

UNMASKING COLONIALITY WITHIN BRAZILIAN CONSTITUTIONAL COURT DECISIONS: THE CASE OF UNLIMITED OUTSOURCING OF LABOR

DESMASCARANDO A COLONIALIDADE NAS DECISÕES DO TRIBUNAL CONSTITUCIONAL BRASILEIRO: O CASO DA TERCEIRIZAÇÃO ILIMITADA DO TRABALHO

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ABSTRACT: In several cases, when deciding on the constitutionality of laws in the Brazilian legal system, the Supreme Constitutional Court adopts interpretations that follow the logic of “one size fits all”. In that logic, it understands that the policies adopted by Global North countries represent the only possible policies to be followed by Brazil (and any other underdeveloped country) in the search for economic progress. Economic progress through capitalism and free global market economies, in turn, is assumed as the only possible way to meet the demands for human dignity. In cases as such, the court often reveals the use of a universalizing rationality that ignores the Brazilian historical and cultural context and authorizes the exclusion of marginalized groups from interpreting the norms and their effects. This phenomenon, promotes what can be called an “epistemological authoritarianism”. The paper realizes a close reading of one of those cases; shows the undesirable side effects of the decision taken; and proposes that decisions as such can be better explained and confronted by the concept of coloniality of knowledge, taken from decolonial theory literature.

KEYWORDS: Coloniality. Western Universalism. Modern Rationality. constitutionalism. Latin America. Global South. Epistemologies from the South. Labour Rights.

RESUMO: Em diversos casos, ao decidir sobre a constitucionalidade das leis no sistema jurídico brasileiro, o Supremo Tribunal Constitucional adota interpretações que seguem a lógica do “tamanho único”. Nessa lógica, compreende que as políticas adotadas pelos países do Norte Global representam as únicas políticas possíveis a serem seguidas pelo Brasil (e qualquer outro país subdesenvolvido) na busca do progresso econômico. O progresso econômico através do capitalismo e das economias de livre mercado global, por sua vez, é visto como a única forma possível de satisfazer as exigências da dignidade humana. Em casos como este, o tribunal revela frequentemente o uso de uma racionalidade universalizante que ignora o contexto histórico e cultural brasileiro e autoriza a exclusão dos grupos marginalizados da interpretação das normas e dos seus efeitos. Este fenômeno, promove aquilo a que se pode chamar um “autoritarismo epistemológico”. O artigo realiza uma leitura atenta de um desses casos; mostra os efeitos secundários indesejáveis da decisão tomada; e propõe que as decisões como tais podem ser melhor explicadas e confrontadas pelo conceito de colonialidade do conhecimento, retirado da literatura da teoria decolonial.

PALAVRAS-CHAVE: Colonialidade. Universalismo Ocidental. Constitucionalismo. América Latina. Sul Global. Epistemologias do Sul. Direitos Trabalhistas.

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“If histories (plural) keeps the wisdom accumulated by the examples of the past to serve as a guide to present conduct, avoiding the repetition of mistakes and stimulating the reproduction of success, History (as collective singular) becomes an inescapable dimension of the becoming itself, forcing every social action to assume horizons of future expectation.”
(Marcelo Jasmin)

1 – Introduction

In 2018, the Brazilian Supreme Constitutional Court, via Extraordinary Appeal number 958.252/MG, decided to expand the cases in which the Federal Constitution allows the hiring of workers through an interposed company the so-called subcontracting, or outsourcing of services. Since 1993, the norm that governed outsourcing in Brazil² only allowed this practice in cases in which the activities performed were accessory to the company’s object (type of activity called a “medium-activity”), thus prohibiting outsourcing for activities related to the company’s main object³ (final-activities).

Thus, according to the old norm, in cases in which subcontracting was used for the performance of the company’s final activities, the labor relationship between the worker and the final contractor should be recognized, forcing the latter to comply with eventual obligations towards its workers. As outsourcing in Brazil has always, as a rule, functioned to make labor costs cheaper and disengage the final contractor from its responsibilities toward workers, Precedent 331 functioned as a mechanism to avoid precariousness employment relations in the country.

However, when deciding for the unconstitutionality of Precedent 331 and, therefore, for the liberalization of the practice of outsourcing for any type of productive activities in Brazil, most the Supreme Constitutional Court ministers used “the economic consequences of the norm” as a basis for their decision. According to the ministers, studies from developed countries had already

2 Precedent number 331 of Superior Labour Court.

3 For example, cleaning, surveillance, secretariat, marketing, etc., according to item III of the same precedent: “III – The contracting of surveillance services (Law No. 7102 of June 20, 1983) and conservation and cleaning services, as well as specialized services related to the contracting party’s activities, does not create an employment relationship with the contracting party, as long as the personal nature and direct subordination do not exist”.

proved that outsourcing did not cause any harm to workers but, on the contrary it stimulated the growth of markets, increased employment and, consequently, the raised the salaries and quality of life in these societies⁴.

Now, four years after the decision was taken in Brazil, the consequences expected by the ministers have not been achieved. As pointed out by the International Trade Union Confederation's 2021 studies, the situation of workers in Brazil has become much direr in the subsequent period, when aspects such as, workers purchasing power, the bargaining power of labour unions, the number of labor agreements reached, and the levels of violence at work and accidents⁵ are considered. Keeping that in mind, when taking a closer look at the arguments sustained, it is necessary to ask which premises the judges adopted. In closely observing the reasoning of the majority decision (votes by Justices Gilmar Mendes and Luiz Fux), it becomes apparent that the court made a consequentialist decision, which did not take into consideration the historical and cultural context in which the norm would be applied. Instead, it adopted a universalizing discourse according to which Brazil was in a lower stage of advancement than countries of the Global North and therefore should follow their policies.

This article aims to demonstrate how decolonial theory can help legal interpreters in detecting and confronting unsuccessful decisions such as the one brought to light in this case. Because most of the work produced by decolonial theorists in the Brazilian legal sphere is limited to discussing abstract concepts and remains stuck in purely academic cycle, the proposal of this paper seeks to demonstrate how the coloniality of thought can operate in the minds of jurists and produces exclusionary effects in the real world. In that line, the paper confronts excerpts from the ministerial votes with theoretical concepts of *decolonial theory*, demonstrating that the theory can help confront the "one size fits all" rationality of the Constitutional Court. According to this rationality, the experience of the Global North represents the only possible experience for Brazil to follow, and therefore following is simply not an ideological choice, but rather a scientific approach to legal and economic issues that Brazil is facing.

The paper is divided into three sections: One, a detailed description of the concrete case brought before the court, to the revelation of some of its consequences, and aspects of Brazilian history that should have been considered by the justices when deciding; Two, an explanation fundamental concepts of decolonial theory in contrast with the votes of the justices that guided the winning thesis on the case (votes of ministers Justices Gilmar Mendes and Luiz

4 Full content of the Judgment in RE 958.252/MG – Page 69 de 278.

5 See ITCU Global Rights Index 2021 in: https://files.mutualcdn.com/ituc/files/ITUC_GlobalRightsIndex_2021_EN-final.pdf.

Fux). Three, a discussion of some of the possible contributions that decolonial theory can offer in facing similar cases.

