Comparative study about labour law systems

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Portugal, South Korea, Brazil, Mexico, Argentina and South Africa

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Comparative study about labour law systems

Portugal

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Comparative study about labour law systems—Portugal, South Korea, Brazil, Mexico, Argentina and South Africa

International Policy Centre for Inclusive Growth
United Nations Development Programme

The International Policy Centre for Inclusive Growth (IPC-IG) is a partnership between the United Nations and the Government of Brazil to promote global learning on social policies. The Centre specialises in research-based policy recommendations to foster inclusive growth. The IPC-IG is linked to the United Nations Development Programme (UNDP) in Brazil, the Ministry of the Economy (ME) and the Institute for Applied Economic Research (Ipea) of the Government of Brazil.

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Project: "Strengthening the production and management of information related to labour justice to expand understanding and improve the Brazilian justice system—judicial teaching in Labour Justice

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Brasília, 30 de novembro de 2021

Alexandre dos Santos Cunha

Coordinator (Ipea/IPC-IG)

LIST OF ACRONYMS

ABC	Brazilian Cooperation Agency
ABRAT	Brazilian Association of Labour Lawyers
ACT	Working Conditions Authority
AI	Infringement Notice
AMCU	Association of Mineworkers and Construction Union
ANC	African National Congress
BCEA	Basic Conditions of Employment Act
CA	Centre for Advanced Training
CABA	Autonomous City of Buenos Aires
CANPAT	National Campaign for the Prevention of Accidents at Work
CAS	Individual Case
CCMA	Commission for Conciliation, Mediation and Arbitration
CDMX	Mexico City
CEJ	Centre for Judicial Studies
CEJUSC	Judicial Centres for Conflict Resolution and Citizenship
CEPJ	Centre for Judicial Studies and Projects
CGJT	Internal Affairs Department of Labour Justice
CLT	Consolidated Labour Laws
CM	Magistrates' Council

CMC	Córdoba Judicial Council
CNJ	National Justice Council
CNRT	National Labour Relations Commission
CONAPO	National Population Council
COSAS	Congress of South African Students
COSATU	Congress of South African Trade Unions
CPACR	Committee of Experts on the Application of Conventions and Recommendations
CPC	Code of Civil Procedure
CPL	Labour Procedural Code
CPT	Labour Procedural Code
CRRTs	Regional Labour Relations Commissions
CRT	Labour Relations Commission
CSAA	Constitution Seventeenth Amendment Act
CSJT	Higher Council of Labour Justice
CSMJS	Comissão de Seleção de Magistrados e Escola Judiciária
CT	Labour Code
CURP	Unique Population Registry Code (Clave Única de Registro de Población)
CUSA	Council of Unions of South Africa
DNT	National Labour Department
DPU	Office of the Federal Public Defender
EEA	Employment Equity Act

EJN	The Nation's Judicial School
ELA	Labour law amendments
ENAMAT	National School for the Training and Improvement of Labour Magistrates
EPH	Permanent Household Survey (*Encuesta Permanente de Hogares)*
FGTS	Employment Guarantee Fund
FMI	International Monetary Fund
FOSATU	Federation of South African Trade Unions
FSTSE	Federation of Labour Unions in the Service of the State
GAJ	Judicial Activity Allowance
GCJ	Office of the Chief Justice
GDI	Gender Development Index
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution Plan
GII	Gender Inequality Index
GoM	Grade of Membership
HDI	Human Development INdex
IBGE	Brazilian Institute of Geography and Statistics
IHDI	Inequality-adjusted Human Development Index
ILO	International Labour Organization
IMSS	Mexican Social Security Institute
INAI	National Institute for Transparency, Access to Information and Protection of Personal Data

INDEC	National Statistics and Census Institute
INE	National Electoral Institute
INEGI	National Statistics and Geography Institute
IPC-IG	International Policy Centre for Inclusive Growth
IPEA	Institute for Applied Economic Research
ICESCR	International Covenant on Economic, Social and Cultural Rights
ITAM	*Instituto Tecnológico Autónomo de México*
JCJ	*Juntas de Conciliação e Julgamento*
JSC	*Comissão de Serviço Judicial*
KLI	Korea Labor Institute
LCT	Labour Contract Law
LDO	*Lei de Diretrizes Orçamentárias*
LFT	Federal Labour Law
LFTSE	Federal Law on State Employees
LOPJF	Organic Law of the Federal Judicial Branch
LOSJ	Law on the Organisation of the Judicial System
LRA	Labour Relations Act
LRC	Labour Relations Commission
LRCA	Labour Relations Commission Act
LSA	Labour Standards Act
MK	uMkhonto we Sizwe

MoL	Ministry of Labour
MP	Public Prosecutor's Office
MPT	Labour Prosecutor's Office
MTEySS	Ministry of Labour, Employment and Social Security
MTSSS	Ministry of Labour, Solidarity and Social Security
NCA	National Court Administration
NEDLAC	National Economic Development and Labour Council
NLRC	National Labour Relations Commission
NMW	National Minimum Wage
NRs	Regulatory standards
NUM	National Union of Mineworkers
NUMSA	The National Union of Metalworkers of South Africa
NUPEC	Permanent Conciliation Centres
OAB	Brazilian Bar Association
OECD	Organisation for Economic Co-operation and Development
OCJ	Office of the Chief Justice
OGMO	Labour Management Authority
R&D	Research and Development
USMCA	United States-Mexico-Canada Trade Agreement
PFMA	Public Finance Management Act
PGT	General Labour Prosecutor's Office

PJe	Electronic Judicial Process
PPP	Purchasing Power Parity
PROFAMAG	Training Programme for Trainee Magistrates
PROFEDET	Federal Attorney General's Office for the Defence of Labour
PRTs	Regional Labour Prosecutor's Offices
PST	Social and Labour Plan
PTMs	Labour Prosecutors' Offices in Municipalities
RAIS	Annual Social Information Report
RCP	Procedural Costs Regulation
R&D	Procedural Costs Regulation
RGPS	General Social Security Scheme
ROK	Republic of Korea
DPRK	Democratic People's Republic of Korea
SACP	South African Communist Party
SAJEI	South African Judicial Education Institute
SECLO	Compulsory Labour Conciliation Service
SHCP	Ministry of Finance and Public Credit
SIDITYSS	Comprehensive Labour and Social Security Inspection System
SIFMT	*Sistema Integrado de Formação da Magistratura do Trabalho*
SIT	Integrated Training System for the Labour Judiciary
SML	Labour Mediation System

SST	Occupational Health and Safety
STF	Supreme Court
STJ	Supreme Court of Justice
TAC	Conduct Adjustment Agreement
TES	Temporary Employment Services
TRT	Regional Labour Court
TRT-15	Regional Labour Court of the 15th District
TSJ	High Court of Justice
TST	Superior Labour Court
UASA	United Association of South Africa
UDF	United Democratic Front
UNDP	United Nations Development Programme
UNV	United Nations Volunteers

SUMMARY

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CHAPTER 1. INTRODUCTION

In November 2019, the National School of Formation and Improvement of Labour Magistrates (ENAMAT), the International Policy Centre for Inclusive Growth (IPC-IG), the United Nations Development Programme (UNDP) and the Brazilian Cooperation Agency (ABC) signed the International Technical Cooperation Project BRA/19/008—Strengthening Information Production and Management related to Labour Justice to Expand Knowledge and Improve the Brazilian Justice System.

This project includes developing research that aims to broaden and deepen the knowledge about the administration, management, and conditions of access to Justice. The components developed between 2019 and 2021 comprise two aspects: (a) an International Comparative Study, which aims to understand how different countries organise their labour jurisdiction through comparative analyses between Brazil and other countries with similar labour markets; and (b) an analysis of the formative dimension of learning evaluation and institutional evaluation of the Judicial Schools to understand the aspects that influence the performance of labour judges, through the assessment of the training process of judges and training models adopted by the Judicial Schools.[1]

In addition, the project provides for a further stage of complementary studies aimed at understanding new technologies, digital platforms and the transformations in the world of work; the impact of collective demands on the effectiveness of Labour Law; the judicialisation of the work environment, occupational accidents and occupational diseases; and developing priority complementary studies defined by the national beneficiary, to improve the Brazilian Justice System.

An international comparison of judicial systems within the labour courts could complement the current studies on the performance of the Brazilian Labour Justice after the 2017 Labour Reform, understanding how labour actions are processed and judged by the judicial system in different contexts. Importantly, this exercise is particularly innovative since research on the Brazilian Labour Justice System in perspective compared to other countries of the Global South constitutes a field that is not only little explored but often subject to confusion. In addition, the results of this study may reveal data about the degrees of labour litigiousness of the countries analysed, as well as advance the understanding of how different methods and techniques are used to address labour disputes.

1. INTERNATIONAL POLICY CENTER FOR INCLUSIVE GROWTH (IPC-IG). Judicial School in Labour Justice, Final Report, 2021. To be published.

It should be added that, especially in the last decade, much has been produced in the field of empirical research on topics that have been little explored so far in research that focuses on the Justice System. The studies undertaken so far, which have addressed aspects related to fundamental rights and guarantees, as well as the reports produced on the institutional aspects of planning and execution of judicial activities, have certainly contributed not only to self-knowledge and public transparency but also to the difficult mission of giving new directions to the Brazilian judicial administration.

