

The so-called outsourcing (subcontracting) question and its regulation

A polêmica sobre o conceito de terceirização e sua regulação

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Abstract

Although outsourcing (or subcontracting) has been subject of great controversy, there is predominant consensus over the concept that defines it. The aim of this paper is to discuss this consensus and point out its contradictions, indicating that the casualization of labour related to outsourcing is not a contingency, but corollary of the nature of this way of hiring workers, which tends to reduce the chances of limiting labour exploitation.

Keywords: Outsourcing; Division of labour; Casualization.

Resumo

Apesar de a terceirização ser objeto de grandes controvérsias, existe um consenso acerca do conceito que a define. O objetivo deste texto é problematizar esse consenso e apontar suas contradições, demonstrando que a precarização do trabalho relacionada à terceirização não é uma contingência, mas corolário da natureza dessa forma de contratação de trabalhadores, que tende a reduzir as chances de limitação da exploração do trabalho.

Palavras-chave: Terceirização; Divisão do trabalho; Precarização.



Introduction¹

One of the main strategies of capitalist companies worldwide over the last four decades has been to adopt outsourcing or subcontracting - in Brazil, the terminology “terceirização” embraces both the terms outsourcing and subcontracting. This management strategy has heavily affected economies, policies, labour markets, working conditions and the lives of workers around the globe.

There are many different analytical approaches to distinguish outsourcing and subcontracting. For instance, outsourcing may be described as a long-term relationship, which usually takes place outside the companies’ walls: “strictly speaking, outsourcing is defined as developing a supply source which is located outside a plant, a factory or an office in charge of producing some final products or services”². In such case, the factories where smart phones are manufactured are good examples of outsourcing.

The literature commonly states that “greater product market competition has made private and public sector bodies more inclined to focus on specialized activities and externalize’ non-core aspects of work and production”³. In other words, outsourcing can be defined as “a shift of activities performed within a company to its suppliers (that) has become widespread”⁴.

Meanwhile, subcontracting can be viewed in the context of arrangements to carry out specific tasks for shorter periods.

Subcontracting is an arrangement between two manufacturing units, under which one of the units (the subcontractor) provides the other (the principal), on agreed terms and conditions, with products (components or final goods) that are used or marketed by the principal under his sole responsibility. Subcontracting orders may include the processing, transformation or finishing of materials or parts by the subcontractor at the request of the contractor. Subcontracting can be domestic, when both units work in the same country otherwise it is international⁵

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² ANDREFF, Wladimir. Outsourcing in the new strategy of multinational companies: foreign investment, international subcontracting and production relocation. *Papeles de Europa*, 18, 5-34.

³ WRIGHT, C.F. **Beyond the employment relationship**. Collective bargaining and supply chain coordination. TUC, 2011, p. 5.

⁴ DRAHOKOUPIL, Jan. **The outsourcing challenge**: organizing workers across fragmented production networks. (2015), Brussels: European Trade Union Institute, ISBN 978-2-87452-366-3.

⁵ UNCTAD, 1975, *apud* HALBACH, Axel J. Multinational enterprises and subcontracting in the third world: a study of inter-industrial linkages. In: **Multinational Enterprises Programme Working Paper No. 58 (ILO)**. 01 January 1989. 92-2-107183-9[ISBN].



Arrangements usually carried out in the construction sector may illustrate what subcontracting is. The UN official definition of subcontracting is:

a subcontracting relationship exists whenever a business (subcontractor) acts for the account of another (main contractor) undertaking in the process of working and making a specific product to plans and technical specifications supplied by the main contractor, who has final economic responsibility⁶.

Despite being two different terms to which people frequently try to give distinct meanings, outsourcing and subcontracting are essentially the same thing. The definitions and the distinctions between the words may vary, but the essence of both concepts is the same: the transference of accessory (or less important) activities from a company to another party, normally another company which has been formally established. Generally, externalization is the main content to describe both words, which is adopted by companies to focus on their core businesses.

Considering subcontracting and outsourcing as one only phenomenon has been done by other authors as well⁷. It is not a coincidence that in Brazil the term “terceirização” applies both for subcontracting and outsourcing and is also predominately defined as the externalization of some part of the production process to be contracted by another stakeholder. Thus, from now on we will use these three terminologies as synonymous.

This paper’s aim, though, is to show that what makes these words essentially equivalent is not what has become the common sense about outsourcing/subcontracting (“terceirização”). Our main goal is to give a coherent concept to this phenomenon. While doing this, we seek to show how the regulatory framework of outsourcing/subcontracting (“terceirização”) that has been imposed worldwide demonstrates the contractions of the mainstream concept, focusing the Brazilian case.

⁶ UNECE, 1995 *apud* ANDREFF, Wladimir. Outsourcing in the new strategy of multinational companies: foreign investment, international subcontracting and production relocation. **Papeles de Europa**, 18, 5-34.

⁷ “We will be using the terms subcontracting, outsourcing, and vertical disintegration interchangeably” (VAN LIEMT, Gijsbert. **Subcontracting in electronics**: From contract manufacturers to providers of Electronic Manufacturing Services (EMS). In: Sectoral Activities Programme Working Paper. International Labour Office, Geneva. April 2007. ISBN: 978-92-119906-9).



1. Consensus and inconsistencies on the mainstream concept of outsourcing

Advocates of outsourcing/subcontracting argue that, in the current context, companies cannot engage directly in all the steps of production like they used to do during Fordism. Nowadays they have to focus attention on their core business and on increasing their productivity, and so contract other agents (normally other companies, though the intermediary may be described in different ways) to perform the less important activities, in which these intermediaries are specialized. In other words, their arguments are based on the idea that the companies are delegating to someone else the production of accessory activities related to their business.

Management consultants have long advised firms to focus on 'core competences' and outsource other activities (e.g. Domberger 1998). Globalization and the creation of the Single European Market may have indeed made it more profitable for firms to specialize in what they can do best (e.g. Meyer 2006)⁸.