2 – The case

2.1 – Case description and parties’ arguments

Within Brazil, labour outsourcing (subcontracting) gained importance in the 1990s, coinciding with introduction of foreign investment in Brazil and deregulation of working contracts. Until 2017, however, the Superior Labour Court (TST) had the consolidated understanding (by Precedent 331) that the practice of outsourcing was only allowed for the execution of “middle activities”, therefore, of activities not related to the final business object of companies, but, instead, associated with support services as, for example, security, telecommunications, cleaning, accountability, etc.

Due to the economic recession in the country in 2016, informality and unemployment reached high levels (around 40% informality in the labour force and 12,4% unemployment rates) and the government of President Michel Temer, in trying to solve it, proposed extensive labour system reform. This included the Law No. 13.429/17, also known as the “*Outsourcing Law*”, which authorized the practice of outsourcing for any business activities, and at any stage of the production process.

In 2016, before the new law came into force, a group subcontracted workers responsible for reforestation activities filed a lawsuit against Brazil’s largest pulp producer (Cenibra, a company owned by Japanese stakeholders), requiring the payment of wages and benefits withheld by their direct employee, and therefore demanding recognition of an employment relationship with their final contractor Cenibra.

The judge *a quo*, recognized the labour duties of Cenibra, and the illegality of outsourcing for such activities, understanding that reforestation – work that includes aligning terrain, checking measurements, subsoiling the land, checking tree inclinations, measuring piles of trees, logs, and bucketed logs – is an essential stage of pulp production and, therefore the employment relationship would be consolidated, according to the Precedent 331 of the Superior Labour Court.

Pressured by Cenibra to reverse the decision, the Superior Labour Court instead maintained it, recognizing the working relationship between the outsourced workers and the company, and ordering the latter to pay for the labour rights required. With this result, Cenibra started a trial at the Supreme Constitutional Court via Extraordinary Appeal n. 958.252, through which the complainant asked the court to do the following: i) declare the unconsti-

tutionality of Precedent 331; ii) affirm the constitutionality of the new Law 13.429/2017; iii) and, subsequently, recognize Cenibra's subsidiary (and not solidary) responsibility for the default of unfulfilled labour obligations by the subcontracted company.

With seven against four votes, the Court decided for the claimant and reform the original comprehension, declaring the constitutionality of the Outsourcing Law with retroactive effects thereby consolidating the understanding that the outsourcing of all activities (at any stage of the production process) has always been legal in Brazil, despite the previous interpretation of the Superior Labour Tribunal.

On one side, the court was confronted by the arguments presented by the industry sector confederation as *amicus curiae*, that outsourcing would generate new jobs, work specialization, and improvements in the Brazilian economy, as they could infer from the experience of Global North. Prohibiting the practice of outsourcing would be a violation to the principle of economic freedom subscribed in article 1^o, III, of the Federal Constitution. According to the industry sector, outsourcing would lead to: (i) improvement of tasks through specialized learning; (ii) economies of scale and scope; (iii) reduction of organizational complexity; (iv) reduction of calculation and attribution problems, therefore facilitating the provision of more robust incentives to employees; (v) a more accurate pricing of costs and greater transparency; (vi) stimulation of supplier competition, as well as other pro-market efficiency arguments⁶.

On the other side, the worker's union argued against the liberalization of outsourcing for end (or final) activities, contending that in Brazil, the practice would lead to violations of labour rights and, therefore to the violation of the principle of human dignity subscribed in article 1st, IV of the Brazilian Constitution. To prove its points, the worker's union (CUT) showed studies that demonstrated how the practice of outsourcing in different labor sectors in Brazil and would increase precarity of labour. The study presented showed that: i) outsourced workers, until 2013, earned, on average, 24,7% less than directly employed workers; ii) accident rates among outsourced workers were more common; iii) the labour rights of those workers were constantly ignored and not reported; iv) wage debt was very common and the ubiquity of short-term

6 (vii) greater ease of adaptation to the needs of structural modifications; (viii) elimination of problems of possible excess production; (ix) greater efficiency by the end of cross-subsidies between departments with different performances; (x) reduction of the initial costs of entering the market, facilitating the emergence of new competitors; (xi) overcoming possible limitations of access to technologies or raw materials; (xii) lower operational leverage, decreasing the company's exposure to risks and balance sheet oscillations, by reducing its fixed costs; (xiii) greater flexibility to adapt to the market; (xiv) no commitment of resources that could be used in strategic sectors; (xv) decrease in the possibility of failures in one sector communicating themselves to others; and (xvi) better adaptation to different management requirements, know-how and structure, for distinct sectors and activities.

work contracts was generated risks to the financial and psychological health of the workers; v) the bargaining power of the worker's union was diminished by such agreements, since outsourced workers had to be classified by different categories within the syndicate, promoting scarcity and discontinuity of the collective organizations⁷.

2.2 – Decision, Subsequent Scenario and Considerations of Brazilian specificities

After weighting both sides, the tribunal decided in favour of the “*modernization of labour contracts*” thesis, according to which the liberalization of outsourcing for all type of economic activities and at any stage of the production process would good policy for Brazil. The conclusion of the majority of the ministers was, at the end, that:

“Outsourcing, according to careful empirical studies, far from increasing precarity, reifying or harming employees, results in undeniable benefits to workers in general, such as the reduction of unemployment, decrease in turnover, economic growth and increase in salaries, thereby allowing the constitutional mandates such as eradicating poverty and marginalization, reducing social and regional inequalities, and promoting full employment.”⁸

In deciding the case, seven of the eleven Supreme Court ministers understood that the enrichment of the workers would be a direct consequence of the country's economic improvement and such improvement could only come if the Brazilian State did not interfere in economic practices.

When justifying its position, the court, however, disregarded many of the arguments claimed by the worker's union⁹. Minister Luiz Fux, the reporter of the trial and the one responsible for writing the winning theses, said:

“It is no surprise to economists that the enrichment of the poorest directly results from a more productive economy. At the same time, the absence of arbitrary interference by rulers and the guarantee of freedom of economic organization are fundamental conditions for this.”¹⁰

From his perspective,

7 Terceirização e desenvolvimento: uma conta que não fecha – Dossiê acerca do impacto da terceirização sobre os trabalhadores e propostas para garantir a igualdade de direitos” São Paulo: Central Única dos Trabalhadores 2014. Available on: <https://www.cut.org.br/system/uploads/ck/files/Dossie-Terceirizacao-e-Desenvolvimento.pdf>.

8 Full content of the Judgment in RE 958.252/MG – Page 7.

9 Basically all the arguments that were based in immaterial, non-calculable facts as, for example, the psychological instability faced by workers.

10 Full content of the Judgment in RE 958.252/MG – Page 34.

“outsourcing is associated with undeniable benefits to workers in general, such as a reduction in unemployment, a decrease in turnover, and an increase in economic growth, and salaries.”¹¹

As it can be seen, the argument was mainly a consequentialist argument, which held that liberalization of labour standards would bring future benefits to workers, and ruling that any refutation of this view would hinge on scientific proof to the contrary brought by the labour class. Furthermore, the ministers reinforced that they do not see their position as an ideological or political position, but as the only way Brazil would be able to develop its economy and, consequently, fulfil fundamental the rights for workers in the future.

