organization of life in society, presupposes value and virtue. This is because it is through law that society can be shaped to achieve a certain degree of security, autonomy and dignity, as well as preserving it against arbitrary acts promoted by those who assume a position of power in the executive, judiciary and legislative bodies.

This is done through publicized law - in a timeless and universal idea, from the birth of the oldest organizations (ULIANO, 2022) to the present day - which organizes and delimits the rules of social coexistence between men and imposes rights, duties and responsibilities on everyone - citizens and public authorities. In its sense of value, the Rule of Law is averse to excesses and needs to be preserved in order to guarantee the stability of public order, bring predictability and security of law for healthy coexistence.

In a State governed by the rule of law, the rule of legality *lato sensu* conveys peace of mind and a sense that institutions are in order and functioning normally. It also shows that life in society is moving along in an orderly fashion and with a certain certainty of expectations, in which people can relate to each other without conflict. This is because they are subject to rules of conduct that are systematically organized in their community (MELO, 2022). Law, in essence, consists of precisely this: an "institutional normative order" that is essential for people to orient themselves on the basis of a rule of law that encompasses "an orderly and systematic body [set] of norms" (MACCORMICK, 2005, p.2).

This formula, coined *Rule of Law by* the Anglo-Americans, began to reach a deeper dimension of the meaning of the law (in its formal sense of abstraction and generality). This is when the state began to adhere to the format of the constitutional rule of law in order to respond to the substantial problems that began to emerge, especially in the post-war period (after 1945).

In this new format, rather than allowing the State of men to continue, it is in fact "a profound transformation that necessarily affects the conception of law" (ZAGREBELSKY, 2011, p.34) and even the jurisdictional function.[3]

3. See these changes in more depth in: MELO, Gabriela Fonseca de. Op. cit., p. 74-75.

There has been, so to speak, a process of constitutionalization in which the focus is no longer solely on the individual, but on a heterogeneous society imbued with claims and interests. Humanist problems are transformed into human rights established in treaties, charters of rights and constitutions. And the language of rights is embodied in diversity, encompassing polysemic meanings, aspirations, ideals and conceptions of social life in all directions.

In this configuration, there is the ethical--Kantian component[4] - in which human dignity becomes an essential normative vector to serve as a guide for everyone -, the philosophical idea of perennial human mutability[5] - the reason for the inevitable emergence of new universal rights[6] - and the value of equity acting in the material or substantial sphere of rights.

The Constitutional Rule of Law encompasses the concept of the Social Rule of Law, which has

> double characterization of the constitutional regulation of the economy: the constitutionalization of property rights and free enterprise and the State's valorization of demands for justice, either as protection of rights or as immediate affirmation of objective needs of general scope (ZAGREBELSK, 2011, p. 102).

An example of a collision between "values of justice" and "economic rights" is: "health can be harmed by certain forms of work organization; the environment, by certain types and modes of production" (ZAGREBELSK, 2011, p. 103).

In Brazil, workers' social rights were incorporated into the Constitutional Charter, in Article 7, as fundamental rights and, therefore, have an axiological function of enlightening and directing state bodies (vertical effectiveness) and private individuals (horizontal effectiveness) in their relations[7]. As such, the state, in its judicial activity, has a duty to ensure that they are respected, and it does so when it judges cases in which the interpretation and application of infra-constitutional laws are carried out in accordance with these rights. Fundamental procedural rights, which are also included in the Brazilian Constitution, must be applied to all types of legal relationships - including just labor relations.

Since then, Labour Law[8] (and then Labour Procedure) has been institutionalized - a typical product of the 19th century, when all the changes necessary for the formation of free but subordinate labour took place, and a new socio-political-economic and legal conception[9] - and the approach to its own principles and its extremely specialized normative

4. Kant's ethical philosophy, which expresses that "every human being has a legitimate right to respect from his fellow human beings and is in turn obliged to respect everyone else. Humanity itself is a dignity, for a human being cannot be used merely as a means by any human being (either by others or even by himself), but must always be used at the same time as an end" (KANT, 2003, p. 307).

5. "Certes c'est un subject merveilleusement vain, divers, et ondoyant, que l'homme: il est malaisé d'y fonder jugement constant et uniforrme" (MONTAIGNE, Michel Eyquem de. **Les Essais**: livre I. Éditions eBooksFrance).

6. When it comes to technological innovation in medicine, a special case is the development of bioethics, which also involves an abundant field for the creation of legal theories, something that was never imagined to exist until then. It addresses, for example, the issue of anonymous donors of genetic material and the debate around the fundamental right to knowledge of parentage or ancestry. See UNESCO's **Universal Declaration on Bioethics and Human Rights** and literature by Stela Marcos de Almeida Neves Barbas, especially, **Direito do Genoma Humano**. Coimbra: Almedina, 2016.