Around the world, there are lots of criticisms of outsourcing/subcontracting, claiming that this phenomenon undermines working conditions, reduces salaries, increases accidents at work, etc. Countless studies carried out in many countries indicate that these allegations are true. But, even when they are engaged in serious struggles against its consequences, critics of outsourcing/subcontracting tend to use the same conceptual understanding of it as that used by those who defend this management strategy. For instance, some authors point out:

(...) radical changes to the structure of employment in the UK, in particular in the form of a sectoral shift from traditional sectors (including manufacturing and the public sector) to business services sectors as service activities are disembedded from their original settings and transferred to companies in other parts of the economy. Later There are numerous reasons why employers choose to outsource services including the ability to focus on core functions and to access specialist services, but the desire to reduce costs is often a key consideration. This demand for lower cost services is passed on to the successful supplier who must satisfy service quality targets within the agreed contract price, whilst ensuring that their business model remains profitable. There are various strategies which suppliers use to achieve this, including: wage restraint; reducing the size of the workforce and providing the same service but with fewer employees; or employing fewer permanent employees and using agency workers instead⁹.

⁸ DRAHOKOUPIL, Jan. **The outsourcing challenge**: organizing workers across fragmented production networks. (2015), Brussels: European Trade Union Institute, ISBN 978-2-87452-366-3.

⁹ HUWS, Ursula; PODRO, Sarah. Outsourcing and the fragmentation of employment relations: the challenges ahead. ACAS future of *workplace relations* discussion paper. August, 2012. Available in: www.acas.org.uk/



Whether the consequences for workers are regarded as good or bad, it is accepted that different companies are in charge of different links in what is commonly called a chain of production (or supply chain). “Under fragmented production, it is no longer necessary for producers to master entire production chains and to organize them within single firms”¹⁰.

But, empirically, outsourcing/subcontracting differs greatly from this description. Invariably, the contracting company directs the process of production and work according to its needs. There are numerous examples of this situation in companies from all around the world and all sectors.

Lots of surveys conducted in recent decades, involving companies from many different countries, has shown that no matter how outsourcing is juridically arranged, the contracting company always manages the workforce¹¹.

In outsourcing/subcontracting, the command of activities remains with the contracting company, which effectively determines when, where and how production takes place. Ways of controlling the subcontracted workforce may vary a little among contractors and economic sectors, and are heavily influenced by labour market features. Frequently the methods of control are very explicit, being carried out as traditionally employers do. It is very common, for instance, to see main companies imposing in the contracts that they can choose who are the outsourced workers. The following quote from the terms and conditions of employment of an outsourced worker in the British cleaning sector provides a good example of this situation:

Your employment with US is subject to continued acceptance by our client who has the right to refuse your admission to the premises. If it occurs, the Company reserves the right to change your place of work, providing this within reasonable travel distance from the present place of work.

In other cases, different management methods are adopted, such as pay per task, imposing deadlines, on-line monitoring, making auctions between the subcontractors, etc. But, in fact, they have the same purpose and achieve the same targets. Over recent decades technology has helped a lot to implement these less obvious ways of managing workers, although sometimes they are even more dominating

¹⁰ ANDREFF, Wladimir. Outsourcing in the new strategy of multinational companies: foreign investment, international subcontracting and production relocation.

¹¹ For instance, Mercante (2015), Filgueiras (2012, 2013, 2014A, 2014B), Dutra (2014), Druck & Filgueiras (2014), Filgueiras & Cavalcante (2015).



than traditional management. Indeed, in many cases they are used intentionally, as firms try to avoid labor law, for instance.

Toyota, the paradigm and precursor of the contemporary outsourcing/subcontracting process, was the owner of small subcontracted companies upon which its outsourcing/subcontracting arrangement was developed¹², and it is not the only such case in the automotive sector¹³. We have personally been in a car factory where the subcontracted workers who built the vehicles were directly selected and managed by the car company, which carried out a kind of tendering processes or auctions between the intermediaries to get the cheapest workers¹⁴.

The garment sector is another good example which reveals what outsourcing/subcontracting really is. The main brands explicitly argue that they don't produce goods and they just buy the clothes from suppliers over which they have no control. Meanwhile, some of the largest fashion companies around the world have been caught using slave-like labor in Brazil, and in every case the State investigations have detected that production was controlled by the main contractor¹⁵.

The control imposed by the main contractor on the process of labour and production is also seen in arrangements such as franchising, as pointed out by Ruckelshaus *et al*:

Also, McDonald's would reportedly act as a labor broker and fires formal employees of its franchises. The author also states that Domino's Pizza tracks the delivery times of its franchisee's formal employees, holding them to the brand's standards.

¹² HIRATA *apud* DRUCK, Graça. 1999. **Terceirização**: (des)fordizando a fábrica: um estudo do complexo petroquímico. São Paulo: Boitempo, 1999.

¹³ MARCELINO, Paula Regina. Honda: terceirização e precarização: a outra face do toyotismo. In: ANTUNES, Ricardo (org.). Riqueza e miséria do trabalho no Brasil. São Paulo: Boitempo, 2007.

¹⁴ For this and other examples in different arrangement in the automotive sector, see Filgueiras and Souza (2011). But it is also common in other sectors, for instance: "On one end of the chain, one or more tiers of contractors make the products for a brand, often in other countries. The brand or major retailer imposes price controls that make it next to impossible for contractors to pay workers producing goods at the bottom of the chain fairly. Then, as products move further through the chain, the retailer's tight control of prices pits bidding subcontractors against each other, creating unsafe and underpaid workplaces in warehouses, ports, and other logistics distribution centers". (RUCKELSHAUS, Catherine *et al.*, Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work (National Employment Law Project, May 2014), <http://www.nelp.org/page/-/Justice/2014/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Out-Outsourced-Work-Report.pdf?nocdn=1>)

¹⁵ Mercante shows details in MERCANTE, Carolina Vieira. A terceirização na indústria de confecções e a reincidência do trabalho análogo ao escravo. XIV Encontro Nacional da ABET. Campinas, setembro de 2015.



Even in the most notorious and geographically fragmented cases of outsourcing/subcontracting, in which the intermediary may make considerable absolute profits, production is clearly controlled by the contracting company. There are reports detailing how this scheme works: the famous brand seeks to impose even the qualification and number of workers needed, in the time it requests and the way requests¹⁶. There is an evident hierarchy in the process, completely ruled by the contracting company.