At the time, Constitutionalists and Labour specialists in Brazil criticized the changes in labor market the new law would produce. They argued, in the same line as defended by the labours union, that outsourcing of labour, in the specific case of Brazil, would help to create the condition of the “second class worker”, stimulating precarious labour conditions¹².

On the other hand, the national industry confederation kept arguing that 54% of the industries in Brazil would be deeply economically harmed if they would have to pay for all labour rights themselves, and that, therefore outsourcing would be “the strongest strategic link in the industry” and should, by consequence, be expanded to all types of activities¹³.

Although constant denunciations of precarious labour relations already existed regarding middle or support activities, the Labour Court Precedent 331 still protected workers by recognizing the labor relationship with companies whose final object was the performance of manual, non-intellectual activities. This included activities that do not require a high level of formal education (as, for example, in the case of construction companies, loading industries, sugar cane cutting, coffee production, chemical industry, mining, metallurgy, and port services).

In refuting the Precedent 331, the Court claimed that Global North countries had already set the economic policy examples that should be followed by Brazil. As Minister Gilmar made clear in his decision,

11 Full content of the Judgment in RE 958.252/MG – Page 69.

12 See POCHMANN, Marcio. *A superterceirização do trabalho*. São Paulo, LTr, 2008; DELGADO, Gabriela Neves; DUTRA, Renata Queiroz. *Terceirização sem limites: a crônica de uma tragédia social anunciada – Jota*; See Pochmann critique in: Pochmann sobre terceirizações: Brasil esvazia fonte de dinamismo econômico – *Brasil 247*.

13 See in The Special Outsourcing Survey conducted by CNI in 2016. Available on SondEsp 68 – Terceirização – Portal da Indústria – CNI (portaldaindustria.com.br).

“Research examining the situation in Germany has concluded that outsourcing is associated with an increase in job stability in the service sector, while it has no impact on job stability in the production sector.”¹⁴

Using a study by Professor Ives Gandra da Silva Martins Filho¹⁵ on the labor reform in Brazil, Minister Mendes also argued that outsourcing would be “on the agenda of the world scenario” and that unemployment rates in countries like Germany, Spain, France, Italy and Portugal had decreased after liberalizing reforms that included the relaxation of hiring rules in those countries¹⁶.

Despite the ministers’ expectations, job stability and wages decreased in Brazil within the period between 2018 and 2022, and improvements in the lives of workers in general did not materialize. According to the Brazilian Institute of Geography and Statistics, the growth in outsourcing practices since the decision was 5% per year, unemployment rose from 11.6% in 2017 to 14.7% in the year 2021, and the purchase power of the Brazilian population diminished in 3.5% in the same period¹⁷.

The condition of workers in Brazil was also measured by the Global Rights Index of the International Trade Union Confederation in the year 2021. The index classified the country as the third worst country in the world for the labouring class considering these five aspects: the right to strike, the right to collective bargaining, the right to establish and join a trade union, rate of violent attacks and deaths, right to civil liberty and the right to free speech and assembly¹⁸. Also, according to their study, the collective agreements and the monetary fund of the syndicates had diminished by 45% and 96% respectively, in the same year.

Furthermore, according to the World Inequality Lab study from the year 2021, the distribution of income in Brazil has remained stable and extremely unequal over the last 15 years, with the top 10% of the Brazilian population receiving over 55% of the overall income, while the share of the bottom 50% was just above 12%, also the wage gap between the white and black populations in the country is around 31%¹⁹.

14 Full content of the Judgment in RE 958.252/MG – Page 45 Here the minister refers to the studies of BACHMANN, Ronald; BRAUN, Sebastian. “The Impact of International Outsourcing on Labour Market Dynamics in Germany”. In: Ruhr Economic Papers, n. 53, jul. 2008.

15 MARTINS FILHO, Ives Gandra da Silva. *A reforma trabalhista no Brasil*, Page. 13.

16 Full content of the Judgment in RE 958.252/MG – Page 230.

17 Synthesis of Social Indicators 11 4 An analysis of the Brazilian population’s living conditions 202, <https://www.ibge.gov.br/estatisticas/sociais/trabalho/9221-sintese-de-indicadores-sociais.html?=&t=resultados>.

18 See ITUC GLOBAL RIGHTS INDEX 2021 in: https://files.mutualcdn.com/ituc/files/ITUC_Global-RightsIndex_2021_EN-final.pdf.

19 WORLD INEQUALITY LAB – World Inequality Report, available at: <https://wir2018.wid.world/files/download/wir2018-full-report-english.pdf>. Page 29.

To sum up, the “Escalation of Inequality” survey launched in August 2019 by Fundação Getulio Vargas (FGV) revealed that inequality in per capita household earned has not improved for 17 consecutive quarters compared to the same month of previous years. From the end of 2014 to the second quarter of 2019, the income of the poorest 50% of the population fell by 17%, while that of the wealthiest 1% grew by 10%. If we are talking about a big recession at the medium and a gain at the top, the bottom of the distribution has had much steeper declines than average. The study found that in 2018 Brazil experienced the most extended period of money concentration in the country’s history since 1989²⁰.

Because outsourced jobs are generally lower paid and offer a more significant contractual discontinuity, they fundamentally serve as Brazil’s minimum wage labour force. As demonstrated by Campos and Andreta²¹, as well as by Pochmann²², the occupations generated around labour outsourcing tend to be concentrated at the base of the Brazilian social pyramid, meaning that 80% of outsourced workers receive a salary not higher than 10% of the minimum wage in Brazil (around R\$ 1.045,00 or US\$ 201,00/month).

It can be seen, therefore, that the court ignored the specificities of the Brazilian scenario in deciding this case. They also ignored the fact that Brazil, as a colonized country from the Global South, would respond differently to norms transplanted from the Global North because labor exploitation is still the rule in the employment relationships. Sociologists such as Florestan Fernandes and Roberto Schwartz had already studied the reality of economic liberalism in Brazil and concluded that it could not be compared to the reality of European liberalism. According to Florestan, in Brazil, the old patrimonial models continued to be in full force with seigniorial dominance, even after Independence²³. In other words, the organization of the slave economy as well the social structures that served as its basis, had not yield to modernizing discourses. However, Fernandes explains,

“the organization of central power was placed at an independent and higher level at which these models of domination made themselves felt only in an indirect and conditioned way... a structural duality was established between the forms of domination enshrined by tradition

20 “A Escalada da Desigualdade: qual foi o impacto da crise sobre a distribuição de renda e a pobreza?” Available in: <https://www.cps.fgv.br/cps/bd/docs/A-Escalada-da-Desigualdade-Marcelo-Neri-FGV-Social.pdf>.

21 CAMPOS, Rosana Soares; ANDRETA, Rachel Loureiro. *Base da pirâmide social brasileira? O perfil dos trabalhadores terceirizados no contexto dos anos 2000*. Available in: <https://periodicos.ufpb.br/ojs2/index.php/abet/article/view/27952>.