7. This topic is dealt with in depth in: SARLET, Ingo Wolfgang. **The Effectiveness of Fundamental Rights**. Porto Alegre: Livraria do Advogado, 2011, p. 143-147.

8. In Brazil, its most intense phase took place in the 1930s. See: BRAZIL, TST. 80 Years of Labor Justice Exhibition. The 1930 Revolution, the Institutionalization of Labour Law and Procedural Labour Law in Brazil and Labour Justice (Vargas Government, 1930 to 1945).

9. This phase began shortly after the First World War (1914-1918), and its milestones were the Weimar Constitution and the creation of the ILO in 1919. The phase of incipient or sparse manifestations began with the Peel's Act (1802), an English law designed to set certain restrictions on the use of child labor. This phase is characterized by the existence of laws aimed solely

rules was inaugurated in the quest to balance the subjects of the employment relationship, which are, by nature, asymmetrical. And from then on, Labor Law was thought of in a way that gave prestige to the legal position of the employee, who is materially and procedurally more fragile in the labor legal relationship (MELO, 2017, p. 53).

The new material and procedural labor order took shape from the construction of its own principles, derived from legal study with an eye to the motivations that emerged on the practical level of the relationships between employers and employees. The basic principle guiding procedural and substantive labor law is the principle of protection, which aims to re-establish the balance between the subjects of the employment relationship, in order to achieve real and substantive equality between the parties, based on "compensating for economic inequality unfavorable to the worker with legal protection favorable to him" (RODRIGUES, 2000, p. 85).

The Brazilian legislature gradually began to adopt protection as a principle to inspire the issue of labor standards containing workers' social rights and certain guarantees to provide a balance in the legal-labor relationship. An example of this is the Consolidation of Labor Laws.

Likewise, for the State-judge, the principle of protection[10] - the guiding vector of the body of material and procedural labor law (RODRIGUES, 2000) - must be taken into account in their hermeneutic work, since, according to Plá Rodriguez, "constitutes a general principle that inspires all labor law rules and must be taken into account in their application" (RODRIGUES, 2000, p. 100). 100); therefore, it is possible to say that it is a normative principle[11] of moral imperativeness of a cogent nature because it holds the essence of positive labor law.

The emergence of this protective principle and its importance for the drafting and application of labor law stems from the process of constitutionalization of the rule of law - and is therefore inherent to the constitutional rule of law. This is because it is allied to the spirit enshrined in Kantian philosophy, the perspective of human mutability in its relationships and the principle of equity as a matrix of inequality[12] in order to achieve substantial equality based on the legal positions of the procedural subjects and the factual specificity of each case *in* concreto. Knowing that the employee is at a permanent disadvantage in the legal relationship - even more so with

at reducing the brutal violence of corporate overexploitation of women and minors. Laws of a humanitarian nature, built unsystematically. The labour law spectrum is still dispersed - without giving rise to its own autonomous branch of law (...) The second phase of labour law in the central countries is characterized by the systematization and consolidation of this specialized branch of law. It extends from 1848 until the process following the First World War, with the creation of the ILO and the promulgation of the Weimar Constitution, both events occurring in 1919. The starting point for this second phase is not only the Communist Manifesto (1848) but also the mass movement known as the Chartist movement in England and the 1848 Revolution in France (...)" (DELGADO, 2011, p. 95-96).

10. The generic principle of protection, which is linked to the very raison d'être of Labor Law, manifests itself through three rules or application criteria: the *in dubio*, pro operario rule; the rule of the most favorable norm and the rule of the most beneficial condition. See how its applicability works in RODRIGUEZ (2000, p. 107, 111-113).

11. Robert Alexy teaches that principles and rules are norms, because "they both say what ought to be" and "can be formulated by means of the basic deontic expressions of duty, permission and prohibition. They can "be reasons for decisions, that is, for concrete judgments of ought" (ALEXY, 2014, p. 87 and 107).

12. Attention should be paid to the legitimate criterion that allows people and situations to be differentiated for the purposes of different legal treatments. Celso Antônio Bandeira de Mello rightly taught: "equality is attacked when the differentiating factor adopted to qualify those affected by the rule has no logical relationship with the inclusion or exclusion of the deferred benefit". The jurist goes further into the subject by saying that it is necessary to "investigate, on the one hand, what is adopted as a discriminatory criterion; on the other hand, it is necessary to verify whether there is a rational justification, that is, a logical basis, for, in view of the unequal trait accepted, attributing the specific legal treatment constructed as a result of the inequality proclaimed. Finally, it is important to analyze whether the correlation or rational basis that exists *in the* abstract is, *in concrete terms, in* line with the values honored in the constitutional normative system" (MELLO, 2000, p. 38).

the range of innovations and technologies that often reduce workers to the status of objects or even exclude them from the job market - these three pillars are fundamental in the work of creating and applying legal rules.