Despite the significant step taken toward the development of judicial research during this period, it can be inferred that there has been little empirical production on themes related to Labour Justice. In the realm of Justice, many phenomena result from the new labour relations emerging in the so-called digital economies. Sheltering the knowledge arising from subordination in a society in constant mutation becomes a strategic element for the knowledge about the future of labour jurisdiction, to be thought of in an environment guided by the new relationships between capital and labour.

Another not most minor relevant aspect is the need to promote research on the effectiveness of the jurisdiction, under the viewpoint of judges' decisions, that contemplates the assessment of the filing of the suit and processing of demands, going through the decision process, in addition to the fulfilment of the right. In parallel, studies on the judicialisation of the work environment, occupational accidents, and occupational diseases become incredibly relevant, given the analysis of judicial effectiveness and legal security in the labour courts.

In this sense, the research presented here aims to conduct an international comparative descriptive analysis of labour jurisdiction systems, deepening the above debate. Comprising six case studies, this paper presents its findings as a comparative case study, intersecting the models adopted by each country studied.

The IPC-IG's experience in global comparative research has allowed the research team to work in collaboration with experts in the local justice systems of each of the countries involved, as well as institutional partners in Brazil and abroad. Conducted in the context of the global pandemic of COVID-19, the research suffered from the restrictions imposed on mobility and personal interaction among researchers, inflicting the challenge of building new work routines that would not harm the quality of the studies carried out.

CHAPTER 2. METHODOLOGY

The first stage of this study consisted of selecting the international cases that would be compared to Brazil based on criteria that would allow us to explore different socioeconomic realities, judicial structures, and degrees of labour litigation. A set of 39 variables were chosen and analysed among 71 countries to cover these three criteria.[1]

Countries were grouped based on socioeconomic, State organisation, and labour law criteria. Three standard or extreme country profiles were drawn using the Grade of Membership (GoM) model. Countries were classified according to their proximity or similarity to the extreme profiles based on their degrees of membership.

The three extreme profiles were classified as per the associations of the categories of the variables used in the model, into:

- Countries with a high level of socioeconomic development, consolidated rule of law, and flexibility of labour laws;

- Countries with an intermediate level of socioeconomic development, weak rule of law, and labour laws with a moderate-to-high degree of worker protection; and

- Countries with low socioeconomic development, weak rule of law, and low worker protection.

This procedure allowed the classification of countries with characteristics of more than one profile - for example, countries that mainly possess attributes of profile 1, some proximity to profile 2, and none of the features of profile 3, are possibly the countries that have reached a high level of development but still retain some aspects of the intermediate profile.

The results were evaluated based on the groupings obtained and the consistency with regional development patterns. After assessing the countries based on their degree of belonging to each of the extreme profiles, the selection included:

a) Two countries with a degree of belonging to profile 1 and possessing some characteristics of the other profiles: South Korea and Portugal. They represent countries undergoing a process of transition or which have recently;

1. Cunha et al. 2020. "Comparando sistemas internacionais de jurisdição trabalhista: uma metodologia para perfis de países." Policy Research Brief, No. 65. Brasília: International Policy Centre for Inclusive Growth. <https://is.gd/SnuNLE>.

b) Two countries with a high degree of belonging to profile 2: Mexico and Brazil, which are quite similar to the extreme profile, representing countries in an intermediate stage of socioeconomic development;

c) One country in an intermediate stage of development that also possesses characteristics of socioeconomically developed countries: Argentina, with degrees of belonging to profiles 2 and 1;

d) A country with no predominant characteristics, with degrees of belonging equally distributed among the three profiles: South Africa.

Besides Brazil, two other countries are federations, whose analysis was focused on a) the federative unit that hosts the federal capital; and b) a federative unit in the interior. In Mexico and Argentina, a federative unit in the interior of the country was chosen because they have undergone recent reforms based on the criteria established by the World Bank for strengthening the institutions of the Justice System.

After the study was presented to ENAMAT's Scientific Research Advisory Committee, its members validated the selected countries.

2.1 PROCESS FOR CHOOSING SOURCES

As a preparatory step for elaborating the case studies, the IPC-IG team surveyed national and international literature on the selected countries. It included publications on Labour Law, Procedural Labour Law (quantitative and qualitative data), and comparative analyses of labour dispute resolution systems among the countries chosen for the research. From this selection, a matrix was prepared for each country featuring the details of each document found, including: the goal of the project; specific topic; year, author(s), title; abstract and/or comments; and Internet links.

To help in this stage of the process and validate the information found, candidates were selected from the United Nations Online Volunteers (UNV) database, preferably from the countries under study, who are familiar with the theme or fluent in the languages of the countries in question. They worked for about thirty days with the team of researchers responsible for the literature survey in each selected country. The volunteers also contributed to the first draft of the case studies.

To allow for a comparative analysis between the countries studied, a decision was made to prioritise the information produced by international organisations, especially concerning the quantitative data on socioeconomic aspects. Thus, statistics and indices produced by the UN,

UNDP, ILO, OECD, and the World Bank, among others, were used. In addition, data from the official statistics bureaus of each country were included.

Regarding the organisation of the labour dispute resolution system and labour regulations in each country, the websites of the respective national institutions were consulted as a priority. In the absence of such data, transparency and citizen information services were consulted to request this information. Furthermore, the bibliographic production of experts on the topics analysed was also considered.

2.2 DATA ANALYSIS AND INTERNAL REVIEWS

The second stage of the research consisted in the IPC-IG team analysing the data collected elaborating the case studies. To this end, a document containing the report's chapters with their respective questions to be answered, was prepared. Each case study should be composed of five chapters, including the following topics:

1. Introduction

a) Brief background on the country's political, economic, and social development and insertion in international markets;

b) Current economic situation and main indicators for the period 2015 to 2019;

c) Constitution and current political organisation;

d) Division of powers and current judiciary organisation, specifying the entity responsible for resolving labour disputes, when applicable;

e) Methodology employed in the study, including the criteria for choosing the provinces studied in the case of federalised countries.

2. Labour protection

a) Historical development of labour protection, union organisation, and the labour dispute resolution system;

b) Constitutional protection of labour;

c) Substantive Labour Law;

d) Indication on the participation of each type of labour relationship in the Economically Active Population, number of unions, labour disputes and strikes for the period 2015-2019.

3. Labour dispute resolution system

a) Organisational structure of the dispute resolution system, competence of each constituent entity and spatial distribution;

b) Procedure of the labour dispute resolution system, individual and collective;

c) Access to justice, including need for legal representation, existence of collective representation, and costs.

4. Administrative organisation of the labour dispute resolution system

a) Degree of administrative and budgetary autonomy;

b) Personnel, types of positions, duties, compensation arrangements, and salary ranges;

c) Recruitment, selection, training, and continuing education of personnel.

→

5. Performance of the labour dispute resolution system from 2015 to 2019

a) Number of requests received, processed, resolved and pending, preferably by economic sector and spatially distributed;

b) Indicators regarding the type of request, type of processing, average time, success rate, average amounts awarded, and execution rate;

c) Budgetary indicators of total cost, per inhabitant, and per selected conflict.

The elaboration of the first version of the country reports was assigned to a specific researcher, with additional collaboration from UN Volunteers, except for the case of Brazil, which will be detailed further on. Thus, the case studies were initially distributed among the IPC-IG team, composed of researchers specialising in Labour Law, International Relations, and Political Science.

In the second phase, each case study was subjected to a horizontal review. Team members were responsible for reviewing a specific chapter to verify that all questions had been answered and for standardising the terminology of the reports. During this stage, adjustments were made to the initial chapter division to improve the analysis. Finally, the case studies underwent a vertical review. In other words, the reports were returned to the main authors, who then re-read the entire document and made whatever adjustments they felt were necessary based on the suggestions made during the previous phase.

A specific team was hired to conduct the Brazilian case study and elaborated the report, composed of professors and students from the Law School of USP—Ribeirão Preto. The document drafted by this team underwent two vertical revisions by members of the IPC-IG.

2.3 VIRTUAL SEMINARS ADDRESSING THE CASE STUDIES

Initially, technical visits were planned to each of the five selected countries to clarify doubts and gather missing data on specific topics. However, in the early stages of COVID-19 pandemic (by March 2020), international travel was suspended. As an alternative, four virtual seminars (webinars) were organised. These workshops brought together experts, members of the Judiciary, and scholars from Portugal, South Africa, Mexico, South Korea, and Argentina to discuss with representatives of the IPC-IG and ENAMAT. The case studies prepared by the IPC-IG team were sent to the speakers, who were able to contribute to the improvement of the material. In this sense, the seminars were yet another step in the review and validation of the data and analyses prepared by the IPC-IG. The dates and schedules of the seminars are displayed in Tables 2.1–2.6.

After the seminars, the main authors reviewed the case studies to include additional data and correct any errors pointed out by the speakers.

