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OUTSOURCING IN BRAZIL: EVALUATION OF LEGAL FRAMEWORK AND COMMENTS ABOUT BILL Nº 4.330/2004

André Gambier Campos[1, 2]

1. Researcher of the Institute for Applied Economic Research (Ipea). E-mail: andre.campos@ipea.gov.br.

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DISCUSSION PAPER

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ABSTRACT

Outsourcing may have several impacts in Brazilian labor market, especially for workers. That's why it is relevant to debate new regulations for this phenomenon, mainly legislative ones. The Bill nº 4.330/2004 is one of the regulations that have been discussed in the Brazilian parliament. But there are doubts whether this bill is the best option for a legislative regulation of outsourcing. Probably, qualified impact evaluations of this phenomenon should be made, before any parliament's decision about all this.

Keywords: labor market; outsourcing; regulation.

SINOPSE

A terceirização pode ter diversos impactos sobre o mercado de trabalho brasileiro, especialmente sobre os trabalhadores. É por isso que é relevante debater novas regulações para esse fenômeno, principalmente regulações de natureza legislativa. O Projeto de Lei nº 4.330/2004 é uma das propostas que vêm sendo discutidas no parlamento brasileiro. Mas há dúvidas se essa proposta é a melhor opção para uma regulação legislativa da terceirização. Provavelmente, mais e melhores avaliações de impacto desse fenômeno deveriam ser realizadas, antes de qualquer decisão do parlamento sobre tudo isso.

Palavras-chave: mercado de trabalho; terceirização; regulação.

1 INTRODUCTION

Nowadays, there is a lot of controversy about the impacts of outsourcing. Actors like workers and companies are debating new regulations for this phenomenon (Dieese and CUT, 2011; Fiesp and Ciesp, 2015). And this debate is taking place in economic, social and political spheres.

Outsourcing has been registered in Brazil since the end of the 1960's. It has begun in the public sector, but has soon spread to the private one. It has started through wage employment outsourcing, but has quickly evolved to the self-employment modality.

The State has presented an ambiguous attitude in face of this phenomenon. In different moments, executive and legislative institutions have fostered outsourcing. In the opposite way, judiciary institutions have curbed, editing strict regulations about it.

Anyway, outsourcing may have impacts in Brazilian labor market, especially for workers. That's why it is relevant to discuss new regulations nowadays, mainly legislative ones (judicial regulations have resulted in legal incertitude).

The Bill nº 4.330/2004 is just one of the proposals that have been discussed in parliament.[1,2] Nonetheless, it is the one that is far ahead in lawmaking process – the reason why it has been chosen to be studied in this article.

As it will be seen below, there are doubts whether Bill nº 4.330/2004 is the best option for a legislative regulation of outsourcing. Probably, qualified impact evaluations of this phenomenon should be made, before any parliament's decision about this bill.

In the last decade, few impact evaluations of outsourcing have been developed in Brazil. And the few ones have a variety of problems. Among others, it is possible to pick the following: *i)* insufficient data (especially quantitative data); *ii)* indirect estimations of outsourced workers (there are no direct estimates); *iii)* several bias (selection and comparison bias).

1. After its approval in the House of Representatives, the Bill nº 4.330/2004 has begun to be examined in the Senate, as Bill nº 30/2015.
2. A discussion of proposals for regulation of outsourcing in Brazil can be found at SAE/PR (2009).

Unfortunately, all those methodological problems affect the quality of evaluations produced about outsourcing – as it is possible to check clearly in Dieese/CUT (2011), for example. And, without qualified evaluations, it is difficult to keep debating outsourcing in Brazil – that's why new studies should be made, before any legislative deliberation about the Bill nº 4.330/2004.[3]

2 WHAT IS OUTSOURCING?

One of the possible concepts of outsourcing is a disjunctive between juridical and economic dimensions of the labor relation. The employee actually works for one company (called the "taker"), but all the rights related to his work are connected to other – an intermediary firm (the "giver") (Barros, 2006; Delgado, 2006).