The labor law branch needs to be well understood in its historical tradition of creating and applying law and respected by the legal community and institutions, taking into account its own arsenal of principles and the *modus operandi* used by the labor courts in their hermeneutic work. When you don't know, you don't understand. If you don't know, it's wise to respect the boundaries of the unknown and avoid hasty judgments.

THE LIMITS OF THE SUPREME COURT'S ROLE IN A DEMOCRATIC STATE OF LAW - THE JUDGMENTS OF ADIS. 5.766, 1.721 AND 1.770 AND RE 760.931

The *Rule of Law* is elevated to a guiding principle for the conduct of public agents - including judges - so that they must act within a legal framework [material and procedural] that is imposed (ULIANO, 2022).

It is often perceived that the Supreme Court goes beyond the limits set by the law and ends up withdrawing the normativity long established by the Labor Courts through their precedents, when it should be self-restraining.

Even if subtly, one can see that it is working with hermeneutics in a manipulative way, when it gives the Constitution the power of ubiquity, as if all legal rules and solutions originated from it. Or, sometimes, when it is observed that there is no definition (or even if there already is) of a certain constitutional (or infra-constitutional) labor issue by the Superior Labor Court, the Supreme Court gets involved in facing it, when its behavior should also be passive (of not deciding) and let that court analyze the issue, or at least act through institutional dialogue that would do much good for the health of the democratic constitutional process.

In a recent amendment to the Consolidation of Labor Laws, by means of Law 13.467/2017, several social actors challenged many of them through the abstract control of constitutionality, as they affront basic legal principles and norms of Labor Law inserted in the dimension of the pillars discussed above. Some of the labor rules that have been modified, despite having been challenged before the Supreme Court, have not been assessed in full compliance with the constitutional principles of labor or with the normative tradition systematized in the law in accordance with the Magna Carta and followed for years by the Labor Courts.

An example of this is the Supreme Court's declaration of the constitutionality of article 844, paragraph 2, of the CLT[13] in the judgment of ADI 5.766/DF (2022). This legal provision states: "In the event of the absence of the claimant, he will be ordered to pay the costs calculated in accordance with art. 789 of this Consolidation, even if he is a beneficiary of free justice, unless he proves, within fifteen days, that the absence was for a legally justifiable reason". The justification[14] given by the draftsman of the judgment, Justice Alexandre de Moraes, for declaring paragraph 2 of article 844 of the CLT to be constitutional, was that it

13. "Art. 844 - The failure of the claimant to appear at the hearing shall result in the complaint being filed, and the failure of the defendant to appear shall result in default of appearance, as well as confession of the facts (...) Paragraph 2. In the event of the claimant's absence, he shall be ordered to pay the costs calculated in accordance with art. 789 of this Consolidation, even if he is a beneficiary of free justice, unless he proves, within fifteen days, that the absence was for a legally justifiable reason."

14. "The law actually provided for something reasonable, another requirement - which is why I don't think it's unconstitutional - for the recognition of free legal aid: not only hypo-sufficiency, but also the obligation for the hypo-sufficient to attend all procedural acts. In my opinion, this is an absolutely reasonable requirement, as it involves a minimum level of cooperation for the exercise of jurisdiction, in the context of the state's willingness to protect workers' claims without requiring initial costs. It should be noted that the provision also establishes that, in the event of non-attendance, the worker still has fifteen days to prove that the absence was for a legally justifiable reason" (STF, ADI 5.766-DF, 2022, p. 124).

was a requirement: "not only that the person be hypo-sufficient, but also that the hypo-sufficient person be obliged to attend all the proceedings". And in this vein, costs are charged when the plaintiff does not attend the opening hearing and does not provide legal grounds to justify his absence.

Now, an interpretation that is in line with the Federal Constitution would take into account the fundamental right to free legal aid for those who present a declaration of miserability - art. 99, § 3, of the CPC (STJ, 5th Panel, REsp 243.386/SP, rel. Min. Félix Fischer, j. 16.3.2000, DJ 10.4.2000, p. 123) traditionally applicable to the Labor Court (art. 769 of the CLT) - or prove insufficient resources (art. 790, § 3 and 4, of the CLT c/c art. 5, LXXIV, of the Constitution).

In fact, there is a conflict of rules between art. 844, § 2, of the CLT and art. 790, § 4, of the CLT, since the latter is clear in stating - in line with art. 5, LXXIV, of the Constitution - that the "benefit of free justice will be granted to the party that proves insufficient resources to pay the costs of the proceedings".

In this case, the Supreme Court failed to assess the labor law provision from the perspective of the philosophy of Labor Law and Procedure explained in section 1 of this essay. There is an arsenal of principles to protect the hyposufficient worker. Paragraph 2 of article 844 of the CLT stipulates that an employee benefiting from free legal aid must pay costs if he or she does not prove, within fifteen days, that the absence was due to legal justification.