TABLE 2.1 Agenda *webinar* Portugal

Portugal Seminar—2 August 2021		
Presentation No.	**Presenter name and title**	**Topic**
1.	Dr. Gonçalves da Silva—Professor at the Faculty of Law of the University of Lisbon Vice-President of the Institute of Labour Law	• Judicial Courts • Voluntary Arbitration
2.	Dr. Liberal Fernandes—Researcher at the Centre for Legal and Economic Research (CIJE, Faculty of Law, University of Porto)	Conflict resolution in strikes in essential services
3.	Dr. Viriato Reis—Deputy Attorney General	The Federal Prosecution Service in the labour jurisdiction: workers' advocacy and the public service
4.	Dr. de Sousa Pereira—State Judge	• Labour Justice: A perspective of practical application • The system of initial and continuing training offered to judges

TABLE 2.2 Webinar Schedule: South Africa

South Africa Seminar—18 August 2021		
Presentation No.	**Presenter name and title**	**Topic**
1.	Alexandre Cunha—IPC-IG	Opening
2.	Laurie Warwick—Senior Commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA)	Role and structure of the CCMA
3.	Mario Jacobs—Researcher at the Research Unit on Work, Development and Governance, University of Cape Town	The labour dispute settlement system in South Africa
4.	Representative of ENAMAT and/or IPC-IG	Discussion and questions

TABLE 2.3 Webinar Schedule: Mexico

Mexico Seminar—25 August 2021		
Presentation No.	**Presenter name and title**	**Topic**
1.	Alexandre Cunha—IPC-IG; ENAMAT Representative	Opening
2.	Dr. Fernando Toriz— Expert on trade union democracy	Labour reform in Mexico and the role of unions
3.	Dr. Luis Gerardo De la Peña Gutiérrez—Judicial Advisor to the Judiciary of the State of Mexico	Differences between the system of conflict resolution of disputes and the Conciliation and Arbitration Chambers after the reform
4.	Dr Martha Guadalupe Arellano Jasso—General Secretary of Individual Affairs of the Local Conciliation and Arbitration Board of Mexico City	Preparations for the labour reform in Mexico City and the dispute resolution system with the Conciliation and Arbitration Boards
5.	Dr. Bernardo Javier Cortes Lópes— Labour Judge of the First Labour Court of Toluca Region	Specific intervention as labour judge, focusing on labour reform
6.	Dr Joyce Sadka—Assistant Professor and Researcher affiliated with the Department of Law and the Centre for Economic Research at ITAM	The reality of labour disputes in Mexico, its negotiations and access to justice and courts
7.	Representative of ENAMAT or the IPC-IG	Discussion and questions

TABLE 2.4 Webinar Schedule: South Korea

South Korea Seminar—1 September 2021		
Presentation No.	**Presenter name and title**	**Topic**
1.	Alexandre Cunha—IPC-IG	Opening
2.	Dr. June Namgoong—PhD in Law and Research Associate at the Korea Labour Institute (KLI)	1. General introduction of the South Korean Labour Law 2. Presentation on the Labour Relations Commission (LRC) with a focus on the advantages and shortcomings of this system compared to judicial dispute resolution 3. Commissioner training model 4. Duality of the labour market in South Korea and the current state of collective labour relations
3.	Representative of ENAMAT or the IPC-IG	Discussion and questions

TABLE 2.5 Webinar Schedule: Argentina

Argentina Seminar—7 March 2022		
Presentation No.	**Presenter name and title**	**Topic**
1.	Alexandre Cunha—IPC-IG	Opening
2.	Dr Andrea Isabel Franconi—Professor and Researcher at the International Training Centre of the ILO	Compulsory Labour Conciliation Service (SECLO) and Conciliation and labour mediation at the national level
3.	Dr. Carlos Toselli—Professor of Labour and Social Security Law at the National University of Córdoba's Schools of Law and Economic Sciences	Abbreviated Declaratory Procedure in labour proceedings: Law 10,596's reform of the traditional oral procedure in the province of Córdoba
4.	Dr. Aldo Victor Gerbaudo— Lawyer of the Province of Cordoba	Legal sponsorship in the area of labour law. Analysis of experiences and current challenges
5.	Representative of ENAMAT or the IPC-IG	Discussion and questions

CHAPTER 3. INTRODUCING THE COUNTRY CONTEXTS

To better understand the context of labour regulation and the history of the different labour dispute resolution systems used in each country, we present a brief history of each of the analysed countries, in the order which the case studies will be presented: Portugal, South Korea, Brazil, Mexico, Argentina, and South Africa.

3.1 PORTUGAL

The political history of Portugal in the 20th century started with a *coup d'état* on 28 May 1926, which was supported by a large part of the country's army and political parties, as a form of retaliation against the Portuguese Republican Party for sending them into a war they did not want to fight (WW I). This coup installed the Second Republic, dominated by António de Oliveira Salazar, who ruled the country for almost half a century.

Portugal remained economically stagnant compared to other European countries during most of this period. It was not until 25 April 1974 that the Carnation Revolution returned freedom and democracy to the Portuguese people, quickly recognising the independence of the former African colonies.

The Third Republic, which followed the Carnation Revolution, continued the growth that had begun in the 1960s and was marked by tremendous socioeconomic development (primarily until the early 2000s). In addition to the economic downturn of the early 21st century, a severe financial crisis hit Portugal in the first half of 2011, reaching its peak in the second half of 2012.

The country's real gross domestic product (GDP) grew annually from 2015 to 2018, but has slightly declined since. Still, Portugal's average disposable household income is lower than the Organization for Economic Co-operation and Development (OECD) average. In terms of international trade, Portugal has a negative trade balance of USD (thousands) -21,493,392.91. Exports of goods and services represent 43.52 per cent of GDP, and imports of goods and services represent 43.44 per cent (World Bank 2020). In 2019, the country's main trading partners were Spain, Germany, and France.

Portugal's economic conditions have improved significantly in recent years due to several factors: strong exports, rapid growth in the tourism sector, investments in housing, and consumption fuelled by rising private incomes associated with several major reforms.[1]

1. Including reducing red tape for businesses (Simplex and Simplex + programmes), aiding innovation (Interface programme), changing labour regulations, and promoting greater use of digital services among the population (INCoDe 2030 and Partnership Digital Skills + programmes), among others.

Regarding politics, Portugal is a semi-presidential republic, in which the president is elected by popular vote. His power is shared with the Prime Minister (whom he appoints) and the Parliament. Elections are held every four years.

3.2 SOUTH KOREA

The pivotal event of South Korean history in the last hundred years is the surrender of Japan to the allies at the end of World War II, which resulted in the division of Korea into two separate states, one in the North of the Korean peninsula (the Democratic People's Republic of Korea—DPRK) and one in the South (the Republic of Korea, ROK). The US occupied the South until an independent, unified Korean government could be established. However, in 1947, the emerging Cold War between the United States and the Soviet Union, combined with political differences between Koreans in the two occupation zones and the policies of the local occupation forces, ended the negotiations regarding a unified Korean government, leading to the Korean War. This war was waged from 1948 to 1953, when an armistice was signed between the countries.

After the Korean War, the DPRK and South Korea were devastated. In 1953, South Korea was one of the poorest countries in the world. Despite tremendous economic aid for post-war reconstruction from the United States and other Western countries, as well as the United Nations, the South Korean economy did not start to recover until the early 1960s. South Korea's civilian government was ousted by a coup in 1962, led by Major General Park Chung-hee, who ruled the country until his assassination in 1979. During this time, the country was considered one of the 'Four Asian Tigers' (along with Hong Kong, Singapore and Taiwan), high-growth economies known for their high industrialisation rates.

After a brief civilian government (1979-1980), the country was placed under army rule yet again, this time under General Chun Doo-hwan. Despite South Korea's continued economic growth and growing international prestige, demonstrations against Chun's regime increased in the 1980s, but he remained in power until 1988. It was only in 1992 that Kim Young Sam was elected South Korea's first civilian president since the 1961 military coup.

The Republic of Korea is a Democratic Republic, and the Head of State—the president—is elected by direct popular vote for a five-year term, with no possibility of re-election. The president is also the Chairman of the State Council, and the Prime Minister serves as the Vice President. In addition, the Prime Minister is appointed by the president with the consent of the National Assembly (Art. 86). The National Assembly is unicameral, and its members serve a four-year term. Finally, the Judiciary, discussed further below, is vested in courts composed of judges (Art. 101).

The South Korean economy grew at an average rate of 6.9 per cent per year from 1971 to 2019. This rapid development is mainly attributed to export-oriented policies, significant investments in education and research and development (R&D), and a set of state-led policies

for the industrial sector (Chang, 2002). According to the Economic History Association (Cha, 2008), South Korean policymakers began stimulating economic growth after the Korean War by promoting local industrial enterprises. However, the traditional export-led growth model produced by a few conglomerates seems to be losing effectiveness. GDP growth has slowed down towards the OECD average, while the decline in the working-age population will reduce per capita income growth.[2] Real GDP growth fell from 3.16 per cent in 2017 to 2.90 per cent in 2018 and 2.03 per cent in 2019.[3]

Trade accounted for nearly 76.7 per cent of South Korea's GDP in 2019.[4] The country's main exports are integrated circuits (USD113 billion), refined petroleum (USD43.6 billion), cars (USD38.7 billion), and vehicle parts (USD19 billion).[5] Its main imports are crude and refined petroleum, electrical equipment, hydrocarbons, and coal. South Korea is heavily integrated into international trade. Therefore, it is highly vulnerable to external shocks, especially coming from China, which is its most important trading partner (25.1 per cent of total exports in 2019), followed by the United States (13.6 per cent), Vietnam (8.9 per cent), Hong Kong (5.9 per cent), and Japan (5.2 per cent).[6]

3.3 BRAZIL

Initially inhabited by indigenous peoples, Brazil endured three centuries of Portuguese colonisation and almost four centuries of black slavery. The formation of its population is also influenced by European (mainly Italian, Spanish, and German) and Japanese immigration, primarily encouraged by the State. Accordingly, the long duration of black slavery in Brazil had a decisive impact on the composition of the country's free labour market.