In Brazil, as a rule, the most common labor relation (the wage employment) doesn't bear this kind of disjunctive. The employee's rights are guaranteed by the company in which he really works – in other words, the taker and the giver are the same firm in this relation, which is called "bilateral".

Nonetheless, in an outsourced labor relation, those rights are not warranted by the company in which the employee actually works, but by an intermediate firm. Thereby, taker and giver are different companies, establishing a "trilateral" relation with the employee.

It is important to notice that outsourcing may take place either through wage employment or self-employment. In the first, the worker continues to be an ordinary employee, with all the attributes of this sort of labor relationship.[4] In the latter, the

3. An exception among the evaluations produced about outsourcing, which seeks to address many of the mentioned methodological problems, can be found at Stein, Zylberstajn and Zylberstajn (2015).

4. According to Brazilian labor law (in the "CLT – Consolidação das Leis do Trabalho", instituted by Decree nº 5.452/1943), a worker is part of wage employment relationship when his relation with the company is personal, typical, subordinated and remunerated. According to Brazilian jurisprudence and literature, "personal" means that the worker may not be changed or substituted without company's acceptance, because the relation between them is *intuitu personae*. "Typical" means that the worker's activity is part of normal, regular, ordinary activities of the company. "Subordinated" means that the way the worker develops his activities is defined by the company (not by the worker himself). "Remunerated" means that the worker develops his activities expecting a monetary, a financial counterpart (Delgado, 2006).

worker is a self-employed, working through a variety of mechanisms (cooperatives, individual firms and so on) (Barros, 2006; Delgado, 2006).

In both ways, outsourcing may have plenty of impacts in Brazilian labor market, which may be positive or negative. Those impacts are the main subject of this article, which presents a brief history of outsourcing, as well as new regulations that have been discussed.

3 OUTSOURCING THROUGH WAGE EMPLOYMENT

The most common labor relation in Brazil is the wage employment, regulated since 1943 by the CLT. This relationship can be described as bilateral, because there are only two actors in it – the employee and the company to whom he works, which is the only responsible for his rights.

The CLT has never focused on trilateral labor relations, as the ones that result from outsourcing, through wage or self-employment. Despite that, other regulations have emerged in Brazil since the end of the 1960s, dedicating attention to those trilateral relationships (Barros, 2006; Delgado, 2006).

In this way, there were Decree nº 200/1967 and Law nº 5.645/1970, which established that, whenever possible, government institutions should purchase the so-called "instrumental" services from private companies.[5] Examples of those services, not related to the "finalistic" purposes of government institutions, were office cleaning, personnel transport, equipment maintenance, security services and so on.

Thus, in the beginning, outsourcing was fostered by State in the public sector, strictly to provide instrumental services to government institutions. Nevertheless, since the middle of the 1970s, the phenomenon has spread a lot, moving from public to private sector, what meant a major shift in its history.

5. The definition of instrumental *versus* finalistic services has always been a difficult task in Brazilian law, jurisprudence and literature. Even official documents, produced by "TST" ("Tribunal Superior do Trabalho" – one of the courts of judicial system, specialized in labor conflicts) face difficulties in characterizing those services (TST, 2014). Anyway, a common and simple definition is that finalistic services are part of normal, regular, ordinary and, mainly, essential activities developed by a company, as well as instrumental services are not (Delgado, 2006).

Laws nº 6.019/1974, nº 7.102/1983 and nº 8.863/1994 allowed private companies to acquire instrumental services from other firms in the market. The first law referred to temporary services of any nature, and the second and the third concerned specifically to permanent services of security.

Therefore, after de 1970s, outsourcing has been stimulated by the State not only in the public, but also in the private sector. Regarding this, it is important to stress that the Brazilian State has not behaved uniformly, properly speaking.