One of the pillars discussed above refers to the principle of equity as a matrix of inequality to achieve substantial equality, taking into account the legal positions of procedural subjects and the factual specificity of each specific case. This pillar must be taken into account both when drafting the law and when checking its constitutionality.

It is unwise to create economic obstacles and make an inadequate equalization of the hyposufficient worker - whose vulnerability is natural in the relationship with the employer - as if it were a civil relationship.

It is clear that the decision to declare the constitutionality of the legal precept was based on economic analysis and excessive litigation in the Labor Courts, which creates a burden for the state. Thus, the penalty included in the legal text - payment of costs - would be a way of discouraging the hyposufficient employee from "uncompromising" litigation[15] - Parliament's justification for creating the legal text.

In truth, the Supreme Court's decision denies validity to the Federal Constitution, when the constitutional text is clear that those who lack resources have the full support of the State to sue the Judiciary to see their rights ensured (art. 5, LXXIV). No law "shall exclude any injury or threat to a right from the appreciation of the Judiciary" (art. 5, XXXV). This is a self-applicable rule and, as Justice Rosa Weber said in her vote, this provision "does not establish that only the litigant who is right has the right to have their claim heard", anyone - even more so the poor - has the right to claim before the State-Judge.

Creating even more economic obstacles, given the socio-economic situation in an emerging Latin American country, means not allowing poor employees access to the courts - it means increasing their poverty. This access is not linked to the outcome of the case - whether it will be successful or not - but to the hope that they will have the state's judicial protection, even if they are unsuccessful.

15. "With regard to Paragraph 2 (combined with Paragraph 3) of Article 844, which regulates the procedural consequences for the unjustified non-attendance of the parties at the hearing, the measures were based on the purpose of "inhibiting uncompromising demand", to avoid neglect, "which generates a burden for the State". Once again, the emphasis is on discouraging uncompromising litigation" (STF, ADI 5.766-DF, 2022, p. 209).

There is an ethical-Kantian dimension of great importance, which is precisely to look at the individual as an end and not a means, based on their dignity - the state exists for the sake of the human person and not the other way around. So, if the constituent legislator gave him full and free access because he is in need, this intention must be respected as a pillar of access to democratic and fair judicial protection, and he cannot - on the pretext of excessive and uncompromising litigation, which even generates costs for the state - restrict this essential fundamental right. Giving greater prominence to the state's financial aspect ("burden on the state") than to the poor individual implies an inversion of ethical values.

It is not possible to be indifferent to the economic obstacles surrounding the hyposufficient employee and yet create new restrictions and penalties that prevent them from participating in life in society as a true citizen who wants to see their rights guaranteed. There is already a penalty for employees who fail to comply with the command to attend the hearing (art. 732 of the CLT)[16] which is the loss of the right to complain before the Labor Court for a period of six months. One more penalty implies creating yet another burden for the hyposufficient employee.

Effective judicial protection, embodied in Article 5, XXXV, of the Federal Constitution, must always be seen as a right that must be facilitated by the judge and legislator and, therefore, the State cannot create obstacles to access to jurisdiction. As Luiz Guilherme Marinoni pointed out, the most obvious obstacle "to effective access to justice is the cost of the process" (MARINONI, 2014, p. 197). The Brazilian jurist continues:

> In fact, legal costs, the cost of hiring lawyers and the cost of producing evidence can hardly be taken out of the parties' budgets, so they will have to make sacrifices. (...)
>
> The cost of the process can prevent citizens from bringing an action, even if they are convinced that their rights have been violated or are being threatened with violation. This means that, for financial reasons, a significant proportion of Brazilians may be forced to give up their rights. However, it is clear that there is no point in granting rights and appropriate procedural techniques and not allowing the process to be used because of economic obstacles.
>
> It is for no other reason that the Federal Constitution, in its Article 5, LXXIV, states that 'the State shall provide full and free assistance to those who prove insufficient resources' (MARINONI, 2014, p. 197-198).

Therefore, instead of interpreting the law in accordance with the Constitution[17], the Supreme Court did the opposite.

In another situation that occurred prior to the Labor Reform Law, it is also possible to see the Supreme Court's action in emptying the normative tradition of the Labor Courts with regard to the effects of retirement on the employee's initiative (spontaneous) and dismissal without just cause. This is the judgment of ADIs. 1.721 (2007) and 1.770 (2023) involving questions about paragraphs 1 and 2 of art. 453 of the CLT. In summary,

16. Art. 731 of the CLT: "Anyone who, having submitted an oral complaint to the distributor, does not present himself, within the period established in the sole paragraph of art. 786, to the Board or Court to have it taken down, shall incur the penalty of losing, for a period of 6 (six) months, the right to complain before the Labor Court." Art. 732 of the CLT: "The same penalty as in the previous article shall be incurred by the claimant who, for two (2) consecutive times, gives cause for the filing referred to in art. 844."