Thus, production may be formally fragmented, even geographically fragmented, but, in fact, the contracting company remains in control. It directs labor and the production process and absorbs most of the social wealth produced.

In the United Kingdom, the picture does not seem to be different. For instance, the construction sector presents a good view of the process. This sector is probably one of the most heavily outsourced/subcontracted. There are different outsourcing/subcontracting arrangements in construction, such as contracting workers as self-employed through agencies, or using “umbrella companies”. What they ultimately have in common is that the workforce is still directed fundamentally by the principal contractor. The main difference between the workers is just how they are hired.

In a London building site that we have visited, apparently not different from most sites in the UK¹⁷, there were 90 men working, but only 5 directly employed by the main contractor: 10 were electricians formally employed by a subcontracted company, 15 hired as agency employees, and 60 contracted as self-employed via agencies. Some

¹⁶ “In 2007, a little over a month before the iPhone was scheduled to appear in stores, Mr. Jobs beckoned a handful of lieutenants into an office. (...) Mr. Jobs angrily held up his iPhone, angling it so everyone could see the dozens of tiny scratches marring its plastic screen (...) “I won’t sell a product that gets scratched,” he said tensely. The only solution was using unscratchable glass instead. “I want a glass screen, and I want it perfect in six weeks.” (...) When an Apple team visited, the Chinese plant’s owners were already constructing a new wing. (...) The owners made engineers available at almost no cost. They had built on-site dormitories so employees would be available 24 hours a day. (...) “They could hire 3,000 people overnight,” said Jennifer Rigoni, who was Apple’s worldwide supply demand manager (...). “What U.S. plant can find 3,000 people overnight and convince them to live in dorms?” (...) In mid-2007, after a month of experimentation, Apple’s engineers finally perfected a method for cutting strengthened glass so it could be used in the iPhone’s screen. (...) Another critical advantage for Apple was that China provided engineers at a scale the United States could not match. Apple’s executives had estimated that about 8,700 industrial engineers were needed to oversee and guide the 200,000 assembly-line workers eventually involved in manufacturing iPhones. The company’s analysts had forecast it would take as long as nine months to find that many qualified engineers in the United States”. See, for instance, DUHIGG, Charles; BRADSHER, Keith. *How the U.S. Lost Out on iPhone Work*. January 21, 2012. In: http://www.nytimes.com/2012/01/22/business/apple-america-and-a-squeezed-middle-class.html?_r=0

¹⁷ According to two engineers interviewed in the building site, that company is one of the few companies in the sector that still hires workers directly to work in the sites.



of these “self-employed” workers hired through agencies had worked for 4 straight years for the principal contractor. Those directly employed were precisely the engineers and supervisors at the top of the building site hierarchy. In other words, those persons who decide what, where, when and how the work should be done. So the crane drivers, for instance, contracted as self-employed via agencies, were obliged by the main contractor to work ten hours a day, instead of the legal limit of 4 hours.

2. The essence of outsourcing/subcontracting

The essence of outsourcing/subcontracting is to put some entity between the workers and the capital that makes profits from their sweat.

Therefore, outsourcing/subcontracting is specifically a labour market phenomenon. It is not a matter of relationships between different companies, each running their own business, determining their own rules and ways of managing their workforce, and exchanging goods or services outside the labour market (such as in the relationship between an energy supplier and a chemical factory). Outsourcing/subcontracting is about how a company organizes its own workforce by adopting a different way of hiring workers.

Another feature of outsourcing/subcontracting is that the relevant knowhow relating to the activities is almost always held by the contracting companies. This is because these activities are part of their labor and production process, and keeping the knowhow helps to prevent the intermediary from becoming the effective or main capital in the process. That is also why the key positions in control and hierarchy are held by the contracting company.

In summary, outsourcing/subcontract is a strategy of contracting workers using an intermediary to do so. An intermediary is an entity which is interposed between a worker and the effective commander of labor and production.

The appearance that outsourcing/subcontracting assumes may range from a piece of paper, like a document stating that the employee is now a “his/her own company”, to legal entities that can formally employ thousands of workers. At most, and only in very few cases, the intermediary might be a minor partner in a business



controlled by the client company¹⁸. In all circumstances, the control of production belongs to the dominant company¹⁹²⁰.

The individual capitalist's reasons for adopting outsourcing/subcontracting may differ slightly in each case, but the main intention, directly calculated or not, is to increase profits by reducing the chances of labour power to limit exploitation. This is so because outsourcing/subcontracting tends to:

- **Reduce individual resistance:** the greater instability and insecurity that characterize these contracts make workers unlikely to confront orders and complain about any issue. At the same time, it also increases the subsumption of labour under capital, as the workers often do not even see themselves as part of the production process of the biggest or sole beneficiary of their work.

- **Undermine collective actions:** outsourcing/subcontracting normally makes it harder for workers with different types of contracts to build common identities, increasing the difficulties of organizing workers together. It is also common to find legal barriers to achieve collective actions involving direct employees and subcontracted workers.

- **Weaken effectiveness of institutional regulation:** as the intermediary emerges as the supposed employer, liability often does not rely on the main party responsible for the workers situation, leaving the contracting company in a comfortable position.

Under these conditions, the consequences of outsourcing/subcontracting, which enable companies to increase their profits, are usually the same:

¹⁸ In some cases where stronger intermediaries were used to outsource, such as in the "integrated" production process in the Brazilian agrarian sector. The intermediaries' strength to manage their own production and face the contracting companies as equals ruined the arrangement (FILGUEIRAS, Vitor. *Novas/Velhas formas de organização e exploração do trabalho: a produção "integrada" na agroindústria. Revista Mediações*. Londrina, UEL, 2013).

¹⁹ Obviously the intermediary can become an effective capital at some point in the relationship. And it eventually happens. In these cases we are no longer talking about outsourcing/subcontracting, but the exchanges between different capitals that have always occurred in capitalist societies.