As legislative and executive institutions have edited several decrees and laws encouraging outsourcing (as the ones mentioned above), judiciary institutions have acted in the opposite way, restraining possibilities for this phenomenon (Artur, 2007; Biavaschi, 2013; Campos, 2009).

In the middle of the 1980s, the TST edited a kind of summary, regulating those possibilities. The Summary nº 256/1986 established that outsourcing was not allowed, except for the cases prescribed by Laws nº 6.019/1974 and nº 7.102/1983.

Later, after a harsh debate, the same court published a less-strict regulation. According to Summary nº 331/1993, outsourcing was forbidden, except for: *i)* cases defined by Laws nº 6.019/1974, nº 7.102/1983 and nº 8.863/1994; *ii)* cases of cleaning and conservation services; *iii)* cases of specialized services – which should be only instrumental, performed without personality and subordination; *iv)* cases of instrumental services purchased by government institutions.[6]

In sum, in respect to outsourcing through wage employment, the Brazilian State has not behaved homogeneously in the last decades. By one side, legislative and executive institutions have fostered the phenomenon; by the other, judiciary institutions have curbed it.

6. In any of the cases of Summary nº 331/1993, there is a subsidiary responsibility of the taker (private companies or government institutions, as defined above). In other words, the taker has full responsibility for the employee's rights, if by any chance the giver is not able to pay for them.

4 OUTSOURCING THROUGH SELF-EMPLOYMENT

As previously pointed, beyond outsourcing through wage employment, there is another one, promoted through self-employment. In the latter, the phenomenon befalls by mechanisms as cooperatives and individual firms.

The labor relations that emerge when those mechanisms are functioning are not bilateral, but trilateral – because there are different companies (or entities) in contact with the workers, resulting in a disjunction between juridical and economic aspects of those relations (Barros, 2006; Delgado, 2006).

Anyway, according to Brazilian labor law, cooperatives are organized by groups of people, who work in activities that are typically collective. Those groups constituted by workers began to be regulated in the beginning of the 1970s, by Law nº 5.764/1970.

The CLT has never focused on cooperatives' labor relations, because they have always been seen as a kind of self-employment (autonomous work). And the focus of CLT, as stated before, has always been on wage employment relations (subordinated work).

In spite of that, in the middle of the 1990s, the CLT was modified by Law nº 8.949/1994, which introduced a clause defining that, whatever the activities, there wouldn't be wage employment relations between cooperatives and their workers, as well as between those workers and companies that purchase services from cooperatives.

Under this new clause, there was a legal presumption that cooperative's workers wouldn't be part of wage employment, even when present the attributes of this labor relation (as personality, typicality, subordination and remuneration). And this made a lot of difference for workers, because they lost rights – protections and guarantees – assigned by CLT.[7]

Moreover, this new clause allowed companies to acquire all cooperative's services in the market. And, important to say, not only instrumental, but also finalistic services, what represented another big issue in the outsourcing debate.

7. It is worth mentioning that, with the approval of Law nº 12.690/2012, legislators tried to mitigate the loss of rights, affecting the cooperative workers. A detailed discussion of this law, as well as of all the debate that followed, can be found at Pereira and Silva (2012).

Anyhow, beyond cooperatives, self-employment outsourcing may take place through individual firms. Roughly speaking, those firms are constituted by a single worker, who turns himself into a legal entity – even from the juridical perspective – to offer his services to the market.

Individual firms have a large history in Brazilian law, but they were clearly nourished in the 2000s, by Laws nº 11.196/2005 and nº 11.442/2007. The first regulated intellectual labor, developed in artistic, scientific and communication activities. The latter regulated labor conducted by drivers, in road transport.

In those laws, there was a legal presumption that the worker, turned into an entity, lacked all the rights assigned by labor law – especially, by CLT. Instead, his activities were regulated by civil and business laws, what made a lot of difference in terms of rights – or, in other words, in terms of protections and guarantees.

Furthermore, as an entity, this worker was able to supply other companies with any services, instrumental or even finalistic – what did mean, once again, a polemic matter in outsourcing discussion.