17. "The unconstitutional law or the law whose literal application leads to a judgment of unconstitutionality must be declared unconstitutional. A law which, in principle, suggests an unconstitutional interpretation, should not be declared unconstitutional if it can be saved by using the technique of 'conforming interpretation'. The technique of 'conforming interpretation' is not intended to allow the choice of the interpretation that best fits the Constitution, but to exclude the unconstitutional interpretation and to define the interpretation that confers constitutionality to the rule. This is constitutionality control" (Cf. MARINONI, 2014, p. 96).

the position prevailed that spontaneous retirement should be equated with dismissal without just cause on the employer's initiative, and thus the employment contract should continue after the retirement application.

The Supreme Court considered that the spirit of the law was to attribute to spontaneous retirement (by the employee's own will) the effect of extinguishing the employment relationship, creating a new type of termination of the contract without just cause[18] and, therefore, attracted the compensation provided for in art. 7, I, of the Constitution[19]. In this way, it declared the unconstitutionality of §1 of art. 453 of the CLT, which has the effect of extinguishing the contractual relationship following the employee's own request for retirement.

The conclusion, in agreement with jurists Fábio Quintas and Fernando Miranda, is that the Supreme Court

> held that the institute of termination of the employment contract would have its general premises already established in the Constitution itself, so that it would not be up to the legislator to establish new benchmarks, according to the values of legislative policies that it deemed appropriate. In fact, the Court started from the premise, albeit subliminally, that the foundations for building the institute of termination of employment contracts have a constitutional basis, all based on hermeneutics based on the text that refers to protection against "arbitrary dismissal or dismissal without just cause (QUINTAS; MIRANDA, 2020, p.183).

In 2004, even after the preliminary injunction in ADI 1.721, which took place on December 19, 1997, the TST continued to take the position that retirement terminates the employment contract, without the right to compensation, because, in essence, it considered that the rules of the CLT and those of a social security nature are distinct. He invoked the doctrine of João de Lima Teixeira Filho, which explains the Labor Court's understanding well:

> The option that Law 8.213/91 gave workers regarding how to retire has effects limited to social security procedures. There is no extension of this field to produce effects on the form of termination of the employment contract, which has completed its vital cycle. (...)
>
> Etymologically, to retire comes from the Latin intransitive verb 'pausare', which means to set down, stop, cease, rest, take up quarters. It corresponds, in French, to the verb 'retirer' or 'retraiter', which means to withdraw, isolate oneself, retire to one's home, and in English, to the verb 'to retire': to go away, to retire.
>
> As you can see, both in ancient Latin and in modern languages, to retire always has the meaning of going to one's quarters, i.e. ceasing daily activities, moving away from one's commitments, business or profession.
>
> Retirement, in labor terms, is the exercise of a subjective public right held by the employee, the inescapable consequence of which is the exhaustion of the contractual obligations in force until then. The employment contract ends when retirement is granted (...) (E-RR-628600-46.2000.5.12.5555, 2004).

It concluded that "the retired employee is not prevented from working and is allowed, through a new employment contract, to carry out any activity, not forgetting the rule in article 453 of the CLT". It confirmed the decision handed down in the appeal, which stated that "the consolidated rule is specific

18. "It so happens that the novelty of §2 of art. 453 of the CLT, which is the subject of this ADI, instituted another form of termination of the employment relationship. And it did so entirely outside the scope of serious misconduct by the employee and even the will of the employer. The fact is that the act itself of granting voluntary retirement to an employee now implies automatic termination of the employment relationship (...)" (STF, ADI 1.721/DF, 2007).

19. Art. 10, I, of the ADCT and Art. 7, I, of the Constitution conceived the termination of the contract without just cause accompanied by indemnity, which was regulated by Law 8.036/1990 in its Art. 18, § 1.

to the relationship between employee and employer, while the provisions of a social security nature deal with the relationship between the two and the official body" (RR-628600-46.2000.5.12.5555, 2002).

In view of these reasons, it upheld the thesis set out in Jurisprudential Guideline 177 of the SBDI-1 of that Court that spontaneous retirement has the effect of terminating the employment contract, "even when the employee continues to work for the company after the social security benefit has been granted. As such, the 40% FGTS fine is undue in relation to the period prior to retirement" (E-RR-628600-46.2000.5.12.5555, 2004). On October 30, 2006, after the final judgment of the direct actions of unconstitutionality, the TST canceled the aforementioned thesis, adopting the understanding of the Supreme Court.