²⁰ In some arrangements the workers are supplied by intermediaries to different contractors, implying that the worker can work for different companies through the same intermediary. In these cases, it is not important to the company who is going to do the job, since the way the workers are integrated in the process plays a fundamental role in making them disciplined. The intermediaries remain a piece in the contracting companies' game, and replacing one intermediary with another is one of the main moves in this game.



- **Lower costs:** cutting salaries, undermining labour rights, avoiding or reducing legal and union-related issues, making it more flexible and cheaper to manage staff (sack them, move them, etc.).

- **Increased productivity:** the workers tend to put more effort into attenuating their precarious conditions²¹, being less likely to strike or take any kind of time off from work (such as sick leave, rest breaks at work and weekly rest).

3. Casualization and “true” or “false” outsourcing

The precariousness caused by outsourcing/subcontracting is well-known worldwide, Outsourced jobs are worse than before (when they were directly contracted), and worse compared to directly employed people that remain performing the same activities.

Just to exemplify, according to Thebaud-Mony:

Numerous research papers in Europe (Appay, Thébaud-Mony, 1997; Thébaud-Mony, 2000; BTS / Saltsa, 2000; Seillan; Morvan, 2005; Hery, 2009), Canada (Lippel, 2004), Australia (Quinlan, Mayhew, 1999, 2001) and Brazil (Druck; Franco, 2009) report the impact of the use of outsourcing and temporary work on the health of workers and the effectiveness of prevention devices and work accidents repair and occupational diseases²².

Even International Labour Organization (ILO) has expressed concern about the link between outsourcing and accidents at work. For instance, see the research quoted by ILO:

Other studies indicate that labour employed through subcontractors is not treated the same way as directly employed labour in relation to health and safety. Research in nine large, high-profile companies from the engineering sector in the United Kingdom found very different treatment for labour employed by subcontractors compared to those who were employed by the main contractor (Gyi et al., 1999). Seven of the nine companies undertook pre-employment medicals for their own employees (usually white-collar workers) but only one did for the workers of its subcontractors (mostly operatives). Six of the companies monitored the health of their own employees but only two did so for the employees of their subcontractors,

²¹ The couriers' situation is a good example of this process. Hired as self-employed, they normally have no fixed payment; they are paid by “rates” of delivery, which may turn to be less than the minimum wage depending on the number of delivers. By making the wage precarious, small and completely unsafe, the company pushes the couriers to try to attenuate this situation (at least to survive) working more and more intensely.

²² THEBAUD-MONY, Annie. Precarização social do trabalho e resistências para a (re) conquista dos direitos dos trabalhadores na França. **Caderno CRH**, Salvador, v. 24, n. spe 01, 2011.



and then only on very large projects. Only one major contractor held the view that it was responsible for labour employed by subcontractors²³.

According to the HSE, research indicates “the negative implications for safety that arise from the sub-contracting arrangements within the industry. This leads to problems with blurred responsibility and difficulties with communication between one contractor and another”²⁴.

In 2015, as part of a research in the UK, we inspected dozens of building sites in London, Leeds, Cardiff and Edinburgh to check health and safety conditions. The sites normally have safe facilities and installations, for example, having edge protection and well-built scaffolds. There were severe unsafe situations in only 8 out of 105 inspections, and all these cases, with no exception, involved outsourced/subcontracted workers: they had no height protection, no ropes, no security belts; some of them were not even wearing helmets. At the same time, a huge number of workers in the construction sector is hired through intermediaries as self-employed²⁵, being prevented from getting their labour rights respected and working in very unstable and insecure occupations.

The scenario shaped by outsourcing/subcontracting is precarious for workers in the UK logistic sector as well. Contracting companies (such as big banks) carry out some kind of auction to get the cheapest workers through intermediaries, reducing wages down to the bottom. We have talked to several workers from 6 different intermediaries, seen documents and equipment, and the situation may be even worse than in the construction sector. Pretty much all workers are hired as self-employed, prevented from enjoying labour rights (such as sick leave and paid holiday), obliged to pay fees to the intermediaries and often work with no minimum payment guarantee.

Very bad working conditions have also been detected in the UK garment sector. According to recent research carried out by the University of Leicester, there is considerable evidence that business strategies in the sector “are associated with severe violations of work and employment rights”, such as non-payment of wages at the National Minimum Wage: “these problems are endemic in the industry: reports

²³ ILO. The construction industry in the twentyfirst century: Its image, employment prospects and skill requirements. Tripartite Meeting on the Construction Industry in the Twenty-first Century: Its Image, Employment Prospects and Skill Requirements. Geneva, 2001, P. 36.

²⁴ HSE. Causal factors in construction accidents. Prepared by Loughborough University and UMIST for the Health and Safety Executive, 2003, p. 69.

²⁵ In March 2013, 39.2% of total construction workforce was register as self-employed (p. 22, Employment Status report. Office of tax simplification, 2015), many contracted by companies through intermediaries.



consistently put the average wage at £3 per hour and state that this applies to 75-90% of jobs in the sector". Also, violations range "from work practices that result in health problems, inadequate health and safety standards, verbal abuse, bullying, threats and humiliation, and the lack of toilet breaks, among others."²⁶

In the agricultural and food sectors, the "return of gangmasters"²⁷ has been the predominant way of outsourcing/subcontracting and seems to have increased the precariousness of labour and the most extreme forms of exploitation. After the tragedy of Morecombe Bay, the creation of the Gangmaster License Authority (GLA) looked like it might reduce bad working conditions. But, by focusing on the intermediary, the GLA has left the main agent of the process (the contracting company) almost untouched, thus facilitating the continued exploitation²⁸. Even the GLA itself admits that slave-like conditions have increased in the UK during recent years²⁹.

In order to tackle criticism, it is common to hear defenders of outsourcing/subcontracting saying that one must distinguish bogus and legitimate (or true and false) outsourcing/subcontracting. To support this argument, they also defend their main-stream concept, arguing that in genuine outsourcing/subcontracting the intermediary is specialized. From this point of view, the problem of precarious labour arises from bogus outsourcing/subcontracting.