In short, regarding outsourcing through self-employment, the Brazilian State has encouraged it in the 1990s and the 2000s, mainly through its executive and legislative institutions.

Nevertheless, once again, judiciary institutions followed the opposite way, shortening the expansion of outsourcing, especially that one produced by cooperatives (Artur, 2007; Biavaschi, 2013; Campos, 2009). This happened through several legal suits, in which the courts decided for the illegality of cooperatives' outsourcing schemes.

5 PROBLEMS RELATED TO OUTSOURCING REGULATION

As seen, outsourcing has a long history in Brazilian labor market – a history that dates at least the end of the 1960s. In the 1990s and the 2000s, this history has accelerated a lot, with several initiatives promoting outsourcing – highlighting the ones of executive and legislative institutions; although judiciary initiatives have pointed to the opposite direction, restricting outsourcing.

Anyway, currently, there are serious problems of legal certainty, involving the regulation through judiciary initiatives, like TST's Summary nº 331/1993.

Those problems may be noticed primarily in the regulation of wage employment outsourcing, which has been questioned in the supreme court of Brazilian judicial system – the "STF" ("Supremo Tribunal Federal").

Among the aspects questioned in this court, there is the distinction between instrumental and finalistic services – what is a crucial issue in outsourcing debate, as mentioned before (Ipea, 2012).

Until now, STF has not showed a tendency to decide against outsourcing of finalistic services. And, if this prevails, companies will be able to acquire any kind of services – not only instrumental – in the market.

As this may have several impacts, mainly for workers, it may be really worth debating another kind of regulation – not a judiciary one, with all the uncertainty mentioned above; but a legislative one, able to assure legal certainty to workers and companies.

6 SOME ASPECTS OF BILL Nº 4.330/2004

Nowadays, there are many propositions in Brazilian parliament ("Congresso Nacional"), able to enact such legislative regulation. Among them, the one that is far ahead in lawmaking process is Bill nº 4.330/2004, the subject of this article.[8]

This specific proposal is rather extensive, covering different aspects of outsourcing, making it difficult to analyze all its rules. Thereby, the aim is only to summarize the main rules, as well as to check if they may benefit workers or companies (or even government).

To begin with, the main scope of Bill nº 4.330/2004 is wage employment outsourcing, not the self-employment, and only in private sector, leaving the public out of its reach. Nonetheless, it is relevant to point that its scope includes state-owned

8. The latest version of Bill nº 4.300/04 (May, 2015) is available at: <http://goo.gl/2OmTw6>.

companies, some of the major firms in Brazilian economy, which already make use of outsourcing.[9]

Whether the takers may be any of private sector companies, the givers may only be those specialized in a singular service, with economic capacity and technical qualifications. Therefore, there are constraints for the giver companies, what may restrict outsourcing.

Defined the sort of companies that may take part of the phenomenon (takers and givers), as well as the kind of workers (almost only wage employees), it is time to examine which rules benefit each side of the outsourced labor relation.

Beginning with the firms, the most important rule is probably the one that explicitly admits the possibility of outsourcing any type of services, instrumental or finalistic.

This may have substantial impacts in Brazilian labor market, because companies will be able to outsource many other aspects of their production process, beyond those admitted by TST's Summary nº 331/1993.

As mentioned before, this specific rule is one of the main issues in the outsourcing debate – and it is the same point that has been recently questioned in STF.

On the other side, regarding the workers, there are several relevant rules in Bill nº 4.330/2004, most of them restraining outsourcing:

- It is not allowed for firms to dismiss workers and outsource parts of production process to them,[10] at least in the period of twelve months after the dismissals.
- Outsourced workers may be subordinated to givers,[11] not to taker companies. And those workers may only develop activities previously defined in the outsourcing contract.
- Further outsourcing (by givers) is not allowed, except in specific situations, formerly established in contract, communicated to unions etc.