Since colonial times, the exploitation of natural goods for export has been the primary source of Brazilian economic production, therefore characterising the profile of work carried out by most of the population. The crisis of the colonial financial system led to the country's independence from Portugal in 1822.

Even after independence, labour in Brazil continued to be based on black slavery, which was legal and practised until the end of the 19th century, with the economy focused on exporting agricultural products.

The 20th century saw the urbanisation of the country's main cities, populated by a mass of formerly enslaved people without access to work or fundamental rights and reparatory

2. See: <https://www.oecd.org/economy/surveys/Korea-2018-OECD-economic-survey-overview.pdf>.

3. See: <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=KR>.

4. See: <https://www.nordeatrade.com/fi/explore-new-market/south-korea/trade-profile>.

5. Observatory of Economic Complexity (OEC). <https://oec.world/en/profile/country/kor/>.

6. World's Top Exports (WTEx). <http://www.worldstopexports.com/south-koreas-top-import-partners/>.

policies. In parallel, an incipient industrialisation process attempted to change the profile of the economy. However, this change never fully materialised.

Although the Brazilian economy in the 21st century is industrialised, it is still very dependent on exporting agricultural production, and unemployment rate varies between 12 per cent and 15 per cent of the economically active population. Equally impressive is the growing proportion of informal work and—even today—instances of slave labour in rural and urban areas.

In recent years, there has been a significant worsening in Brazil's economic situation, which has affected the labour market. Paradoxically, the labour protection system is undergoing a downsizing of agencies, workers' rights guarantees. International trade—relevant to the composition of the country's GDP—has been favourable during the period but is still heavily reliant on primary products and concentrated on few commercial partners. The labour market follows this profile.

Brazilian exports, according to World Bank 2018 data, are concentrated in raw materials (46.6 per cent), intermediate goods (25.7 per cent), and consumer goods (11.8 per cent). Imports are concentrated in capital goods (34.8 per cent), intermediate goods (30.7 per cent), and consumer goods (25.5 per cent). Brazil's top three import and export trading partners China, the US and Argentina.

Brazil is a presidential republic. The president is elected by direct vote and serves a four-year term, with the possibility of one re-election. As afederative republic, its 26 states and the Federal District have significant autonomy, mainly in the legal, administrative and fiscal spheres.

3.4 MEXICO

Mexico's historical background is marked by Spanish colonisation, which ruled Mexico for nearly three hundred years. In 1821, Mexico conquered its independence. The administration of Porfirio Diaz followed this period (1876-80; 1884-1911). It was an era of dictatorial rule carried out by a combination of consensus and repression. The authors argue that the *Porfiriato* regime shaped the evolution of the Mexican labour movement and national labour policy (Walker, 1981).

The end of the *Porfiriato* regime in 1910 gave rise to the Mexican Revolution. However, scholars argue that the consequences of the revolution were relatively moderate, as it did not solve the land issues or the working class struggle (Handelman, 1979; Walker, 1981). After the revolution, the new Political Constitution of the United Mexican States was enacted in 1917. The explicit and largely deliberate purpose of the constituents of was to establish a politically and constitutionally strong executive branch (Congress, n.d.).

The 1917 Constitution is the first of its kind in some social and political respects.[7] Article 123 establishes an 8-hour workday, a six-day work week, the institution of the minimum wage, and equal pay for the equal work. The right to organise was extended to workers and employers, collective bargaining was expanded to workers, and the right to strike was recognised. Mexico's Constitutional Law corresponds to a federalist and democratic rule, whose presidential government is chosen by popular election. The federal government is divided into executive, legislative and judicial branches. The country has 31 free and sovereign states and a Federal District, which houses all branches of government.

Regarding international trade, 77 per cent of Mexico's total GDP corresponds to commercial activity. According to the Ministry of Economy, the country has 13 free trade agreements and 32 agreements for the Promotion and Reciprocal Protection of Investments. The US is Mexico's main trading partner, with USD614.5 billion total (bidirectional) trade in goods during 2019. Exports from Mexico to the US totalled USD256.6 billion (Office of the United States Trade Representative, 2020). Mexico's top exports include manufactured goods such as vehicles, auto parts, electronics, oil and oil products, silver, plastics, fruits, vegetables, coffee, and cotton.

3.5 ARGENTINA

Until the early 19th century, Argentina was part of the Spanish Empire. In the aftermath of the May Revolution in 1810, the country 0formally declared its independence in 1816. The consolidation of the Argentinian State occurred in 1880 after a gruelling civil war, and in 1853 the Constitution was enacted, which is still in force today, albeit with several changes. It guarantees the right to decent work, the preservation of health, welfare, social security, family protection, the improvement of economic conditions, and professional interests, among other rights.

There was a military coup in 1955, and the reformed Constitution was revoked the following year; consequently, the previous 1853 Constitution (with amendments) was applied. There were various military governments until 1983. Since then, there have only been civil governments in Argentina.

The Republic of Argentina is a Federal State composed of 23 Provinces and the Autonomous City of Buenos Aires (CABA). The form of government is representative, republican and federal. The executive power is headed by the president, elected by direct popular vote every four years. And the vice-president—elected in the same fashion—presides the Senate. Each province (and CABA) has its own Constitution. Due to the federal nature of the country, the provinces are autonomous in relation to the central government. Each region is administratively divided into departments—subdivided into districts—and further broken down into localities.

7. Secretaría de Gobernación, Gobierno de Mexico. <https://www.gob.mx/segob/es/articulos/inicio-de-la-revolucion-mexicana-el-fin-del-porfiriato-y-el-levantamiento-de-madero?idiom=es>.

Historically, Argentina has always been an exporter of raw materials, mainly from the livestock and agricultural sectors. The country experienced a slower growth than the rest of the world until the 1980s, with a significant increase in foreign debt: in 1989, inflation skyrocketed, and GDP declined by -7.1 per cent. More recently, as reported by the OECD (2017), between 2011 and 2015 growth was virtually zero, with a worsening fiscal deficit: as the country had no access to international financial markets (recovered in 2016), deficits were increasingly financed through printing currency, taxing exports, and the seizure of private assets. Inflation rose to 40 per cent at the end of this period.

In 2015, the newly elected government initiated a set of macroeconomic, structural and social reforms. However, in 2018 a deep recession emerged after a sudden reversal of capital flows: the national currency depreciated by about 50 per cent (OECD, 2019). In the same year, the government signed a financing agreement with the International Monetary Fund (IMF), reducing the weight of direct public spending by 54 per cent. This was accomplished mainly by reducing social benefits and public works, in addition to laying off civil servants (Orchani, 2020).

World Trade Integrated Solutions (2021) reported that in 2019 Argentina's major export products included solid soybean residues, corn (excluding seeds), soybeans, diesel-powered trucks, and crude soybean oil. Its main imports are petroleum oils, soybeans, automobiles, and transmission equipment. Brazil, China and the US are its main export and import partners. It is also important to note that raw materials in the same year accounted for 32 per cent of the country's total commodity exports.

3.6 SOUTH AFRICA

The history of South Africa is also a history of non-free black labour, which has haunted the country for over 350 years. Since 1652, South Africa has adopted different labour patterns, from colonialism and imperialism to neoliberal capitalism, through major internal power shifts (Cornell and Panfilio, 2010).[8] During the slave trade, unlike other African countries, South Africa was not a supplier of slaves but an importer, and its workforce came from both within the African continent and abroad.

As a result of colonisation, several conflicts emerged among the populations, with segregation between blacks and whites being one very significant consequence.

It is worth recalling that in 1913, the Natives Land Act established a clear legal distinction between African reservations and areas cultivated by white people, leading to about 87 per cent of the country being considered 'white land'. Although discrimination had been present

8. Ross, R. 2013. A concise history of South Africa. South Africa: Cambridge University Press.

in the country for several years, it was institutionalised in 1948 by the National Party, with the Apartheid regime.

This regime intensified and systematised the segregation that already existed in the country. During Apartheid, non-white people were not considered South Africans, but rather citizens of some other independent country within its borders.

It was only some 30 years later—in the early 1980s—that black trade unions were formed. The Federation of South African Trade Unions (FOSATU), the Council of Unions of South Africa (CUSA) and the National Union of Mineworkers (NUM) are examples of organisations created during this time. These unions would be key players in the struggles that led to the end of Apartheid.In April 1994, South Africa elected a new constituent and legislative assembly, with Nelson Mandela as its president.

Since 1994, when the African National Congress (ANC) became the ruling party, there has been a systematic removal of Apartheid legislation and the introduction of new laws designed to create equal opportunities throughout society (Webster and Omar, 2003). However, South Africa's transition to an inclusive society remains incomplete.

A critical aspect post-Apartheid society is the centrality given to wage labour, so that social citizenship coincides with participation in the labour market. The unions and the ANC government understand wage labour as the basis of social policies based on full employment, redistribution, and decommodification. However, instead of being combined with an emphasis on redistribution and whole employment policies, the centrality of wage labour in the political discourse has reinforced neoliberal policies of limited public spending. Today, in addition to high levels of unemployment, most new job openings are 'atypical': informal jobs with low levels of unionisation, scarce protections, increased vulnerability, and limited social benefits.