22 POCHMANN, Márcio, *op. cit.*

23 FERNANDES, Florestan. *A revolução burguesa no Brasil: ensaio de interpretação sociológica*. 5. ed. São Paulo: Globo 2006. Page 101.

and the forms of power created by the legal order. In practice, reactive controls often prevailed over legal precepts.”²⁴

Therefore, the contradictions that liberalism presents in the Brazilian context stem from this paradox and the hypocrisy of the elitist class, as showed by Fernandes: “Liberalism unleashed a wave of political idealism that had constitutive repercussions on the constitutional monarchy’s organization, functioning, and improvement. This point needs to be duly pondered because it explains an apparent incongruity. A country that barely emerged from colonial status and that could not put an end to the social order inherited from the colonial system engendered not only a relatively modern national state but, above all, a state hardly capable of further modernization of its economic, social, and cultural functions”²⁵.

To prove the same point, Schwartz – one of, if not the most, original critical theorists of Brazilian culture (and perhaps the first) – described the incongruences between Brazilian society and the principles of European liberalism, demonstrating that, in Brazil, the “abominable and apolitical” fact of slavery reigns until this day, when slave-like labor is still the norm²⁶.

In 1992, Schwartz wrote that the ideas of “free labour”, “equality before the law,” and “universalism” even in the European context corresponded much more to appearances than reality (since they have always ignored pervasive exploitation of labour), however, in the Brazilian context, these same liberal and universal principles would have a different meaning, given that they coexisted with the materiality of an agrarian country, divided into large estates, in which slave labour was the main and almost the only source of profit. Following Schwartz, the contradictions between liberal universality and the maintenance of slave labour creates a situation in which equality becomes truly formal provision that will never happen in practice:

“On the one hand, there were the slave trade, the latifundia, and clientelism – that is to say, a set of relations with their own rules, consolidated in colonial times and impervious to the universalism of bourgeois civilization; On the other hand, hampered by these relations, but also stymying them, there was the Law before which everyone was equal, the separation between public and private, civil liberties, parliament, romantic patriotism and so on. Ensuring the stable coexistence of these

24 *Idem*, Page 56.

25 FERNANDES, *op. cit.*, Page 56.

26 SCHWARTZ, Roberto. *Misplaced ideas: critical studies in Latin America – cultural studies*. Verso 1992. Page 21.

two conceptions, in principle so incompatible, was the center of ideological and moral preoccupations in Brazil in the nineteenth century.”²⁷

Schwartz recalls that, with the logic of slave labor in Brazil, the idea of producing efficient work did not necessarily mean reducing the amount of effort and energy expended by the workers, as presupposed by the liberal logic of efficiency. Rather, it meant to make maximum use of the cheapest possible manual labor. There was, therefore, no incentive to diminish work and more efficient work, but only to make it more productive with the use of military violence and discipline.

Schwartz explains that, in Brazil, it was only when slavery became less profitable than wage labor that the idea of “freeing” the enslaved people became attractive to the elites. According to him,

“Insofar as it was property, an enslaved person could be sold but not fired. In this sense, a free worker would give more freedom to his employer because he would mobilize less capital; this is one reason, among others, why slavery imposed limits on the rationality of production.”²⁸

Furthermore, with a wage, the former slave would become a consumer of the same products generated by his former master, providing the latter with even more profit.

Therefore, it is not surprising that even after abolition, slave-like labor was maintained due to extreme inequality and the absence of rights to protect workers. Following Schwartz’s conclusions, in Brazil after independence

“a small elite dedicated itself to copying everything that came from the Old World (Europe), separating itself from the mass of the population, which remained uneducated. Consequently, literature and politics came to occupy an exotic position far from the reality of most people.”²⁹

As showed, Schwartz’s description should have been considered in the decision on the Extraordinary Appeal number 958.252/MG, in which the absorption of ready-made Northern formulas into the Southern context reveals itself to be a form of “one size fits all” reasoning does not consider the context of its application to decide.

27 *Idem*, Page 9.

28 *Idem*, Page 10.

29 *Ibidem*.

3 – Confronting the Decision with Decolonial Concepts

3.1 – Decolonial Theory – Main Concepts

After most of the colonies independencies and until the end of the XX century, colonialism was generally treated as an unfortunate event from the distant past, and it was would have had its effects ceased with the official independence of colonized countries. Later, around the 70's, some scholars Asian and African descendent³⁰, influenced by post-structuralism and postmodern theories, revealed that colonization could not be treated simply as a past event that have been overcome, since its effects were much more prolonged than those immediately generated by the administrative control of the colonies by the metropolis. Those scholars denounced the fact that colonialism had also extended to social relationships, the psychology of the colonized and colonizers, and international relations between countries.

Around 1997, inspired by post-colonial ideas, a group of Latin American intellectuals, already involved in Latin American Subaltern Studies, proposed a reinterpretation of the arguments presented by the post-colonial critique, shifting the focus of the discussion to consequences of to first colonization (the one that happened on the XVI century by Portugal and Spain in the Americas). According to those scholars, the post-colonial theory had opened many doors to discussion. And yet, it had made not a sufficient rupture with the colonizers because the break with the colonizer should be not only a materialistic but an epistemic break.

The approach offered by this group – later called the “Modernity/Coloniality Group” and initiated by the Peruvian philosopher Anibal Quijano – deepened the discussion around colonialism and its extended effects by arguing that colonization is still happening until today through different forms of exclusion called *coloniality*. According to those scholars, since the historical time called Modernity, which was initiated by the European conquest of the Americas, a new Eurocentric way of thinking³¹ and a new scale of values was imposed on all societies across the globe, killing and silencing other systems in the name of a modern rationality.

The expansion of coloniality is, by that logic, a continuous process that goes side by side with the expansion of Modernity. Therefore, Modernity has a dark side in the shape of this type of “domination through the mind”, called coloniality of thought. Catharine Walsh explains what this concepts means and

30 See Spivak, Mbembe, Fanon, Aimé Césaire, Memmi, Gilroy, Hall, Bahbha.

31 Refereing here to cartesian and kantian rationality.

describes the four cores of coloniality: of power, of knowledge, of being and of Nature, respectively:

“The first core – coloniality of power – refers to the establishment of a social classification system based on a racial and sexual hierarchy, and in the formation and distribution of social identities from superior to inferior: pale-skinned, mixed-race, Indians and black-skinned.³² (...) *The second core is the coloniality of knowledge: the positioning of eurocentrism as the unique perspective of knowledge, which rules out the existence and viability of other epistemic rationalities and other knowledges that aren't the one of the white European males or Europeanized.*³³ (...) Coloniality of being, the third core, is the one that appears in the middle of inferiorization, subalternization and dehumanization: to what Frantz Fanon (1999) refers to the treaty of no existence³⁴ (...) The last core, one that has been a rather less reflective and discussed topic, is coloniality of mother nature and life itself. The foundation comes from the binary nature/society division, ruling out the magical-spiritual, the millennial relationship between biophysical worlds, humans and spirituals, including the one of the ancestors, which supports the essential systems of life and of humanity itself.”³⁵

Coloniality of knowledge takes place whenever there is the imposition of Global North epistemologies and ways of living over epistemologies from the Global South. Coloniality can be identified when European experiences are taken as universal experience, while multiple other ways of living, being, and organizing society are condemned as antique, archaic, barbaric, or underdeveloped. Coloniality and Modernity are thus both sides of the same coin: whenever Modern rationality is imposed on the whole globe as the only possible rationality, coloniality is present because, in consequence, other forms of thinking and living will be silenced, dominated, reduced and infantilized. Coloniality appears, then, as this complex set of phenomena that usually goes hand in hand with modern rationality and which, according to Boaventura dos Santos, establishes a homogeneous way of perceiving knowledge, time, differences, market scales and social productivity models³⁶:

“i) A single form of knowledge as valid (modern science and high culture);

32 WALSH, Catherine. Interculturality, purinationality and decoloniality: political-epistemic insurgences to refund the State. *Tabula Rasa*, Bogotá, n. 9, p. 131-152, julio/diciembre 2008, Page 136.