9. The leadership of the current government asked the leadership of the parliament to include state-owned companies (like "Petrobras", "Eletrobrás", "Banco do Brasil", "Caixa Econômica Federal" and many others) in the scope of Bill nº 4.330/2004. For more details, see Cunto (2015).
10. Supposing the fired workers turned themselves into legal entities (cooperatives, individual firms and so on).
11. "Subordinated" means, in this case, being hired, controlled and remunerated.

- Giver firms have to offer financial guarantees that they will comply with labor, social security and taxes obligations.
- Taker companies have to continuously monitor the compliance with such givers' requirements (labor, social security and taxes).
- Givers and takers have joint liability concerning labor and social security requirements, even in the cases of further outsourcing by the givers.
- Taker firms have to inform the unions about any kind of outsourcing (after or even before it takes place).
- Takers have to guarantee, for outsourced workers, the same labor conditions, regarding: food, transport, training, safety and health services at work.
- When takers and givers are part of the same economic category,[12] the workers of the latter will be represented by the same union of takers' workers.

In sum, from workers' perspective, those are the principal rules in Bill nº 4.330/2004. And the majority of them restrain outsourcing by a variety of means – specially, by imposing controls over giver companies, as well as by imposing responsibilities to giver and taker firms.

It is important to add that, in any case, present the attributes of a wage employment relation (as personality, typicality, subordination and remuneration), the direct relationship between outsourced workers and taker companies will be declared by any authorities (as the labor courts).[13]

7 FINAL REMARKS: IS THIS THE BEST REGULATION FOR OUTSOURCING?

As stated before, currently, in Brazilian parliament, there are several propositions able to enact a legislative regulation to outsourcing. Bill nº 4.330/2004 is just one of them – probably, the one far ahead in the lawmaking process.

12. According to CLT, workers' unionization in Brazil has to obey economic and professional definitions. Usually, a union may represent only workers of a particular economic category (defined by the kind of activity of their company) and of a specific professional category (defined by the kind of labor developed by workers).
13. Except for the cases of state-owned companies, because Brazilian constitutional law affirms that those firms may only contract workers through public tenders.

Is this the best option for regulating outsourcing? There is a harsh debate about this, involving mainly workers' and companies' representatives. Specifically from workers' point of view, there are some aspects that may cause a lot of apprehension.

Firstly, there are concerns about workers' rights. Going down in the network of firms involved in outsourcing, it is common to go from a big company to a small one, from a well-structured firm to a less-organized one. This simple fact poses challenges to workers' rights, because these tend to be broader and stronger in big/well-structured firms (Cardoso and Lage, 2007; Dieese, 2007).

Furthermore, down in the grid of companies engaged in outsourcing, it becomes more difficult to unionize and mobilize workers. This fact poses additional challenges to workers' rights that come from collective bargaining, at least in some extent. Being more difficult to attract workers to unions, as well as to stir up them to bargain, those rights are prone to suffer (Dieese, 2007, 2012; Marcelino, 2008).

Secondly, there are worries about workers' *guarantees*. As said, going down in the net of firms entangled with outsourcing, it is expected to go from a big company to a small one, from a well-structured firm to a less-organized one. And this fact has implications in terms of labor warranties, because tiny/precarious companies face more difficulties to offer guarantees for workers' rights (Cardoso and Lage, 2007; Dieese, 2007).

In a nutshell, due to the list of threats described, outsourcing naturally causes a lot apprehension among workers. Some of the aspects mentioned about Bill nº 4.330/2004 may ease this worry – as all those that impose controls over giver companies and responsibilities to giver and taker firms.

Nonetheless, perhaps it is too early to know in advance whether other features of Bill nº 4.330/2004 wouldn't provoke further anxiety among workers – as the one that allows outsourcing in any kind of services, instrumental and finalistic ones.

Probably, additional studies should be made about this, before parliament's final deliberation. After all, outsourcing may pose many relevant impacts for Brazilian labor market, especially for workers.

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