South Africa's main trading partners include China, Germany and the US. In 2018, trade accounted for 59.47 per cent of the country's GDP. Furthermore, in the same year, the leading trade sectors were anchored mainly in the mining industry, especially gold mining.[9]

South Africa is a central state divided into nine provinces and three capitals. The country is a parliamentary republic in which the president is elected indirectly through a vote of the National Assembly and the National Council of Provinces. The president's term of office is five years. The current Constitution of the Republic of South Africa provides a cooperative form of government consisting of distinct, interdependent, and interrelated national, provincial and local spheres of government.

9. See: <https://is.gd/vXEFVc>.

3.7 COMPARED ECONOMIC AND SOCIAL INDICATORS

This section presents social and economic indicators to determine similarities and differences between the countries analysed to allow for a better understanding of each one's current context. The reference period for the data is the same used throughout the study (2015 to 2019). Economic indicators include GDP, GDP per capita and GDP per employed person. Social indicators include the Human Development Indicator (HDI), inequality-adjusted HDI (IHDI), the Gender Development Index (GDI), and the Gender Inequality Index (GII). Each of these indicators is detailed below.

The first indicator depicted in Table 7 is GDP, which is the sum of all goods and services produced in a country during one year. For our analysis we considered 2017 USD purchasing power parity (PPP) values. Except for Argentina, all countries saw an increase in their GDP between 2015 and 2019. Brazil has the highest GDP among the countries analysed, and Portugal the lowest.

GDP per capita is be the value of GDP divided by the country's population number. The GDP per capita of Brazil, Argentina, and South Africa decreased between 2015 and 2019, while that of Portugal, South Korea and Mexico saw an increased. Among the countries analysed, South Korea has the highest GDP per capita, while South Africa has the lowest.

Additionally, GDP per person employed represents a country's GDP divided by its employed population. Labour statistics are normally used to determine this indicator.[10] GDP per person decreased in Mexico, Brazil, Argentina, and South Africa between 2015 and 2019. Portugal, on the other hand, saw an increase. Data for South Korea were not available. Among the countries analysed, Portugal has the highest GDP per person employed, and Brazil has the lowest.

The United Nations Development Programme's HDI is composed of three basic dimensions (education, income, and health) using four indicators: (1) life expectancy at birth, as a measure of the health and longevity of a population; (2) adult literacy rate and combined gross enrolment ratio, as a measure of knowledge and education; and finally, (3) GDP per capita by PPP as a measure of a decent standard of living (Gallardo, 2009). During the period analysed, all countries saw an increase in their HDI, with South Korea at the top and South Africa at the bottom of the list.

Inequality-adjusted HDI (IHDI) employs the same three dimensions used for measuring HDI. However, it adds some data related to the measurement of inequality, such as consumption and income data, inequality-adjusted life expectancy and educational attainment according to income, among others. The IHDI is equal to the HDI when there is no inequality among the

10. See: <https://millenniumindicators.un.org/unsd/mdg/Metadata.aspx?IndicatorId=0&SeriesId=757>.

population, but as inequality increases, so does IHDI drop in relation to the HDI.[11] All countries analysed, with the exception of Portugal, saw an increase in this indicator. In 2019, I-HDI was highest in South Korea and lowest in South Africa.

The Gender Development Index (GDI) measures the educational attainment, standard of living/income and health (using the same indicators as the HDI) of men and women separately to identify the size of the gender gap. South Africa, Portugal and South Korea have seen improvements in this indicator over the years. Brazil's GDI has worsened during the period analysed, and remained stable in Mexico and Argentina.

This indicator is highest in Brazil and Argentina, and the lowest in South Korea. South Korea ranks 23rd in a UNDP ranking of 170 countries, while South Africa places 114th in the same UNDP ranking.

Finally, still regarding the gender issue, Table 3.1 also presents the Gender Inequality Index (GII), which reflects gender inequalities across three dimensions: reproductive health, empowerment and economic activity. The first is measured by maternal mortality and teen birth rates; empowerment is measured by the proportion of parliamentary seats held by women and the attainment of secondary and higher education by each gender; and economic activity is measured by the labour market participation rate of both women and men. Note that all countries have seen a decrease in this indicator between 2015 and 2019 (except for South Korea, whose data for 2015 were not available). Portugal displays the highest GII values, representing greater gender equality, and the lowest are seen in Mexico, representing greater gender inequality.

TABLE 3.1 Economic and social indicators

	Portugal		South Korea		Braxil		Mexico		Argentina		South Africa	
	2015	2019	2015	2019	2015	2019	2015	2019	2015	2019	2015	2019
GDP (2017 PPP $ billions)	322.7	357.4	1.983.0	2.206.0	3.079.2	3.092.2	2.350.4	2.519.2	1.032.3	990.2	711.2	730.9
GDP per capita (2017 PPP $)	31,158	34,798	38,870	42,661	15,059	14,652	19,288	19,746	23,934	22,034	12,840	12,482
GDP per person employed (2017 PPP $)	70,579.1	72,525.5	N.D.[12]	N.D.	33,107.9	32,929.2	45,799.4	45,023.9	57,713.2	52,674.6	43,809.4	43,799.1
HDI	0.854	0.864	0.899	0.916	0.754	0.765	0.766	0.779	0.840	0.845	0.701	0.709
Inequality-adjusted HDI	0.766	0.761	0.759	0.815	0.563	0.570	0.590	0.613	0.708	0.729	0.458	0.468
Gender Development Index	0.985	0.988	0.932	0.936	0.996	0.993	0.960	0.960	0.993	0.993	0.982	0.986
Gender Inequality Index	0.099	0.075	0.076	0.064	0.439	0.408	0.347	0.322	N.D.	0.328	0.419	0.406

Source: United Nations Development Programme—Human Development Reports and World Bank Data.

11. See: <http://hdr.undp.org/sites/default/files/hdr2020_technical_notes.pdf>.

12. No data.

After economic and social indicators presented earlier, next comes the Gini index, which measures (in a broad way) the extent to which the distribution of income among individuals or families within an economy deviates from a perfectly equal distribution. A Gini index of 0 represents perfect equality, while 100 represents perfect inequality (ILO, 2002). Table 3.2 describes the Gini Index of the six countries analysed between 2010 and 2018. It can be seen that South Africa and Brazil have the highest income inequality, and those with the lowest inequality are Portugal and South Korea.

TABLE 3.2 Gini Index, 2010–2018

	Portugal	South Korea	Brazil	Mexico	Argentina	South Africa
Gini (2010-2018)	33.8	31.6	53.9	45.4	41.4	63.0

Source: United Nations Development Programme — Human Development Reports.

The following data refer to the amount of taxes and mandatory labour contributions paid by businesses. This figure measures all taxes and subsidies required by the government, whether at the federal, state, or local levels—i.e., employer contributions to private pension fund or workers' insurance funds. It excludes taxes applied to the tax base. Here the calculation is performed with the actual taxes owed divided by earnings.

South Africa is has the lowest percentage of labour taxes and contributions relative to corporate earnings, and Brazil exhibits the highest rate. We should stress that while there is no ideal taxation level, it might affect the behaviour of economic players.

TABLE 3.3 Amount of labour taxes and mandatory contributions paid by firms, 2019 (as a percentage of earnings)

	Portugal	South Korea	Brazil	Mexico	Argentina	South Africa
Labour taxes and contributions (percentage of earnings—2019	26.8	13.7	39.4	27.2	29.9	4.0

Source: The World Bank Data.

3.8 CONSTITUTION AND FORM OF STATE/GOVERNMENT

This study chose to analyse countries that are presidential, semi-presidential, or parliamentarian republics, half of which are federations. As already mentioned in the methodological section, the federations chosen for analysis are Guanajuato and Mexico City (in Mexico), and the CABA and Cordoba (in Argentina). Table 3.4 depicts the political organisation of each of these countries.

TABLE 3.4 Type of political organisation by country

	Portugal	South Korea	Brazil	Mexico	Argentina	South Africa
Political organisation	Semi-presidential republic	Presidential republic	Federal presidential republic	Federal presidential republic	Federal presidential republic	Parliamentary republic

Table 3.5 displays the year of promulgation for each country's Constitution. Argentina has the oldest Constitution, while South Africa has the most recent one. It should be noted that all of them have undergone several reforms and amendments since their promulgation.

TABLE 3.5 Year of promulgation of each country's Constitution

	Portugal	South Korea	Brazil	Mexico	Argentina	South Africa
Year of promulgation of the current constitution	1976	1948	1988	1917	1853	1996

Bearing in mind the political, economic and social formation of the countries studied, the various indicators suggesting their position in the international scenario and taking into account their form of government and Constitution, we will now further elaborate on each country's judicial system, seeking to understand how labour disputes are resolved.

3.9 SEPARATION OF POWERS AND ORGANISATION OF THE JUDICIAL SYSTEM

Concerning the organisation of the judicial system in the countries investigated, some have specific courts tasked with resolving labour disputes. Others settle them in courts with other jurisdictions, and a third group have other instances and ways of resolving their labour disputes other than the courts. Although each case study will analyse these distinct organisations in more detail, here we briefly introduce the judicial system of each country to highlight their particularities.

- Portugal: According to Art. 209 of the Constitution, Portugal has two distinct sets of courts—civil and administrative. In addition, the Constitution also explicitly refers to other courts. In turn, Law No. 62/2013 (LOSJ), which regulates the organisation of the judicial system, states that district courts may be further split into specialised labour courts (Art. 81).