33 *Idem*, Page 137.

34 *Idem*, Page 138.

35 *Idem*, Page 139.

36 SANTOS, Boaventura de Sousa. *Epistemologies of the South: Justice Against Epistemicide*. Routledge 2016. Page 164.

ii) A single form of accounting for time and history (a linear conception of time in which History has a unique and well-known meaning and direction guided by European countries);

iii) A single form of naturalizing differences in which differences between human beings are based on attributes that negate the intentionality of the hierarchies produced (ex: racial, sexual, performative classifications);

iv) A single logic of dominant scale in which Western Universalism should prevail regardless of specific contexts, histories, and cultures. Global scale prevails over other regional forms of social organization;

v) Finally, a single way of organizing social productivity which is through the advancement of global capitalism: capitalism is the social production model that best expresses the nature of human beings in its maximum fertility and potential.”

According to this, the European experience seems to be the only possible model for all societies around the globe and, therefore, a definite and determinate scientific model. For that rationality, advanced capitalist societies represent the most developed examples of humanity, as explained by decolonial theorists. This universalized way of thinking does not consider, however how much societies depend on the labor exploitation and nature exploitation to grow economically. Such logic creates, in parallel, forms of non-existence or failed experiences in the figures of the underdeveloped, ignorant, residual, inferior, local, non-productive and infantile, in a binary logic that condemns colonized countries and peoples. This happens because such social forms of non-existence represent obstacles vis-à-vis the realities deemed relevant by the scientific, advanced, superior, global, or productive world and are incarnated by the groups of subaltern peoples of the Global South. Therefore, whenever such a homogeneous way of reading the world appears, it operates and propagates coloniality by condemning other forms of living to non-existence or irrelevance.

3.2 – Locating Coloniality in the Ministerial Discourse

When opposing these theoretical concepts with the votes cast by the ministers, it becomes clear how the ministerial discourses in analysis of the case are based in and promote *coloniality*. As mentioned above, the minister’s reasoning was, based mainly in arguments that were justified by the economic consequences of the decision. According to the court, the enrichment of the poor would be a direct consequence of the country’s economic improvement, and this improvement would be only possible with the non-interference of the state in market forces. Thus, any restriction on freedom to hire employees

would be detrimental to the workers themselves, since their life's improvement depends on incentives for hiring. In theory, the court held that relaxing the hiring rule alone would not stimulate greater exploitation if companies were still be subsidiarily responsible for worker's rights. Furthermore, the relaxation contracting rules was the only way for the country to progress.

As will be shown, several features of the Justices' votes fit the descriptions of coloniality of knowledge described by Santos: i) The superiority of universalist global north theories and institutions; ii) The privileging of global scale over the local scale of analysis iii) The conceptions of time and history as linear; and iv) The single way of organizing social productivity as embrace of global capitalism.

The first and most obvious example of coloniality in the ministerial discourse is the implicit superiority that ministers attribute to Global North theories in comparison to contextualized studies produced by the Global South. This reveals that, for them, a single form of knowledge should be considered as valid, which is the knowledge produced by intellectuals and institutions recognized by developed countries. Also, this evidence leads to the conclusion that the court assumes a certain homogeneity of legal systems and legal contexts of application, and it is guided by a universalized and homogeneous conception of living within European parameters. In his vote, Justice Luiz Fux, reporting judge on the case, used direct and non-contextualized quotes from Global North doctrines to describe what should be done in Brazilian reality. At first, he cited studies from Harvard Economists, decisions from the German Constitutional Court, and arguments from German writers and professors such as Robert Alexy, Volker Epping, and Christian Hillgruber, to defend the idea that, in the abstract, "any restrictions on individuals' freedom to contract would only be justifiable when supported by empirical elements that indicate their necessity and adequacy"³⁷.

Precisely because the workers did not justify their position based in terms of universality, but, rather, in their local experiences, many of their requests were simply ignored. When confronted with the arguments presented by the workers, the court considered them invalid, because of a "lack of methodological validity". However, the same methodological parameters were not even questioned for the studies produced by global north/scientifically recognized institutions. Following this line of thinking the ministers preferred to simply assume the quality of the arguments presented by industry, because of the sole fact that they were based in privileged institutions. As mentioned above, all the historical and cultural distinctiveness of Brazil in comparison with Global

37 Full content of the Judgment in RE 958.252/MG – Page 9.

North countries, as for example, in the assimilation of economic liberalism by an agrarian and newly formed country were completely ignored.

Minister Fux, for example, made use of technical and abstract parameters to disqualify the worker's arguments, writing:

“to admit the arguments presented by the workers' union in this scenario, would be to assert that reality must bow to the thesis elaborated by jurists, not the opposite. The reality is that of the benefits brought to the workers and the Market as a whole.”³⁸

This shows that for minister Fux, being open to non-universal arguments would imply a deviation from reality.

After defining the Global north to be the Global as such, coloniality also privileges the global over the local. This is the second evidence of coloniality that can be seen within the ministerial discourses: the logic of dominant scale in which global practices and discourses must prevail over local, regional contexts. In that line, the ministers consider the country's economic growth as a sufficient factor for measuring the life quality of life of its population because, on average, people would have more access to products they need, and workers would have more opportunities to be hired. This vision helps to propagate an idea of progress and happiness that supposedly can be measured as an empirical, utility-based element.

Mendes reinforced this hypothesis by clamming that in the global north and therefore in general, “outsourcing is associated with labor market growth, insofar as firms' competitiveness and productivity also increase with specialization in the production process”³⁹. Citing Timothy Taylor⁴⁰, he affirmed:

“The rationale for this correlation can be described as follows: ‘When outsourcing allows firms to produce more cheaply, competition between firms that are outsourcing will drive down the prices of their products. (...) consumers will have more money to spend on other goods, which will help jobs in other industries’.”⁴¹

Mendes conceive of outsourcing as a universal global practice and not as local context dependent activity.

Here it is clear that Mendes ignored non-state and customary law as it is that case, for example of Brazil semi-slave working relations. In the opinion of both justices, the eventual increase in the number of precarious services in

38 Full content of the Judgment in RE 958.252/MG – Page 47.

39 Full content of the Judgment in RE 958.252/MG – Page 67.

40 TAYLOR, Timothy. *In defense of Outsourcing*. In: 25 Cato J. 367 2005. Page 371).

41 Full content of the Judgment in RE 958.252/MG – Page 67.

Brazil would be the necessary cost to be paid for advancing the conditions in the country. It can be seen, in both their votes, that besides the hierarchy of knowledges that privileges global north conceptions also the global scale prevails over the local conditions in Brazil.