The understanding drawn from the judgment of ADIs. 1.721 and 1.770 that there are delicate situations that call for reflection. Social security law has specific institutes and rules that follow a logical order, so is it appropriate to mix institutes from different legislations to the point of causing a loss of the systematicity of the legal order that emerges with a certain meaning and purpose for the common good? Wouldn't it be foolhardy to equate retirement with termination of the employment contract without just cause, when this opens the door for the legislator to create a variety of hypotheses for termination of the employment contract, in addition to the concepts of just cause/without just cause? Could it be that the Supreme Court, by bringing the institute of retirement into Article 7, I, of the Constitution (as if it stemmed from it), which deals with the termination of contracts without just cause - institutes that were born in a singular way - would not itself be contravening this constitutional norm, when the systematization of the legal order is lost and the source of inspiration for the constituent legislator is destroyed?[20] Or on the other hand, wouldn't it be reckless to say that within the Constitution we find the regulation of institutes already regulated by ordinary legislation, taking away the strength of the normative systematization already drawn up by Parliament?

In view of these questions, another arises: wouldn't interference - without at least an institutional dialog - in the normative dynamics that labor courts and tribunals have been thinking about and following for years cause a deconstruction and emptying of the labor normative system - specific principles, legal rules and norms-precedents?

At this point, there is a danger in the Supreme Court's actions when it employs "interpretative modes that allow excessive manipulation of the linguistic content of constitutional and legal norms" (ULIANO, 2022, p. 55) which can lead to the dismantling of the legal system and the opening to allow the same behavior by the other organs of power - as creators of legal norms - to the point of losing the authority of the functioning of positive law.

It is not possible to read norms in isolation or in isolation from specific legal concepts and institutes. It is necessary to consider the system of legal norms that have a reason to exist when they are coherently interconnected - there is a "connection of meaning or relationship of dependence between the norms" (ÁVILA, 2016, P. 169). This is because they carry justifications for being laid out in a certain way, as well as being supplied with normative content containing a certain purpose.

Neil MacCormick attaches importance to the postulate of coherence in the system of legal norms. He states that this postulate informs us that the rules of a legal system make

20. According to Marinoni, "conforming interpretation cannot be used to give the rule a result other than that desired by the legislator or a different regulation. Therefore, there are two requirements for compliant interpretation: respect for the literal expression of the legal text and respect for the purpose sought by the legislator" (MARINONI, 2013, p. 1139).

sense when considered together, that is, in the way they interconnect, so that they are "compatible with a more general rule and can therefore be considered as more specific or 'concrete' manifestations of that rule" (MACCORMICK, 2006, p. 197). It is therefore essential that the magistrate, in his hermeneutic work, values the coherence of the "set of general rules [which are interconnected with the specific ones] that express the justificatory and explanatory values of the system" (MACCORMICK, 2006, p. 197-198).

Thus, the content of each legal norm - general and specific - and its interaction with other norms in the system must be considered. And not invoke, as Fábio Quintas and Fernando Miranda warned, the "omnipresence of the Constitution for selective and punctual interventions" (QUINTAS; MIRANDA, 2020, p. 187).

Likewise, the Supreme Court has taken an invasive stance in another legal situation, in the context of diffuse control of constitutionality. This is the judgment of Extraordinary Appeal 760.931-DF (2017).

In extraordinary appeals, the filter instrument for selecting appeals - the general repercussion - must be taken into account. The constitutional issue must be demonstrated by the person appealing and assessed carefully and sparingly by the justices - in dialog - who can only refuse the extraordinary appeal "by the manifestation of two thirds of its members"[21]. The appeal will only be heard when the constitutional issue has transcendence and political, social, economic and/or legal repercussions.[22]

The general repercussion has a vocation to provoke reflection and popular participation[23]. This is because the Supreme Court has a greater and more sophisticated function, that of developing Constitutional Law, not restricting itself to resolving conflicting cases and simply making *inter* partes res judicata[24]. Today, this Court has the power to decide or not to decide (MARINONI, 2021), based on what the constitutional issue offers, because, depending on what it is, it will have repercussions on society as a whole, influencing citizens' way of life.

From the perspective of analyzing the constitutional issue, it is important to differentiate between "individual facts" and "general constitutional facts" (MARINONI, 2021, p. 685-811). The former are inherent to the litigation itself and the latter are part of an amplified dimension of the specific case, with the potential to interfere in the lives of people in society, because they involve political-social values and constitutional principles in a dimension of fundamental rights. Therefore, at the time of the general repercussion, the magistrates of the constitutional court must be careful to investigate whether the case brings this greater perspective or not.

Well, in RE 760.931, judged by the Supreme Court in 2017, the subsidiary liability of the public entity was questioned[25], without mentioning the burden of proof as to whether it was

21. The general repercussion was created with Constitutional Amendment 45/2004, which introduced § 3 of art. 102 of the Federal Constitution: "In the extraordinary appeal, the appellant must demonstrate the general repercussion of the constitutional issues discussed in the case, under the terms of the law, in order for the Court to examine the admission of the appeal, and may only refuse it by the manifestation of two thirds of its members."