Portugal is a unitary state, in which the Assembly of the Republic is the eminent legislative body and may legislate on all matters except those relating to the organisation and

functioning of the government. Specific issues are reserved to the competence of the Assembly of the Republic, regarding which the government can also legislate with the authorisation of the Assembly, under what is termed 'partially exclusive competence to legislate' (Assembly of the Republic, 2020).

- South Korea: As pointed out by the Supreme Court (2019, p. 9), the country's courts comprise the Supreme Court, High Court, District Court, Patent Court, Family Court, Administrative Court, and Bankruptcy Court. These are composed of three levels: district courts, superior courts, and the Supreme Court.

Especially relevant to our context are the Administrative Courts that try tax, eminent domain, labour, and other administrative cases. In the past, the exhaustion of administrative remedies was a requirement for bringing an administrative lawsuit before the court. However, with the creation of Administrative Courts, an administrative lawsuit can be introduced without first resorting to administrative appeals, unless otherwise specifically provided for in legislation.

- Brazil: The Brazilian judicial system is structured into different areas of action, divided between common and special. The 'common courts' include the Federal Court (competent for cases involving the Union) and the State Courts (one in each state, with generic and residual competence). The 'special courts' are divided into Labour Courts (for cases arising from labour relations), Electoral Courts and Military Courts. There is, therefore, a special court to judge labour disputes.

Labour Justice is dedicated exclusively to labour cases. It is linked to the Union and structured across three levels: about 1,500 first-instance Labour Courts, 24 courts of appeal, Regional Labour Courts (TRTs), and a Superior Labour Court (TST) as the highest instance.[13] This structure ensures regionalisation and describes the hierarchical nature of Labour Justice.

- Mexico: Several federal judicial bodies in Mexico are not part of the regular federal court structure, such as the *Juntas de Conciliación y Arbitraje* (which settle labour disputes and represent Labour Justice), the Military Courts (*Tribunales Militares*), and the Tax Court (*Tribunal Fiscal de la Federación*). The Labour Court System has jurisdiction over workers' complaints alleging violation of their rights under the Federal Labour Code, collective labour disputes, and strike-related issues. The responsibilities and structure of the labour courts are covered by the Federal Labour Law (*Ley Federal del Trabajo*).[14]

13. Data extracted from the TST website: <http://www.tst.jus.br/web/estatistica/vt/varas-existentes>.

14. In Avalos (2003).

The federalisation of labour legislation in Mexico was achieved on 6 September 1929, as a result of reforms to Article 73 of the Constitution, whereby Congress started legislating on labour issues throughout the country. Thus, the power vested in local legislatures—which had prevailed from 1917 to 1929—ended, and labour law became a federal issue.

The legal framework governing labour disputes is based on the Mexican Constitution, the Federal Labour Law, the Social Security Law, and all applicable case law from the Collegiate Circuit Courts and the Supreme Court.

- Argentina: The country's Judicial System consists of the Supreme Court of Justice and other lower courts at the federal and provincial levels. Judges are appointed by the president, with the approval of the Senate, from a shortlist of candidates selected through open competition by the Council of the Judiciary.

On the one hand, there is a National Justice whose powers extend throughout the country's territory, and on the other hand, a common Justice that carries out its functions through judicial bodies, which each province must create and organise independently of the central government. According to their own Constitutions, each province in Argentina has a distinct legal organisation.

- South Africa: In South Africa, judicial authority is vested in the courts, which are independent and subject only to the Constitution and the law (section 165). The judicial system consists of several courts, among them the Labour Court.

Labour Justice comprises specialised courts in South Africa: the Labour Court, which decides certain labour disputes, and the Labour Appeal Court, which hears appeals from the former. From the Labour Appeal Court, appeals concerning labour matters are then submitted to the Constitutional Court.

The Constitutional Court is the highest legal instance in South Africa and is responsible for ruling on constitutional issues and other matters.

CHAPTER 4. CASE STUDY: PORTUGAL

4.1 EMPLOYMENT PROTECTION

4.1.1 Evolution of substantive labour law

The period between 1820 and 1926 in Portugal led to the consolidation of rights with a classic liberal ideological setting. Labour relations were strictly conceived as individual and governed by civil law: the provision of work was conceived as *locatio operarum* whereas the formation of professional groups and coalitions was prohibited (Leite J. , 2016).

The first Portuguese labour law, dating back to 1890, regulated the work of minors and women in industrial establishments.[1] In 1893, another Decree set the minimum age for admission to industrial establishments at 16 years for men and 21 years for women; it also provided for maternity protection. Thus, during this period, the protective character of labour law was observed only for the most vulnerable groups of workers (minors and women).

Fundamental rights and duties were recognised with the advent of the Republic in 1910. In 1911, the mandatory social insurance for work-related injuries was instituted (Martins, 2019). The military coup of 1926 resulted in a new catalogue of economic and social rights, in line with the interventionist ideology of the 'New State' (*Estado Novo*).

In 1976, a constitutional intervention in the private sphere led to the constitutional recognition of workers' rights, freedoms and guarantees, which will be analysed in subsection 2B. As reported by Palma Ramalho (2013, p. 1–2), the Portuguese Constitution (*Constituição de Portugal*—CP)'s approach in relation to the fundamental rights of workers contributed to the development of protective labour legislation. This was reflected in two essential points: (i) for many years, the legal framework for employment contracts was based on an industrial 'typical labour relationship' model. Consequently, the law created strict protection schemes in crucial areas, such as job description, workplace, working hours, remuneration and protection against dismissal. In addition, the legal system allowed for non-standard forms of work only to a very small extent; (ii) from the 1970s onwards, collective bargaining has developed following the principle of *favor laboratoris*: collective agreements were conceived as instruments designed only to improve the legal provisions considered to be the minimum standard of protection for work, whereby a collective agreement could only be replaced by a more favourable one. Therefore, collective agreements tended to be more protective than the law, remaining in effect for a long time (Palma Ramalho, 2013).

1. Ministry of Public Works, Trade and Industry. Labour regulation for minors and women in industrial establishments. Decrees from 10 February 1890 and 14 April 1891.

As a result of the trends mentioned above, Portuguese labour law was considered for many years to be one of the most protective in Europe. In addition, it was also characterised by a reluctance to modernise in terms of providing greater flexibility to labour market regulations.

From the 1980s onwards, a long tradition of social dialogue between the government and organisations representing employers and employees began. This has resulted in a constant dialogue between labour relations parties and facilitated the participation of workers' commissions in the approval of legislation in the field, pursuant to Art. 54, let. d) of the CP.

Starting in the 1990s and during the first decade of the 21st century, there was a significant evolution in Portuguese labour law. This marked the start of regulation of specific matters and situations in the labour field, consolidated with the Portuguese Labour Code (*Código do Trabalho*—CT)—Law No. 99/2003—and subsequently in its amendments.

The specific codification, for the first time, of norms setting the personality rights of the worker in the CT (Arts. 14–22 of the CT, after the 2009 amendments) should be highlighted. These encompass freedom of expression and opinion, physical and moral integrity, privacy, protection of personal data, biometric data, tests and medical examinations, means and use of remote surveillance, confidentiality of messages, and access to information (Lopes, 2019, p. 26). The approval of the CT also resulted in the total or partial transposition of several European directives into the domestic legal order. Such directives are listed in Art. 2 of the Code. As for their application over time, Art. 7 provides that employment contracts and collective labour regulation instruments entered into force or adopted before the CT are, as a rule, subject to it.

On the other hand, it is crucial to observe that the 2003 code abolished the above-mentioned principle of *favor laboratoris* and the practical interminability of collective agreements, whereby an agreement could not be cancelled without substituting it (Naumann, 2018, p. 95). As Leite et al. point out (2014), since the elaboration of the 'Green Paper on Labour Relations' in 2006, in Portugal was recognised the existence of a formal rigidity in labour legislation, manifested in particular by the difficulty in dismissing employees with a permanent contract who enjoy considerable legal protection: this, in the opinion of some scholars, would have a negative impact on employment creation.

In 2009, the CT was reformed through Law No. 7/2009, providing for compensation of this rigidity, namely in matters such as adaptability of schedules, bank hours, concentrated schedules, or dismissal processes. Further, the economic/financial crisis (discussed further in Section 1B) had a severe impact on Portugal's labour sphere and led the country to request assistance to the Troika—the consortium of the International Monetary Fund, the European Commission, and the European Central Bank—in May 2011. A Memorandum of Understanding (MoU) was signed in the same year, which resulted in an adjustment programme that was terminated in 2014. An important point is that this MoU identified strict labour market regulations as one of the causes for low competitiveness in the Country (European Union, 2011). The Portuguese government then

had to commit to implementing a detailed plan for structural reforms. This included amendments to labour law, employment policies and collective bargaining (OECD, 2017).