However, research shows that whether carried out legally or illegally, by small, medium, big or giant enterprises, providing formal or informal jobs, outsourced/subcontracted jobs have inferior working conditions, and are responsible for the vast majority of the worst cases of exploitation and fatal accidents at work³⁰.

The deeper issue in this debate is related to the division of labour. By saying that outsourcing/subcontracting is the deepening of the division of labour, the concept tries to make the phenomenon appear inexorable. The division of labour between companies will always exist in any capitalist economy, where different companies exchange goods and get surplus from their own workers. In fact, if

²⁶ UK. Employment Status report. Office of tax simplification. March, 2015, p. 10.

²⁷ ROGALY. Population, Space And Place, Vol. 14, 497---510. Intensification of Workplace Regimes in British Horticulture: The Role Of Migrant Workers Ben Rogaly, Department Of Geography, University Of Sussex, 2008.

²⁸ FILGUEIRAS, Vitor Araújo; LIMA FILHO, Raymundo. 2015. **O Ministério Público do Trabalho e a regulação do direito do trabalho no setor sucroalcooleiro de Sergipe**. Anais do Encontro Nacional da ABET. Campinas, 2015.

²⁹ GLA. Strategy for Protecting Vulnerable and Exploited GLA Workers: 2015-2018. 2015.

³⁰ FILGUEIRAS, 2014A, 2014B, 2015.



outsourcing/subcontracting was just the deepening of capitalist division of labour, there would be nothing substantially new to say.

Understood in such terms, the problem would be *how* outsourcing/subcontracting is carried out, not the phenomenon itself. Indeed, how difficult is it to criticize and fight against increasing productivity derived from division of the labour and specialization if it does not necessarily harm workers? The thing is that casualization is not a contingency, but part of the process if we accept that outsourcing is a strategy of management to reduce limits of exploitation.

4. Contradictions of the mainstream concept of outsourcing

In addition to our previous argument concerning the empirical inconsistency of the mainstream outsourcing/subcontracting concept, there are at least two contradictions within the mainstream discourse throw light on the real phenomenon.

Firstly, if outsourcing/subcontracting is the deepening of the division of labour, then the markets should have fragmented, and now be divided into smaller companies.

Let's take the UK as an example. Between 2000 and 2014, the number of companies employing 250 or more employees (regarded as large), which are mainly contracting companies, fell by 6%. Meanwhile, the total number of businesses grew by 51%, and the number of businesses with no employee increased by 68%. This rise in the amount of non-employing businesses is very much related to rates of self-employment and non-employing companies, which are directly associated with outsourcing/subcontracting. As a result, at the beginning of 2014, the small business (0 - 49 employees) represented 99.3% of businesses existing in the United Kingdom.

In the early 1990`s, more than 50% of jobs in the UK were in big companies³¹. But by 2011, according to the ONS, small businesses (up to 49 employees) represented 46.2% of jobs, compared to 41.2% in the case of big companies (over 250 employees). By 2014, these figures were 47.9% and 39.9% respectively. So, apparently, the fragmentation of production is exactly what has indeed happened during the expansion

³¹According to OECD, Database on SME statistics; Eurostat (1996), 53% of Jobs in the UK, in 1991, were placed in companies hiring more than 100 employees.



of outsourcing/subcontracting. A higher proportion of small companies in the business population are employing higher percentage of workers in the labour market.

But, in spite of this appearance, in recent decades the world has seen the exactly opposite take place. In the UK, although being an increasingly small minority of companies registering increasingly lower rates of employment, the large companies increased their turnover rates between 2011 and 2014 from 51.2% to 53.2%. In the same period, small companies saw their turnover decreased from 34.9% to 33.2%.

How is it possible to explain this seemingly contradictory process?

One might say: *“That is because the bigger companies have increased their productivity compared to the smaller businesses”*. However, a huge number of workers registered by small businesses work precisely for the big companies through intermediaries. Furthermore, the accountability of these jobs in small business increased at the same time as outsourcing/subcontracting increased, so, more people are classified as working for small businesses even though they keep working for the big companies.

The point is that while they are outsourced, these people continue to effectively be part of the workforce of the companies they continue to work for, or have started to work for, in both cases as subcontracted labour, independently of the appearance given by the intermediary.

In many cases, we are talking about the exactly same people, in the same jobs, working for the same company³². So, the data allows us to reaffirm our hypothesis that outsourcing/subcontracting is not only a strategy to manage the workforce, but a strategy to manage the workforce that tends to amplify absorption of social wealth produced.

In this sense, it is worth thinking about the self-employment issue, whom in many cases are hired by companies via outsourcing³³. If the majority of people classified as self-employed were effectively independent as market players, trading with other businesses, they tended to increase their rates in the national income (comparing to their previous situation as subordinated employees). However, ILO shows that their participation in the national income of rich countries has fallen over the last few years.

³² SEELY, Antony. Self-employment in the construction industry. BRIEFING PAPER Number. 000196, 8 July 2015. 2015a, P. 23-24.

³³ Nowadays the so-called gig-economy has just called workers as self-employed rather than used intermediary figures.



Different sources corroborate this indicator for the UK, pointing out that self-employed average income is smaller than the income of employed workers, and that this income gap has increased³⁴. Also, the self-employed have got less income outside work lately³⁵.

Therefore, this process of the migration of production from big companies to small businesses and from employee status to being contracted as self-employed contracted (often through intermediaries) does not seem to happen in practice, but is rather the formal appearance of an underlying strategy.

If there is a centralization of capital, the concept of outsourcing as externalization of production (deepening division of labour) concept cannot resist.

The second contradiction of the mainstream outsourcing/subcontracting concept is even more obvious: if outsourcing/subcontracting is a management strategy to focus on the core-business and increase specialization, how come contracting companies try to outsource/subcontract all their workers? In the UK, for instance, many companies have no employees³⁶. What do they specialize in? And the same is true for intermediaries: if in many cases they have no employees, then what are they specialized at?

The main companies keep “shirking” their “core-business” because they want to do with their remaining direct employee what they have done with the outsourced, as to say: manage workforce as if they were not employers.