22. Art. 1.035, § 1, of the CPC/2015, establishes: "The Federal Supreme Court, in a non-appealable decision, will not hear an extraordinary appeal when the constitutional issue addressed in it does not have general repercussion, under the terms of this article. For the purpose of general repercussion, consideration will be given to the existence or not of relevant issues from an economic, political, social or legal point of view that go beyond the subjective interests of the case."

23. "The vocation of general repercussion is not to reduce the Supreme Court's caseload (although this is a reflex effect). In fact, its function is to ensure another kind of judgment for extraordinary appeals: more reflective and with greater social participation" (QUINTAS, 2008, p. 17).

24. "The Supreme Courts, in most *civil law* systems, were designed to correct - either by annulment or revision - the interpretation of the law" (MARINONI, 2015, p. 17).

25. This case was subjected to in-depth empirical research to find out how each Supreme Court justice ruled and how the exchange

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the employee's or the employer's, while the TST ruling imputed liability to the public entity based on the burden of proof. As the public entity did not fail to prove its guilt in supervising the labor bidding contract, it became liable for the labor debts incurred by the real employer (the company providing the services).

The moment of general repercussion - which would be the analysis of whether, in fact, there was a constitutional issue in the appeal and in the TST's ruling that could be used to analyze its merits - was frustrated. In the report of the ruling on RE 760.931, the rapporteur, Justice Rosa Weber, states that this appeal replaces "the paradigm in which the general repercussion of Theme 246 was recognized - RE 603.397". The STF *website states* that the decision on the general repercussion of RE 603.397 (2010) was made in a Virtual Plenary. According to the rapporteur, the subject of the general repercussion is the attribution of subsidiary liability to the Public Administration (art. 71 of Law 8.666/93) (RE-760.931/DF, 2017).

In replacing RE 603.397 (2010) with RE 760.931 (2017), the rapporteur, Justice Rosa Weber, stated that she was concerned about the "multiplication of controversies and lawsuits" because, in her view, the issue is infra-constitutional in nature, which leads her to believe that the last word should be with the Labor Court and not the Supreme Court. She also pointed out that, in the ADC 16 judgment, there was no approach to the burden of proof and no "guidelines for the judge's assessment of the evidence" were established. But even so, the appeal was assigned to resolve the issue of the burden of proof.

The final decision of RE 760.931 resulted in the repetition of the thesis set out in the ADC 16 judgment, without mentioning the distribution of the burden of proof: "The default of the labor charges of the contractor's employees does not automatically transfer to the contracting Public Authority the responsibility for their payment, either on a joint and several or subsidiary basis, under the terms of art. 71, § 1, of Law 8.666/1993".

In view of this report, it is clear that the moment of general repercussion was not taken advantage of, a rule of mandatory observance of which is found in art. § 3 of art. 102 of the Federal Constitution[26] and art. 1.035, § 1, of the CPC/2015[27]. The collegiate body was not allowed to debate the issue discussed in the extraordinary appeal and in the TST ruling. But the subject of discussion was defined and the appeal was assigned and judged.

In this respect, in order to reflect on the Supreme Court's actions, one wonders: isn't it time for the STF to fulfill its role as a court of precedents, instead of trying to resolve issues in the area of other courts of precedents, such as, in this case, the TST? Wouldn't self-restraint be the way forward in order to respect the TST's long-established understanding in its precedents, as in the case of the distribution of the burden of proof? Would institutional dialogue be a good way to learn more about the TST's point of view on certain labor issues defined (or still undefined) in its rulings? These are questions that make us wonder what the real function of our Supreme Court is as a court of precedents and which route it should take that is more in line with the democratic constitutional process.

with the TST proceeded and vice versa. See: MELO, Gabriela Fonseca de. **Precedente judicial - formação e aplicação**: a tensão entre o STF e o TST no caso de responsabilidade subsidiária de ente público em relação de terceirização. Curitiba: Juruá, 2022.

26. It was created with Constitutional Amendment no. 45/2004, which introduced § 3 of art. 102 of the Federal Constitution: "In the extraordinary appeal, the appellant must demonstrate the general repercussion of the constitutional issues discussed in the case, under the terms of the law, so that the Court may examine the admission of the appeal, and may only refuse it by the manifestation of two thirds of its members".

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Now, the burden of proof - as an issue for discussion by the Supreme Court - has already traveled a long road in the field of procedural law, starting with the principles and specific rules of labor law, taking into account the positions of the procedural subjects and the respective needs of substantive law[28]. In view of this, it would be a good idea for the Supreme Court, when faced with infra-constitutional issues "(which are often ancillary to the assessment of constitutional issues)", to take into account "the constructions already consolidated within the scope of ordinary jurisdiction, paying homage to judges and courts (especially the understanding established by the Higher Courts) (QUINTAS, 2013).