TABLE 4.1 Main amendments to labour legislation due to the economic and financial crisis

Public Sector
Nominal wages were frozen and progressively cut for four years; likewise, bonuses were cut or suspended. Increase of weekly working hours from 35 to 40 without corresponding salary increase.
Wage setting
The mandatory minimum wage (EUR485) was frozen from 2011 to 2014; yet it was increased to in 2015 (EUR505).
Working time
• Overtime payment was cut in half and the compensatory time off—equal to 25 per cent of overtime hours (in regular working days)—was abolished (Law 23/2012). • Reduction of holidays by three days and reduction of four public holidays, in both the private (Law 23/2012) and public sectors (Law 35/2014).
Termination of employment contracts
• Almost all severance payments were reduced (in the case of termination of a fixed-term contract, collective dismissal, redundancy, dismissal for unsuitability, etc.). • Dismissals due to redundancy or unsuitability were facilitated (Law 23/2012).
Collective bargaining
• Allowing the employment contract to regulate *in pejus* issues that previously could only be regulated by collective agreement. • Declaring null and void or suspending collective agreement clauses that established a more favourable regime for employees than the reformed law. • Reducing the threshold company size, above which non-union workers' representatives could carry out collective agreements (by delegation of unions), favouring decentralisation (Law 23/2012). • Reducing all periods concerning the expiry and 'after-effect' of collective agreements: the first period was reduced from 5 to 3 years, the survival period was reduced from 18 to 12 months (Law 55/2014). • Law 55/2014 also established the possibility of temporarily suspending collective agreements with companies in crisis. • Severely limiting the administrative extension of collective agreements. The extension was blocked, and new rules came into force introducing strict conditions whereby extension was only possible if employers' organisations employed more than 50 per cent of all employees in the industry concerned (Resolution 90/2012). In the last quarter of 2014, under pressure from trade unions and employers' confederations, the government decided to introduce less strict rules on the extension of collective agreements, on the basis of less strict criteria for the representativeness of employers' associations—i.e. as an alternative to the 50 per cent share of employees in the sector, an extension became possible if at least 30 per cent of the employers' association members were small or medium-sized enterprises (Resolution 43/2014).

Source: (European Trade Union Institute 2016).

The Constitutional Court of Portugal was a central element of the reforms, which declared some of the government's implementation of austerity measures as unconstitutional for violating the principles of equality, proportionality, protection of trust, collective bargaining, or autonomy of the local administration.[2] Amendments to the CT were implemented due to these reforms. The most significant ones are reported in Table 4.1, subdivided by theme.

2. See for example: Decisions No. 353/2012,187/2013, 602/2013, 413/2014, 494/2015 of the Constitutional Court of Portugal.

Yet the 2015 elections and the newly-elected government marked a new trend reversal in labour regulation, resulting in a return to the 35-hour week and a revision of wage cuts in the public sector, a gradual increase in the mandatory minimum wage and the extinction of the internal revenue service (IRS) surcharge (personal income tax) (European Trade Union Institute, 2016).

Finally, recent changes in the CT were carried out through Law No. 90/2019, aiming to strengthen parental care: as a result, 13 provisions were changed, and 5 new articles were included. Some highlights include: new rights and social support for the various levels of parenting (maternity, paternity, adoption); new licenses; the expansion of justified absences; support for assisted procreation; and extension of parental and adoption leave (CEJ, 2019).

Law No. 93/2019, in turn, amends the CT in relation to the trial period (from 90 to 180 days); the minimum number of hours of professional training (from 35 to 45 hours); the strengthening of the rights of harassed workers; requirements and terms of fixed-term contracts (revision of the admissibility clause); the very short-term contract, the hour bank regime; intermittent work (reduction of the minimum annual work period); temporary work (limited to 6 renewals, whereas there were no prior limitations); the deadlines for dismissal procedures; and, finally, various matters of collective labour regulation (CEJ, 2019).

4.1.2 Constitutional protection of labour

The Portuguese constitution contains several provisions that are instrumental in shaping the country's labour relations. Table 4.2 reports the main provisions contained in Chapter 3 of the CP, which establishes workers' rights, freedoms and guarantees.

TABLE 4.2 Workers' rights, freedoms and guarantees as described in Chapter 3 of the CP

Article	Provision
Art. 53	Employment security guarantee, prohibition of dismissal without fair cause or for political or ideological reasons
Art. 54	Right to form workers' committees and workers' committees rights
Art. 55	Freedom to form, belong and operate trade unions
Art. 56	Trade union rights and collective agreements
Art. 57	Right to strike and prohibition of lockouts

Source: Authors' elaboration.

In addition, the first chapter ('Economic Rights and Duties') of Chapter 3 of the CP includes further norms that are relevant. Art. 58 enshrines the right to work and correspondingly sets the duty of the State to promote full-employment policies, equal opportunities in the choice of profession or type of work as well as the cultural and technical training of workers.

Art. 59, in turn, enshrines several workers' rights applicable "regardless of age, sex, race, citizenship, territory of origin, religion, political or ideological beliefs":

a) to the remuneration of work in accordance with its volume, nature and quality, with respect for the principle of equal pay for equal work and in such a way as to guarantee a proper living;

b) to the organisation of work in conditions of social dignity and in such a way as to provide personal fulfilment, and to make it possible to reconcile work and family life;

c) to hygienic, safe and healthy working conditions;

d) to rest and leisure time, a maximum limit on the working day, a weekly rest period and periodic paid holidays;

e) to material assistance when the worker is in a situation of involuntary unemployment; and

f) to assistance and fair reparation when he is the victim of a work-related accident or occupational illness.

Moreover, the second paragraph of Art. 59 attributes to the State the responsibility of ensuring the working, remunerative and rest-related conditions to which workers are entitled, particularly by:

a) establishing and updating a national minimum wage, which, among other factors, shall have regard to workers' needs, increases in the cost of living, the level of development of the forces of production, the demands of economic and financial stability, and the accumulation of capital for development purposes;

b) setting national limits on working hours;

c) protecting especially the work done by women during pregnancy and following childbirth, as well as the work done by minors, people with disabilities, and those whose occupations are particularly strenuous or are undertaken in unhealthy, toxic or dangerous conditions;

d) ensuring, in cooperation with social organisations, the systematic development of a network of rest and holiday centres;

e) protecting emigrant workers' working conditions and guaranteeing their social benefits; and

f) protecting student workers' working conditions.

Finally, as highlighted by Fernandes (2014, p. 60), it is also necessary to consider several fundamental rights of an "unspecific" character, which can be put into play in labour relations. For example, the right of resistance (Art. 21 CP), the right to personal integrity (Art. 25) and other personal rights (Art. 26), the rights inherent to the protection of personal data (Art. 35), freedom of expression and information (Art. 37), and freedom of conscience, religion and worship (Art. 41).

4.1.3 Substantive labour law

A. Labour law contextualisation and main features of employment protection

Portuguese Labour Law is an autonomous legal branch—dissociated from Civil Law—[3] with specific principles, rules, and institutes (Leite J. , 2016).[4] The main legal sources of Portuguese Labour Law are the CP of the Portuguese Republic (1976), the Labour Code (Law No. 7/2009),[5] Law No. 105/2009—which regulates and amends the Labour Code -, the Labour Procedural Code,[6] collective and individual labour agreements, and relevant European legislation (Mota, 2020).[7] In addition, the International Labour Organization (ILO)'s conventions must also be considered: in accordance with Art. 8,2 of the CP, the rules contained in the conventions ratified (and/or approved) by the Portuguese State, and published in the Official Gazette, become part of domestic law regardless of the transposition of their content into domestic statutory law.

In accordance with Leite (2016, p. 45-48), Portugal's labour law can be characterised as:

- A relatively recent area of Law, being previously considered part of civil law. Labour law, whose scope was initially limited to industrial relations, progressively expanded to other subordinate labour relations (such as workers in trade, agriculture, maritime navigation, etc.). Conversely, matters that originally fell within the purview of labour law progressively shifted beyond it (social security law, for example).

- An imperative area of law. Legal labour norms do not convey imperatives in an absolute manner, but are limited to ensuring minimum protection guarantees to the

3. Although the Portuguese Civil Code (CC) provides for some notions of the labour field—as is the case of Art. 1152º—the legislative autonomy of Labour Law is recognized (Art. 1153º of the CC). However, Civil law is subsidiarily applied in some instances. See, for example, Art. 14 of the CT regarding the applicability of the CC for the purposes of subjects' capacities.

4. See also: Palma Ramalho (2001).

5. Official Eletronic Gazzette (Diário da República Eletrónico—DRE) Law No. 7/2009.

6. DRE Decree No. 480/99.

7. See also: Leite, J. (2016). Capitulo III- Características gerais e importância do direito do trabalho. Em J. Leite, Direito do Trabalho (pp. 45-51). Porto: FDUC and CIJE.

worker, becoming mandatory—and, therefore, imperative—only to that extent. These guarantees are reflected either in the establishment of minimum (wages, for example) or maximum limits (such as duration of work) in relation to which the will of the parties is irrelevant. This does not mean that there are no mandatory norms of an absolute nature, but only that imperativeness in the aforementioned sense assumes a dominant character in labour law.

- An expanding area of law, in the sense that it does not cover all possible fields of application.

- A diversified area of law. Unlike most other branches of law, labour law does not apply collectively to all employees. As it is closely shaped by existing, distinct social and economic realities, to perform its function it must take into account the concrete situation of each category of workers. For this reason, the applicability of its rules varies according to the respective industry, the size of the company, the profession, etc. (objective factors) and according to age, sex, etc. of the worker (subjective factors).

- A volatile area of law. The instability of labour law is due fundamentally to three reasons: first, its sensitivity to economic, social and political changes; second, its own nature as a branch of law designed to establish guarantees; and third, due to how new it is.