The contradictory rhetoric reveals the actual content of so-called outsourcing/subcontracting, which is probably the main workforce management strategy in the current stage of capitalism.

It is worth pointing out that recently, this rhetoric which claims that companies are deepening the division of labour in contemporary capitalism has reached another level. The so-called “apps” or “platforms” deny the very basic idea that they are engaged

³⁴ Resolution Foundation (2015): “Our analysis finds that self-employed weekly earnings are 20 per cent lower than they were in 2006-07, while employee earnings have fallen by just 6 per cent” (...) “As a result, the typical self-employed person now earns 40 per cent less than the typical employed person”. (2014, p. 4) HBAI records weekly self-employed earnings in 2010–11 to 2012–13 of £438 at the mean and £248 at the median, compared with £519 and £407 respectively for employee earnings (in April 2014 prices) (Earnings since the recession, Jonathan Cribb and Robert Joyce (IFS)).

³⁵ Self-employed income increase coming just from work: self-employed with investment income, i.e. property, interest, dividends: 2000= 63%; 2013= 35%.

³⁶ According to research quoted by Drahokoupil, in the UK 23% of all companies uses outsourcing. Within this companies, 49% full outsources their activities (DRAHOKOUPIL, Jan. The outsourcing challenge: organizing workers across fragmented production networks. (2015), Brussels: European Trade Union Institute, ISBN 978-2-87452-366-3).



in their real sector (as transport and delivery companies). Furthermore, they argue that workers (couriers, drivers) are their clients, as if there was no employment relationship between them³⁷. These companies do not necessarily use outsourcing/subcontracting to manage their workforce (many times there is no intermediary between them and the workers), but the idea that they are not related to the process of production (which is precisely used to direct the workforce) is essentially the same.

5. Regulation of “terceirização” in Brasil: Juridical Controversies

In Latin America as well, the conceptual debates persist, as there is significant discussion regarding applicable terminologies to the phenomenon. In the legislation of Latin American countries, the opposition continues regarding the use of expressions such as intermediation of labour force, subcontracting of products and services and subcontracting of labour force, as Uriarte and Colotuzzo observe, and this creates diverse criteria and juridical consequences to the framing of similar phenomenon³⁸.

The authors understand externalization, a wider and more general category, as all forms of work organization in which the company seek for workers that really are or can be considered to be external. They recognize, based on the theoretical and legal framework verified in Latin America, that the difficulties in homogenizing the concepts tend to invalidate the production of an international normalization on the theme, as well as tend to deepen the precarious nature of the phenomenon³⁹.

According to them, one of the main elements for the increase of outsourcing/subcontracting, alongside with the crisis in the traditional model of company, of demands for competitiveness and its binding to informal economy growth (so typical of Latin American countries), would be basically the legal and ideological environment, in which a certain form of preference for contractions similar to civil law can be noticed, *in lieu* of the systems of Labour protection⁴⁰.

³⁷ ANTUNES, Ricardo; FILGUEIRAS, Vitor. Plataformas digitais, Uberização do trabalho e regulação no Capitalismo contemporâneo. *Contracampo*, Niterói, v. 39, n. 1, p. 27-43, abr./jul. 2020.

³⁸ URIARTE, Ermida; COLOTUZZO, Natalia. **Descentralización, tercerización, subcontratación**. Lima: OIT, Proyecto FSAL, 2009. 202 p.

³⁹ *Idem*.

⁴⁰ *Idem*.



Therefore, in the roots of the opening for outsourcing/subcontracting is the role of a very specific ideological aspect, that puts juridical systems on duty to the privatization of Labour Law. This can be observed in a wider perspective, that has come to life recently with the absorption of the figure of entrepreneurship and the false autonomous provision of services through apps (the so-called GIG economy), but that has originally manifested since 1990, focusing on the permissiveness of wider ways of outsourcing and its consequent deviation from the protective parameters of Labour Law.

In Brazil, the terminology “terceirização” has been used to embrace outsourcing and subcontracting. Since the end of the 1980s, liberalist ideologists have defined it as a form of specialization for companies to increase their efficiency: the proposal would attend a supposedly trend in the proliferation of small companies, with less workers, and the reduction of laboral costs promoted by outsourcing. Based on this perspective the criteria adopted by the Brazilian jurisprudence in the 1990s and 2000s was to allow outsourcing of accessory activities and the forbid outsourcing of companies’ core businesses (Precedent number 331 of the Superior Labour Court - TST). At some point, these authors started to state that the network operation of the companies and the division of tasks and activities between them could not necessarily be put into the distinctive criteria of main and accessory activities, reason why they began to criticize to cited Precedent number 331.

Following this line of reasoning, two questions seem relevant for the analysis of the Brazilian case: first, the centrality of the category of employment for each and every possible assessment of the compatibility of outsourcing with the juridical order, element which, in fact, justified the adoption of criteria for both core business and accessory activities in the 1990s and that, for the same reason, subsists its derogation by the Supreme Federal Court (STF) in the judgment of ADPF number 324 (Constitutional action on which was discussed the constitutionality of “terceirização” in Brazil).

Second, the fact that the categorization in the Brazilian law about outsourcing (“terceirização”) of core business and accessory activities coexisted with other categories which were very far from the stablished regulatory pattern, so that, far from ending this question, it opens space for other possibilities to be practiced without protective regulation or with diverse incidence. This way, the works’ contracts and the contracts of faction which, though they promote triangular arrangements of work, were



understood as absorbed to figures of civil law and business law, respectively, acquiring refractory position to the protective tutelage of workers, substantiated in the contract of work.

In this second idea, it is interesting to know, on one side, the selectivity of the argumentation favourable to the use of civilian and business juridical forms and, on the other side, to the refusal to the juridicization of ordinary characters of outsourcing (terceirização), allowing defenders of this practice the use of expressions such as “good outsourcing” and “bad outsourcing”. By doing so, they treat the data related to the casualization promoted by the outsourcing (“terceirização”) as accidental, not inherent to the phenomenon, and, for this reason, very distant from the central considerations of the juridical phenomenon.