As Luiz Guilherme Marinoni said, the general repercussion

> is an instrument for the Court to decide well what should be decided, avoiding wasting time on cases that do not require a response aimed at stating how the Constitution should be interpreted in the face of a situation that is shared by society or by many. Anyone who should be concerned only with deciding well what should be decided obviously also **has a duty not to decide what should not be decided or the case that is not suitable for them to decide properly and** adequately.
>
> (...)
>
> In fact, the extraordinary appeal, given the general repercussion, has taken on a new value. Not only did it cease to embody a subjective right to the correction of decisions, but it also **became a resource at the service of the Court, or rather, a resource capable of allowing the affirmation and development of the Constitution when this proves necessary for the protection of individuals** (MARIONI, 2021, p.524-525).

As can be seen from these three examples, there is a negative and damaging movement on the part of the Supreme Court when deciding specific labor issues, summarized in three situations. The first involves a lack of interpretation in accordance with the Federal Constitution (the case of ADI 5.766/DF). The second involves the failure to observe a coherently ordered system of legal norms [mixing concepts of different institutes and doing manipulative hermeneutic work: voluntary retirement by the employee and dismissal without just cause by the employer] and the use of a constitutional provision (art. 7, I, of the Constitution) as a subterfuge to decide in a selective and punctual way (case of ADIs. 1.721 and 1.770). The third is the failure to observe a constitutional procedural rule [general repercussion] in order to analyze the issue under discussion. When they see that a certain labor issue [burden of proof] has been defined in precedent rules of the TST (case of RE 760.931)[29], prudence calls for not deciding or for a dialogical process with this Court.

Finally, these examples lead us to reflect on the Supreme Court's role as a court that develops constitutional law. This role encompasses the limits of constitutional hermeneutics, compliance with constitutional procedure (e.g. general repercussion), the necessary practice of self-restraint to convey respect and appreciation for the normative-principal systematization consolidated in the body of precedents of other apex courts (such as the TST) and the importance of healthy institutional dialogue in order to preserve the democratic constitutional process.

28. I discuss this development in depth in the essay: MELO, Gabriela Fonseca de. The dynamization of the burden of proof: a sure way to obtain full labor judicial protection. **Revista de Direito do Trabalho - RDT**, São Paulo: Revista dos Tribunais, year 43, v. 181, September 2017.

29. Although the issue of the burden of proof was not defined when the extraordinary appeal was heard, the Court's intention was to address it. But it was still not resolved. In the final judgment, the thesis established in the ADC 16/DF decision was repeated. These two judgments were well analyzed, through qualitative empirical research, on the occasion of my master's dissertation which was transformed into the book: MELO, Gabriela Fonseca de. **Precedente judicial - formação e aplicação**: a tensão entre o STF e o TST no caso de responsabilidade subsidiária de ente público em relação de terceirização. Curitiba: Juruá, 2022.

FINAL CONSIDERATIONS

This research shows that the process of constitutionalization of law, following the two Great Wars, led to changes in the conception of law and in the way constitutional courts judge, whose powers were increased and, with them, their responsibilities towards the courts and other state bodies.

It was necessary to think about another type of equality that could take into account humanity and its respective factual particularities in legal relations. The principle of legality also needed to be revised, because the cases typified in the law did not satisfy the multifaceted context of factual situations pointing to different legal horizons. Human rights were born and gradually embodied in constitutions and called fundamental rights. The Constitutional Rule of Law emerged and the focus of vision, to this day, is centered on it, as a way of ensuring that all legal issues can be resolved within its axis.

In this moment of transmutation, Labor Law and Procedure emerged, developed from the experience of the post-war social reality. It was noticed that there was an economic mismatch in labor relations: one party was weaker, the employee. In order to balance out this relational asymmetry, it was necessary to protect the more vulnerable party by creating and applying a body of normative-principles that could give them parity of arms to compete on an equal footing with the employer. In this context, the normative structure of this branch of labor law was established with principles, legal rules and precedent norms.

Given this context, one wonders how far the limits of the constitutional court's action go, despite the expansion of powers in this process of constitutionalization. This is because it was shown in the second section of the research that the Federal Supreme Court, in the judgments of ADIs 5.766, 1.721, 1.770 and RE 760.931, exceeded the normative-constitutional range that limits its interpretative and operational activity - both when it must act and when it must restrain itself.

In addition to reflecting on the limits of hermeneutics and constitutional procedure ("external law"), we propose a Kantian reflection related to the "internal law" or "ethical law" that brings the idea of the duty of neutrality in the magistrate's act of choice. When making a choice, it is important to think: is it prudent to go down this path? Is there common sense in this choice? What are the consequences of this choice, considering a sphere that transcends the litigious informational field? Where and how will this choice interfere? It is virtuous to "choose and want promptly what practical reason[30] presents as reasonable in the circumstances" (CORDIOLI, 2020, p. 38).

30. In short, Kant states that human beings are endowed with a practical reason that will determine their free will or freedom of action. This practical reason "orders how men should act" (Cf. KANT, 2003, p. 58-64).

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