The third explicit form of coloniality present in the votes, is the universalized way ministers Gilmar Mendes and Luiz Fux conceive of Time and History. According to them, there is a logic of linearity of time in which the Brazilian reality represents the Global North reality in a lower stage of evolution. In this logic, there is only one historical path, that privileges the narrative of global north societies and the multiple hierarchies of domination that support them. Some excerpts illustrate this idea of “History as a linear path” within the ministerial votes, as, for example, when t minister Fux affirms that:

“Human history is divided by authors and anthropologists into three major milestones. First, with the cognitive revolution, homo sapiens and communication abilities emerged. Next, with the agricultural revolution, man becomes fixed on the land when he learns to plant and domesticate animals. Finally, the scientific revolution began at the turn of the Renaissance to the Modern Age and continues to the present day. We live, by the way, in the framework of the scientific revolution.”

Within this linear path, the experience and even the language of new technological sectors continues to prevail over local understandings of the Brazilian major economy:

“The language of today includes a set of terms that, just a few years ago, were not even considered: Google, WhatsApp, Waze, Uber, Spotify, YouTube, Windows, Mac, Dropbox, Skype, FaceTime, Facebook, Twitter, Instagram, Amazon, Google Maps, Google Translator, to name a few. *There is no sector of the traditional economy that has not been affected: everyone is after new business models.*⁴² (...) The traditional economy based on agricultural production, industrial production, and the transformation of raw materials, gold, oil, wheat, *this economy gives way to a new time in which the great value, the great wealth is intellectual property, knowledge, and information.*”⁴³

This situates the Brazilian present as taking place in the past of the scientific revolution currently. The minister vote reveals a developmentalist idea that relates market competition, progress of technology and science with more equal opportunities in the “history of humanity”, which the ministers see

42 Full content of the Judgment in RE 958.252/MG – Page 74.

43 Full content of the Judgment in RE 958.252/MG – Page 75.

as a single path. In yet, another of Fux's proposals, he continued to argue that European past corresponds to Brazil's present:

“the great leap forward for humanity, which has enabled us to enjoy standards of never living before experienced, was only possible with the advent of constitutionalism – in the English case, with the overthrow of the Stuart dynasty and the imposition, by glorious revolution, of a constitutional monarchy. It is no surprise to economists that the enrichment of the poorest directly results from a more productive economy. At the same time, the absence of arbitrary interference by rulers and the guarantee of freedom of economic organization are fundamental conditions for this.”⁴⁴

Here Fux equates present day market regulation with past European despotism. The reading reveals again single the linearity of time, making it necessary for Fux to correlate European past with now Brazilian present. This position assumes a scientific and apolitical account of history despite the very examples as being political conflicts as the glorious revolution. It creates a teleological discourse of human flourishing for which allows no other competing logic for time.

While the Judeo-Christian tradition perceives time as an exclusively 'linear' category (i.e. past-present-future), many other civilizations – including Ancient Greeks, Mayans, Incans, and present today, Hinduists and Buddhists – understand the world differently, with a circular conception of time. They organize their understanding of time around the circularity of nature and have the alternation of day and night, seasons, moon phases, birth and death as references to time passing. For many Australian Aboriginal communities, time is perceived as a procedural pattern according to which an individual is in the center of time-circles and events are placed according to their relative importance for the individual and his or her respective community (i.e. the more important events are perceived as being 'closer in time')⁴⁵. In such polychromic cultures, the focus is on the quality of time rather than on its quantity, meaning that time is measured in terms of relationships, communication and the results of activities (often several of these at once)⁴⁶.

The imposition of this western model conception of time and history as linear is limiting because it sees Brazil present as the European past instead of a present in its own right, with all the complexities and possibilities that come with that. Linear time also erases alternative conceptions of time as, for example

44 Full content of the Judgment in RE 958.252/MG – Page 33.

45 See Janca and Bullen. The Aboriginal concept of time and its mental health implications. Available at: <https://doi.org/10.1046/j.1038-5282.2003.02009.x>.

46 Hall, E.T. *The Dance of Life, The other dimension of time*. New York: Doubleday. In: RAKMANKULOVA, Amina. *How different cultures understand time?* Available at: <https://www.loteagency.com.au/how-different-cultures-understand-time/>.

indigenous, collective and located conceptions that could lead to values that could challenge the hegemony of capitalist progress

Liberal society constitutes, according to the linear vision, not only the desirable social order, but, also, the only possible order, since all society is supposed to be at the same final point: a society without ideologies, secularized, single, globalized, with a universal model of civilization. This would make politics itself unnecessary. This logic is in line with the western Cartesian/Kantian vision, which ignores not only cosmological conceptions of life but notions such as “conviviality” or “respect to mother nature” which are seen by marginalized societies as components of happiness and life quality of life as, for instance, pre-colonial and colonized societies see it⁴⁷.

The judges understanding of the end of the history as scientific, apolitical and capitalist leads to the conclusion that global free market competition is the natural expression of human development and the destiny and that is why Brazil cannot avoid outsourcing along the European model. According to Mendes, if Brazil continued to restrict its labor contracting conditions, it would be transformed into an “employment exporter and an importer of products manufactured by a Brazilian company abroad” since Brazil would be creating conditions for its companies to seek other regions in the globe with the more ruling-flexible situation. For him, there is, therefore, no alternative besides accepting the global market concurrence.

In this sense, if, in the view of the ministers, history is just one, the global scale is the only alternative and the European models of functioning, and are the most developed and emancipated ones, their decision to follow the European models would not be an ideological or political decision, but a scientific one. This demonstrates the fourth example of coloniality of knowledge in the case: the decision to follow European models as free markets economies is not seen as an ideological decision but a scientific one.

Justice Luiz Fux went so far as to declare, for example, that his position:

“is not a matter – and I would like to make this clear – of ideological choices or philosophical preferences. It’s about the course of history and that: ‘if there is no economic development or business success of companies, there will be no employment, income, or any other right for workers. When there are 13 million unemployed and 37 million workers in informality, it is necessary to consider the available options, without ideological prejudices and attachments to old dogmas’.”⁴⁸

47 The concepts of *buen vivir*, *Ubuntu*, *sumac kawsay*, for example, inspired in indigenous epistemologies are examples of conceptions of living that scape the modern logic and inspired the new constitutionalism in Bolivia and Ecuador.

48 Full content of the Judgment in RE 958.252/MG – Page 76.

In the same logic, Mendes deviated even further from assuming his political view by stating that, in this case, they were called upon to decide “*between utopia and reality*” in which opening the Brazilian market would be “the reality” while alternatives to this model would represent pure Marxism. According to him:

“it is not a matter of choosing between a formal work model and an informal work model, but between a model with work and a model without work; between a utopian social model and a model in which social gains are contextualized with reality.”⁴⁹

Here, in their view, political discourses are linked to utopia while reality is defined by apolitical science such as economics.