To face the first question, it is important to have in mind, beyond the ideas of “Division of work” or business specialization, the fact that outsourcing (“terceirização”) promotes a dissociation between the economic relation of work and the corresponding juridical relation⁴¹. Based on these concepts and having in mind the central category of employment defined in the Brazilian legislation, and of central reference to the applicability of all that is instituted by Labour Law, it is defined by legislation, based on the reality (and despite other formalities), the presence of personality, non-eventuality, rewarding and juridical subordination to the service provider, we can understand the legal limits of the phenomenon.

This way, the legal limit of the dissociation between the economic relation and the corresponding juridical relation was given: even if the jurisprudence intended to reinterpret the legislation able to promote the increase of outsourcing (terceirização), that could only proceed in the hypothesis in which the elements of direct employment won't succeed. From that, the concepts of core business and accessory activities have unfolded very logically, and the difficulty (or impossibility) of implementing the outsourcing of core business at some level of control and power (counter faces of subordination) on the side of the borrower of services.

Therefore, when declared by STF in 2018 that “The outsourcing (“terceirização”) or any other form of division of work between distinct juridical person is legal, regardless of the social object of the companies, considering the subsidiary

⁴¹ DELGADO, Maurício Godinho. **Curso de Direito do Trabalho**. São Paulo: LTr, 2019.



responsibility of the contracting companies”⁴², if, on one side, the jurisprudential barriers are suppressed when the nature of the activities could be outsourced (older version of the Precedent number 331 of the TST), on the other hand, the juridical tutelage, denominated “division of labour”, must respect the labour, juridical and business frameworks that persist in the juridical order.

It is worth noticing that the preconditions and the form of assessment of work relations have not been altered by the labour reform of 2017 (Laws 13.429 and 13.467), which amplified the hypothesis of outsourcing (“terceirização”). Therefore, it is once again the juridical subordination, in its complying rereading with the transformations the world of labour has undergone after the post Fordist productive restructuring, the element able to define the incidence of labour protection. At this point, the contradiction of absorbing the outsourcing phenomenon based on the arguments that the productive relations have transformed themselves and that the right to work need to renew itself in order to absorb them is unbearable. And even if this is not done regarding the institutes that can indicate vectors of protection in order to think new dimensions – objective, reticular and structural – of subordination.

Following this line, the phenomenon of juridical subordination and its counter face, that is the exercise of business power, have been considered in the new productive and market architecture to the production of several juridical effects. Most importantly, for the preservation of competing relations and the safety of capitalist transactions, it is observed in the business field the recognition of subjects of rights, even if there is no corresponding corporate formalization. Ana Frazão observes, for instance, the juridical recognition of prerogatives and responsibilities denominated contractual *joint ventures*, which are constituted of business arrangements firmed through contracts that appear due to the economic reality of hollowing out of big companies and the increasing importance of deverticalization, of outsourcing, of company *networks*, as well as the precedence of market mechanisms on the movements for internalization and integration of great bureaucratic structures”⁴³.

Thus, the author observes that, regarding business law, the juridical figure of *joint ventures* have been recognized for joint activity and in regards to the possibility of

⁴² BRASIL. Supremo Tribunal Federal. ADPF nº 324 / Recurso Extraordinário (RE) nº 958.252. DOU de 31/8/2018.

⁴³ FRAZÃO, Ana. Joint ventures contratuais. *RIL Brasília* a. 52 n. 207 jul./set. 2015 p. 187-211.



attributing responsibility and obligations, based on the identification of their control centres, while business clusters are connected through contractual relations⁴⁴.

Likewise, the same phenomenon acts as a challenge to work relations established after these new arrangements. As Uriarte and Colottuzo observe, the most important consequence to outsourcing in labour is the recognition that there are no more coincidences between employers and employees, stating the challenge of identifying the real employer among the various companies that form the productivity chain, regardless of who figures as the formal employer⁴⁵.

Concerning Labour Law, new instruments, including those endorsed and amplified by labour reforms, such as the recognition of economic groups by coordination, with solidary liability of members of the productive chain and aptitude to recognize them as a single employer, progress in the same path already trekked by business law as a form of understanding the mere “division of labour” among companies, configuring new productive arrangements in network, as they configure concentration of power and business command in conglomerates, and non-alternance of employees. Likewise, they are not able to dissociate themselves of the binomial power-responsibility, a very effective juridical form in the preservation of competitive relations between capitals⁴⁶.

Thus, the contradictions within the juridical discourse become evident when it is shown that the new arrangements sometimes are assimilated for safe capitalist transactions, sometimes conveniently pointed as barriers do the attribution of labour responsibilities or even charged for the level of employment, as stated in the decision of the Federal Supreme Court which declared the permissiveness of each and every outsourcing activity. That is, beyond the conceptual distortions between reality and discourse of those defending outsourcing, there are even more important contradictions revealed within juridical discourse.

Last but not least, it is worth observing that the empirical reality constantly detected in researches, regarding the increasing casualization of the work promoted by outsourcing (“terceirização”), has been refuted amid juridical discourse that endorses

⁴⁴ *Idem*.

⁴⁵ URIARTE, Ermidá; COLOTTUZZO, Natalia. **Descentralización, tercerización, subcontratación**. Lima: OIT, Proyecto FSAL, 2009. 202 p

⁴⁶ FRAZÃO, Ana. Grupos societários no direito do trabalho e a reforma trabalhista. **Rev. TST**, São Paulo, vol. 83, no 4, out/dez 2017.



outsourcing: for the hegemonic argumentation, outsourcing would not be bad in itself. *Au contraire*, the bad use of the concept would be responsible for the situations of disrespect to worker's rights that happen frequently to outsourced workers. In fact, those who defend outsourcing are used to shamefully narrating hypothetical situations or exceptions when outsourcing is an advantage for workers⁴⁷.

That is why it is relevant to juridicize the indicators produced by outsourcing, and that are consensus in sociological studies, including those promoted by international organizations of protection of labour.

In this sense, the effort of Gabriela Neves Delgado and Helder Amorim are worth mentioning as they start to attribute to outsourcing what they have denominated "rarefaction of labour rights". Although the juridical arrangement promoting outsourcing assures the persistence of a work relation between the service provider company and the workers, such agreement is not enough to prevent that labour rights originated from employment relationship suffer depreciation or fade away, be it in its material value or in its own feasibility⁴⁸.

The conceptual path in literature reveals their accuracy, especially because in 1990s, the discourses favourable to outsourcing were built upon the idea of externalization of accessory activities, aiming to reach an increment in the performance of companies in their core business, guaranteeing specialization and competitiveness in the global market. This argumentative construction dissipated as a smoke screen when the business discourse that prevailed in the National Congress in 2017, with its agenda, was that the companies, to be really effective and competitive, would need to outsource all their activities, including those core activities to their business in which they would, two decades ago, intend to focus on.

The commercial interest on outsourcing is now wide open: it is the reduction of costs, the decreasing of responsibility levels and the flexibility it achieves, regarding the contraction, dismissal and management of the work force what really interests the outsourcing arrangement.

In fact, that is what the data has constantly shown: the outsourcing appears as a form of management of the work force, by those who supposedly outsources.

⁴⁷ PASTORE, José. Terceirização: uma realidade desamparada pela lei. *Rev. TST*, Brasília, vol. 74, no 4, out/dez 2008, p. 117-135.

⁴⁸ DELGADO, Gabriela Neves; AMORIM, Helder. *Os limites constitucionais da terceirização*. São Paulo: LTr, 2014.



Domination is intensified, subordination is doubled (now exerted both by the company provider and receiver of the service). That said, a permission of the worker is forged regarding even more predatory practices (which make them more disposable, more vulnerable, more susceptible to employer's commands); while the costs and responsibilities of those who do not stop acting as an employer, but who protect themselves from the juridical existent onus, are reduced.

The logics of flexibility that oriented the regime of accumulation after the productive restructuring and the neoliberal rationality that guides it, find in the outsourcing an instrument capable of implementing its agenda: workers reduced from the condition of subjects of work contracts, to silent objects of service providers business contracts, alienated from their collectives, weakened in their identities, belongings and bonds of solidarity: therefore, more vulnerable than ever to this employer's power that multiplies itself.

More than that, the logic of outsourcing banalizes and naturalizes its perverse mechanism: with time, it is inevitable that non-outsourced workers start to understand the precarious and disposable nature of the work provided by outsourced workers, and the moral, political, economic, dialogical and even juridical responsibilities, due to the degrading condition of these workers, belongs to those who are not visible, who are out of reach, conducing to sleep the collective conflicts of labour.

For Labour Law, the narrative is that of alienation of this group of workers in relation to its own protective shield which, by the way, has been more and more restrict. Facing outsourcing as a paradox and contradictory juridical category in relation to the institutional paths already followed by Labour Law, exploring alternatives to the disruptive commands it originates, presupposes a conceptual confrontation that, assimilating the phenomenon, allows us to bring it to the regulation of work considering the tools the juridical systems already have.

In this sense, the constant conclusion of sociological research that the practice of outsourcing is not empirically verified without the maintenance of subordination between workers and the main company makes unbearable the contradiction between the pattern of the Brazilian juridical regulation, which allowed outsourcing of core business at the same time it preserved its original concept of employment relation.

As the outsourcing of core business without subordination is not realistic and being subordination a central element to the definition of direct employment relation,



the Brazilian juridical order puts itself in contradiction when it legitimates outsourcing exactly in those hypotheses in which the affirmation of direct employment relation is imperative.

6. Conclusions

We define outsourcing and subcontracting as one single concept, meaning a strategy of contracting workers using an intermediary to do so. An intermediary is an entity interposed between a worker and the actual commander of labour and production process. It can be formally named in many ways, but it is normally presented as a company.

Regarding each company individually, the very specific reasons to adopt outsourcing/subcontracting may differ slightly in each case, but the main intention, directly calculated or not, is to increase profits by reducing the chances of labour power of limiting exploitation. That is why outsourcing/subcontracting and worst forms of labour exploitation are strongly related.

Outsourcing is not a mechanism to deepen the social division of labour. As demonstrated throughout this paper, the increase of outsourcing does not correspond to an effective attribution of tasks to others, let alone a spread of capital in smaller companies. In fact, researches demonstrate that contracting companies keep control and, as a consequence, the subordination of workers to them, as well as the deepening of the phenomenon of outsourcing has corresponded to a reinforcement to the acting and concentration of capital in larger companies.

In fact, the false argument of the social division of labour, which oriented the decision of the Brazilian Constitutional Court regarding outsourcing, has created confusion in the discussions about labour in relation to other themes beyond outsourcing. It has been called, for instance, to justify fraudulent juridical architectures imposed by the so-called GIG economy, that disrespect labour rights and do not follow tax obligations simulating a contraction of self-employed workers, on the pretext of externalizing or not directing realizing their main economic activities.

That is what Uber does: while they sell themselves as a logistic company, the biggest transport company does not recognize themselves as a transport company, but



as a mere mediator of consumer and autonomous drivers' relation, not bearing the responsibilities that comes with an employment relation. It also does not relate to the social division of labour, but its distortion as a way of bypassing regulation and radicalize control over workers.

As we have said earlier, “apps” and “platforms” are generally not using outsourcing/subcontracting arrangements (they outsource only if using intermediaries to hire workers), although they rely on the discourse of division of labour to undermine the workers unions and their rights. Once again, companies based their strategy on the idea that workers are not their employees. Although this time the rhetoric is even more radical, because “apps” and “platforms” deny the very basic fact that there is a work relationship between them and the workers, arguing that workers are their clients, paying them for “use the technology”.

Another conceptual approach to outsourcing/subcontracting is urgently necessary for those who seek to promote decent work. Based on the mainstream concept of outsourcing/subcontracting, institutions tend to focus regulation on the intermediaries and leave the main companies in comfortable position to manage despotically their labour power, systematically perpetuating deplorable work conditions.

On a broader perspective, if there is any kind of aiming to improve labour conditions, it is urgent to stop taking for granted companies rhetoric on how they link themselves to workers and investigate the real content of the business arrangements.

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