The supposedly scientific discourse that modernity imposes was analysed by the Brazilian researchers Thais Luzia Colaço⁵⁰ and Eloise da Silveira Petter Damázio. According to them, coloniality uses this apolitical mask to make itself even more vital⁵¹. They assert that in a decolonial research practice,

“we are, therefore, facing the need to modify a process in which the researcher was immune and separated (in the imaginary of point zero) from the world he or she was studying. From the decolonial position, it makes no sense to talk about objectivity, neutrality, science, and so on. Knowledge is not constructed ‘about’ but ‘for’, with a political, committed sense.”⁵²

In that conception, it is up to the researcher who seeks to decolonize his methodology, to reveal the political character of the supposedly apolitical discourses of modernity. From the votes of the ministers in the case, one can easily see the pretension of political neutrality hidden in technical-scientific lessons.

When Justices Fux and Mendes talk about utopia and reality, it means that they use this apolitical mask to hide their own utopia.

The problem of how outsourcing of services in the global north can generate working class marginalization is contentious but beyond the scope of this paper. However, in Brazil, the disastrous consequences for the working class are obvious and stems from both the coloniality of knowledge and the historical specificities of this country that coloniality forces us to ignore.

49 Full content of the Judgment in RE 958.252/MG – Page 231.

50 post doctor in indigenous rights and professors at the UFSC university,

51 COLAÇO Thais Luzia; DAMÁZIO Eloise da Silveira Petter. *New perspectives for legal anthropology in Latin America: law and decolonial thought*. Florianópolis: Funjab, 2012. Page 204.

52 *Ibidem*.

4 – How the case could be reinterpreted in the lenses of decolonial theory

The first of the paper was dedicated to demystifying the superiority of Global North epistemologies by showing that the solution found by the court in case rather than contemplating the local history and culture of Brazil, ended up promoting even more inequality and segregation. The second section of the paper showed that the concept of coloniality can be useful to identify this problem in court cases and confront it. After that, it is necessary, in this third section, to imagine ways in which those problems could be avoided, which means to discuss how decolonial theory can also help in the construct of something new.

As shown, the *coloniality of knowledge* often needs to be analysed to uncover its hidden logic. Coloniality operates as this universalistic and generalist perception of life which is unable to contemplate the richness of competing perspectives. Coloniality provokes the production certain discourses that intend to prove that we are all in the same boat towards a better future, towards progress. This lesson, nonetheless, hides a reality of exclusion of *others* and their voices. It is precisely because of this mechanism of exclusion, that such discourses can have a technical and scientific appearance of while overriding other conceptions of law such as “living law”.

In that line, and according to this analysis of the case, it would be appropriate to raise questions such as, for example: “from what place are the Ministers speaking?”; “to whom are they referring when they use the terms as ‘humanity’?”; and “what do they mean by ‘History’ and by the ‘language of our days’”? When they use the pronoun ‘we’ to announce that “‘we’ live in the realm of the scientific revolution, “to what part of society specifically are they talking about?”. These questions reveal the polarized and inevitably political point of view that is often hidden behind supposedly scientific approaches.

The critique can begin with the discussion around the term “reality” itself, which is described in the case as something that can only be accessed by intellectuals and economists. As Edgardo Lander points out, such “*discourse of the real as a uniquely real*” is a totalizing standard of analysis that promotes coloniality, submitting all interpretations of the world to the logic of the technical-scientific. This mechanism is subjecting all peoples of the planet to the epistemological criteria of colonial modernity. The standard, explains Lander, makes us feel condemned to categories of success or failure according to the binary parameters of the primitive/traditional, as opposed to the modern/successful. He says:

“Categories, concepts, and perspectives (economy, state, civil society, market, classes, etc.) thus become not only universal categories for the analysis of any reality but also propositions that define what should be for all the peoples of the planet. This knowledge is converted

into a standard form which analyses the deficiencies, delays, brakes, and perverse impacts as the product of the primitive or traditional in all other societies.”⁵³

In the same line, without explicitly mentioning decolonial theories, Professor Menelik de Carvalho Neto has also called attention to the risks of this universalist and “*one size fits all*” rationality imposed on the Brazilian reality:

“(…) the elaboration of universal, legitimate and constitutional general laws does not eliminate the work of modern law, although enlightenment logic might suppose giving free rein to scientific positivism. On the contrary, this elaboration only initiates the work since, in the hypothesis of the conflict, the raising by the parties of opposite claims based on general and abstract norms that are also opposite and equally valid, requires the work of the discourses of application. That is, the production of a judgment of adequacy about the general and abstract norm is necessary to effectively govern that specific concrete situation in its uniqueness and unrepeatability, without producing residues of injustice.”⁵⁴

Professor Menelik, together with other scholars, released a book that proposed to evaluate the labor reform that has been evaluated in this paper. In this work, he brilliantly addresses that problem of “one size fits all” rationality:

“even when a law pretends to exhaust its application situation, there is no application situation in the world that is not unique, that does not require an immense amount of work from the applier so that an injustice is not committed when, due to lack of analysis of the specificities that characterize that case, it ends up giving way to the abusive claim raised only to win the case if the argument were to prosper due to the absence of due judicial examination. The content of the law is as complex as life; otherwise, it would not even be able to seek to regulate it.”⁵⁵

That said, even though laws must pass through the sieve of universality to be valid – for they cannot exclude anyone by definition, general and abstract norms still need to be applied and interpreted to distinct situations, and social potentialities are not exhausted in the law, but go through the instances of execution⁵⁶.

53 LANDER, Edgardo. Libro: La colonialidad del saber: eurocentrismo y ciencias sociales. Latin American perspectives. Edgardo Lander (org). *Collection Sur Sur*, CLACSO, Ciudad Autónoma de Buenos Aires, Argentina. September 2005. Available in: *Microsoft Word – 49CD0508-55CC- 285770.doc (usp.br). Page 8.

54 CARVALHO NETTO, Menelick de. Racionalização do ordenamento jurídico e Democracia. In: ROCHA, Claudio Janotti da. *Constitucionalismo, trabalho, seguridade social e as reformas trabalhistas e previdenciária*.

55 *Idem*, Page 103.

56 *Ibidem*.

When questioning the line that separates valid knowledges from marginalized knowledges, decolonial theorists can contribute not only to reinforcing the resistance of today's marginalized epistemologies, but can bring into light pre-colonial or contemporary excluded epistemologies as possible inspirations for future realities. As an example, the notion of *Buen Vivir*⁵⁷, taken from indigenous epistemologies has inspired Bolivian and Ecuadorian constitutional laws.

Acosta⁵⁸ explains, we can only understand *Buen Vivir* in opposition to the Western "better life" (or the *dolce vita* of some), which exploits the available resources to the maximum until the basic sources of life are exhausted. Thus, *Buen Vivir* has a strong present sense of solidarity, in opposition to the iniquity of capitalism, in which a few live well to the detriment of the great majority.

In that sense, from a decolonial point of view, the court should have considered that: i) Global North theories are not able not describe and override contextualized studies and conceptions of life that are locally produced in the place of application; ii) non-state and customary practices from Brazil should have been taken into consideration instead of being ignored as non-law; iii) Time and History of certain peoples (concepts that were used to describe progress and emancipation) can have a broader sense by also having in the centre of its meaning notions as solidarity and conviviality; iv) legal science cannot be seen as an independent, ahistorical, decontextualized science.

A legal theory that proposes to be decolonial, firstly needs to recognize the importance of interdisciplinarity, of historical and cultural contextualization in the application of legal decisions, and of the expansion of the constitutional interpretive circle in an epistemic sense. As stated by Gonçalves and Tarrega Correia,

"the (false) independence of legal science would be an epistemological obstacle since it reinforces the a-historical, de-contextualized perception of the law. Law distances itself from ethics and politics as if its institutes were shielded from ideological flavours and influences: it is the process of affirmation of liberal ideology as a science. By convincing social actors that law is non-political and politics is non-ideological, liberalism would have consolidated its hegemony."⁵⁹

57 ACOSTA, Alberto. *O bem viver – uma oportunidade para imaginar outros mundos*. Rio de Janeiro: Editora Elefante, 2016.

58 Alberto Acosta is one of the main ideologists of the beginning of the Citizens' Revolution in Ecuador, having been one of the people responsible for the government plan of Alianza País, the party led by Rafael Correa, whose ascension to the Presidency of the Republic in 2007 initiated a series of transformations in this hermosaic nation located in the center of the world. Ecuador has thus become a reference for utopians and social fighters.

59 GONÇALVES, Daniel Diniz; TÁRREGA CORREIO Maria Cristina Vidotte Blanco. Decolonial hermeneutics: revealing the exhaustion of the legal and political speech of liberalism. Decolonial hermeneutics: revealing the exhaustion of the legal and political speech of liberalism. *Law, State and Society*, n. 52, jan./jun. 2018.

In this path, academic work must recognize its limitations. If decolonial theorists can help to clarify to the social actors the alternatives to their actions and, in doing so, help them to develop and deepen their political will, it is not the goal of a decolonial critique to determine what should be the political orientation of the new alternatives to Modernity should be. Otherwise, decolonial theorists can risk becoming “the new colonizers of thought”⁶⁰. In that sense, the decolonial critique can open the way for richer decolonial pluralism instead of colonial liberal conception as the only possible conception of life. Global North epistemologies do not have to be thrown away, but can live together with other forms of social organization in a plural society.

5 – Conclusion

In response to the many criticism directed at Latin American decolonial theory, this article aims to demonstrate how the concepts formulated by this theory can still help jurists with a differentiated understanding of the world, to confront epistemic authoritarianism. This may favour the construction of more solidaric and humanitarian conception of progress and emancipation.

The close reading of the Brazilian supreme constitutional court case serves to illustrate how *coloniality of knowledge* operates by excluding and marginalizing social groups in Brazil from legal protection. The rise of the technicality of legal language and the prohibition on those groups naming and interpreting their own reality in parameters other than specific in technical parameters are evident mechanism of an epistemological authoritarianism.

Going forward will be extremely important task for Brazilian legal researchers to identify similar discourses driven by this “one size fits all” rationality. As has been shown, such discourses prohibit the consideration, oppressing them and considering them as non-existent. While this paper has taken the first decolonial step by recalibrating legal science considering local historical cultural, historical and political contexts in which decisions are taken, further research could explore alternative epistemologies as references for emancipation.

6 – Bibliography

ACOSTA, Alberto. *O bem viver – uma oportunidade para imaginar outros mundos*. Rio de Janeiro: Editora Elefante, 2016.

CAMPOS, Rosana Soares; ANDRETA, Rachel Loureiro. *Base da pirâmide social brasileira? O perfil dos trabalhadores terceirizados no contextos dos anos 2000*. Available in: <https://periodicos.ufpb.br/ojs2/index.php/abet/article/view/27952>.

60 Quijano (1989); for a more extended version of the ideas explored in the nineties, see Quijano (2000) see also, in the same issue the article by Lander.

CARVALHO NETTO, Menelick de. Racionalização do ordenamento jurídico e democracia. In: ROCHA, Claudio Janotti da. *Constitucionalismo, trabalho, seguridade social e as reformas trabalhistas e previdenciária*.

COLAÇO, Thais Luzia; DAMÁZIO Eloise da Silveira Petter. *New perspectives for legal anthropology in Latin America: law and decolonial thought*. Florianópolis: Funjab, 2012.

DELGADO, Gabriela Neves; DUTRA, Renata Queiroz. Terceirização sem limites: a crônica de uma tragédia social anunciada. Available at: *Terceirização sem limites: a crônica de uma tragédia social anunciada* – Jota.

FERNANDES, Florestan. *A revolução burguesa no Brasil: ensaio de interpretação sociológica*. 5. ed. São Paulo: Globo, 2006.

GONÇALVES, Daniel Diniz; TÁRREGA CORREIO, Maria Cristina Vidotte Blanco. Decolonial hermeneutics: revealing the exhaustion of the legal and political speech of liberalism. Decolonial hermeneutics: revealing the exhaustion of the legal and political speech of liberalism. *Law, State and Society*, n. 52 jan./jun. 2018.

HALL, E. T. (1983). The dance of life, the other dimension of time. In: RAKMANKULOVA, Amina. *How different cultures understand time?*. Available at: <https://www.loteagency.com.au/how-different-cultures-understand-time/>.

ITCU. *Global Rights Index 2021*. Available in: https://files.mutualcdn.com/ituc/files/ITUC_GlobalRightsIndex_2021_EN-final.pdf.

LANDER, Edgardo. Libro: La colonialidad del saber: eurocentrismo y ciencias sociales. Latin American perspectives. In: LANDER, Edgardo (Org.). *Collection Sur Sur*, CLACSO, Ciudad Autónoma de Buenos Aires, Argentina. September 2005. Available in: *Microsoft Word – 49CD0508-55CC- 285770.doc (usp.br).

MARTINS FILHO, Ives Gandra da Silva. *A reforma trabalhista no Brasil*.

CARVALHO NETO, Menelick de. Racionalização do ordenamento jurídico e democracia. In: ROCHA, Claudio Janotti da. *Constitucionalismo, trabalho, seguridade social e as reformas trabalhistas e previdenciária*.

POCHMANN, Marcio. *A superterceirização do trabalho*. São Paulo: LTr, 2008.

QUIJANO, Aníbal. *Colonialidade do poder, Eurocentrismo e América Latina*. Available at: http://bibliotecavirtual.clacso.org.ar/clacso/sur-sur/20100624103322/12_QUIJANO.pdf. (1989).

SANTOS, Boaventura de Sousa. *Epistemologies of the South: Justice Against Epistemicide*. Routledge, 2016.

SCHWARTZ, Roberto. *Misplaced ideas: critical studies in Latin America – cultural studies*. Verso books 1992.

TAYLOR, Timothy. *In defense of outsourcing*. In: 25 Cato J. 367 2005. p. 371).

WALSH, Catherine. Interculturality, purinationality and decoloniality: Political-Epistemic Insurgences to refund the State. *Tabula Rasa*, Bogotá, n° 9, p. 131-152, julho/diciembre 2008.

WORLD INEQUALITY LAB. *World Inequality Report*, page 29 available at: <https://wir2018.wid.world/files/download/wir2018-full-report-english.pdf>.

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