- An area of law with particular, specific features. The peculiarity of labour law is manifested in terms of (i) its sources, (ii) its techniques, and (iii) its recipients. Regarding sources, the law gradually gives way to the process of elaboration by the interested parties, considered not at the individual level, but rather collectively. b) The techniques it sets in motion—such as strikes, peaceful resolution of collective conflicts, etc—can be said to be based on a fundamental, albeit sometimes ignored, reality: working conditions concern two distinct social groups (social classes) with conflicting interests. As for the recipients, in order to regulate relations between employees and their employers, labour rules are, in principle, only susceptible to change if they result in improved conditions for the former category, attributing to the employee a sort of legal privilege.

Concerning employment protection, it is important to note that labour rights, freedoms and guarantees afforded by the CP are complemented by those enshrined in the CT. In particular, the CT affords specific protection in the field of work, including: (i) the equal treatment of foreign workers or stateless persons compared to native Portuguese workers; (ii) the application of personality rights and safety and health at work to situations in which work is performed by one person to another, without subordination, whenever the work provider economically depends on the beneficiary of the activity; (iii) guarantee of the worker's personality rights; (iv) the right to equal access to employment and work; (v) prohibition of discrimination, with the right to compensation for discriminatory acts; and (vi) prohibition of harassment.

'Personality rights' mentioned above include the freedom of expression (Art. 14), the right to physical and moral integrity (Art. 15), the right to privacy (Art. 16), the protection of personal data (Art. 17), the limits to the use of biometric data (Art. 18), medical examination and tests (Art. 19), remote surveillance tools (Art. 21–22) and, finally, the confidentiality of communication and access to information (Art. 22). These rights, already present in the CP, are transposed in the CT with two main consequences. Fundamental personality rights are transposed, through the employment contract, in labour relations: these serve to shape the prerogatives of employers and the duties of workers (for example, the direction and control of the employer might contrast with the privacy or dignity of the worker; the physical and moral integrity of the worker might be undermined if the employer does not fulfil its obligations related to occupational health and safety). Therefore, the insertion of these non-negotiable rights in the employment contract is instrumental to eventually determine liability in case they are breached.

Conversely, within the context of employment protection, it is necessary to bear in mind the various reforms of labour legislation, exposed in section 1A, aiming at its flexibilisation. While in the opinion of some scholars the measures introduced have contributed to safeguarding and promoting employment and the protection of the unemployed (Leitão, 2019), for others the amendments fundamentally contributed to the devaluation and fragmentation of employment. For example, Leite et al. (2014) posited that the measures implemented in between 2009 and 2012 had the following effects (among others):

- progressively devaluated salaries;
- increased working hours without an increase in labour productivity;
- increased labour market flexibility—e.g. through the reduction of severance pay in the event of dismissal or facilitation of dismissals for unsuitability.

B. The employment contract

In the Portuguese legal system, the employment relationship is functionally interlinked with the employment contract. The employment contract is defined by Art. 11 of the CT as "that by which a natural person undertakes, by way of retribution, to render his activity to another or other persons, within the scope of organisation and under their authority". It should be highlighted that prior to 2009 the norm included also the 'direction' element, which has since then been eliminated. As it can be inferred from the definition of the CT, various elements compose the legal notion of the employment contract, analysed below (Fernandes, 2014).

The object of the contract is the activity of the worker. The worker, through the employment contract, is bound to provide a given specific activity in benefit of the other party (i.e. the employer). In subordinate employment, the activity of the worker is organised and directed by the other party, whereas the outcome or result of the activity is not relevant for the contract. Therefore, the worker who diligently provided the activity established in the contract cannot be held liable if the expected result stemming from the activity is not achieved. On the other hand, the expected result from the provision of the activity is relevant to determine the due diligence to which the worker is bound, pursuant to Art. 128 of the CT.

The parties of the employment contract are the employee and the employer. The former can be defined as the individual who, by means of an employment contract, puts his workforce at the disposal of others for remuneration. In turn, the employer (literally defined as *entitade patronal* in Portuguese labour legislation) is the individual or corporate entity who, by contract, acquires the power to dispose of the workforce of others—within the scope of a company or not—through retribution.

The remuneration represents the compensation of the workforce provided (or made available) by the employee.The legal subordination of the employee is a further fundamental element which must be present to determine the existence of an employment contract. Legal subordination is a relationship of necessary dependence of the employee's conduct regarding the carrying out of the contract in relation to the orders, rules or guidelines dictated by the employer, within the limits of the same contract and the rules that govern it. Potential dependency is sufficient (linked to the availability that the employer obtained by the contract), and it is not necessary that legal subordination is concretely manifested or made explicit in acts of authority and effective direction of the employer. The more intellectual is the activity of the employee, the harder it is for the employer to characterise subordination, something that also occurs in autonomous employment. Finally, we must highlight that legal subordination might exist despite the absence of technical dependence for those activities whose nature requires the technical autonomy of the employee: this instance is explicitly foreseen in Art. 116.

Particularly problematic is the distinction between the employment contract as defined in the CP (analysed in the paragraph below) and the provision of a service contract, which is defined and regulated by the civil code (CC). Art. 1154 of the CP defines the contract of service provision as one in which one of the parties undertakes to provide the other with a certain result or outcome of their intellectual or manual work, with or without retribution.
It is important to note that in accordance with Art. 1156 of the CC, non-standard forms of service provision are also admissible. Hence the widespread phenomenon of the so-called 'illicit shift to autonomous work' through the fraudulent concealment of a subordinate employment relationship under the cover of false independent work, provided under an alleged 'service provision contract'. This phenomenon of abusive manipulation of the qualification of the contract is, moreover, well known to labour jurists, translating into a relative simulation about the nature of the contract, whose goal is avoiding the application of labour

legislation (Amado, 2019). As is clear from the above, the qualification of the contract regarding proof of the existence of a subordinate employment relationship takes on decisive importance in terms of the effectiveness of labour law.

The CT provides for the presumption of the existence of the employment contract when, in the relationship between the person who provides an activity and another or others who benefit from it, some of the following characteristics are verified (Art. 12 of the CT):[8]

a) the activity is carried out in a location belonging to its beneficiary or determined by him;
b) the equipment and work instruments used belong to the beneficiary of the activity;
c) the activity provider observes the start and end times of the service, as determined by the beneficiary; d) a certain amount is paid to the activity provider, with a certain periodicity, in return for the service; e) the activity provider performs management or leadership functions in the company's organic structure.[9]

The establishment of the employment contract is regulated according to the general terms of the law and the provisions of the CT. It fundamentally relies on two declarations, the proposal and acceptance which might occur in three different modalities: 1) an oral proposal and the explicit (oral) or implicit acceptance; 2) written proposal and acceptance; 3) a proposal manifested through a predefined contract type and the employee's acceptance through implicit or explicit adherence. In this last case there is no negotiation. Thus, it is not necessary to observe the general rule of special form to sign an employment contract (Art. 110 of the CT).[10] However, there are specific cases where the contract or some of its clauses must be signed in writing. These include: 1) fixed-term contracts;[11] 2) part-time employment contracts; 3) intermittent employment contracts; 4) contracts for the exercise of a position or functions in a service commission; 5) teleworking contracts; 6) temporary employment contracts.
The same requirement also applies to employment contracts for entertainment professionals (Art. 10, No. 1 of the aforementioned law), work on board (Art. 186 and § 2 of Decree No. 45,969 / 64) and sports (Art. 5, No. 2), among others.

8. Conditions are non-cumulative. Need for a case-by-case analysis to weigh the elements that make up the legal employment relationship. Juris tantum presumption, with onus probandi on the beneficiary of the work activity. See also Acórdão do Tribunal da Relação de Lisboa, proc. 4113/10.2TTLSB.L1-4, de 02/11/2015: "the verification of the presence of two conditions is enough to consider that the worker benefits from the presumption of the existence of an employment contract established in Art. 12, No. 1 of the 2009 Labour Code, and the employer is responsible for proving the contrary, that is, for the occurrence of other signs that, due to their quantity and relevance, impose the conclusion that we are facing another type of legal relationship."

9. "The integration into the structure of the activity's beneficiary is assumed as an indicator element, in terms of the performance of management or leadership functions. It is not the mere integration in the beneficiary structure that is relevant, but it is a qualified integration, in terms of the performance of management functions" [Proc. 2242/14.2TTLSB.L1.S1 de 07/09/2017, STJ]. Directive power can be defined as "the power to determine when and the quantum of work" [Proc. 7/18.1T8CSC.L2.S1 de 06/11/2019, STJ].

10. In this sense, there is no need to sign an express, written contract, documenting the obligations of the parties in specific clauses. The employment contract is covered by the principle of freedom of form. Fernandes (2014, 298).

11. Special-case exceptions include very short-term employment contracts, namely of seasonal activities in the agricultural or tourism sectors, with a duration not exceeding 35 days (Art. 142, No. 1 of the CT). New wording arising from Law No. 93/2019.

Furthermore, the law establishes various subjective and objective requirements. In relation to the former category, the juridical capacity to work must fundamentally subsist. Article 68 of the CT establishes that, in order to be admitted to work, the individual must have reached the minimum age of admission (16 years old) and have completed compulsory education. In addition, the individual must have the capacity to exercise his rights, which generally happens upon reaching adulthood (18 years of age). Conversely, concerning the rights and duties of the employee, capacity is considered to have been acquired at 16 years, after having completed compulsory education. It is worthy of note that employment contracts signed by an individual or legal entity without juridical capacity are to be deemed null, whereas those signed without the capacity to exercise rights are nullifiable.

Additionally, pursuant to Art. 280 of the Civil Code, the object of the agreement must be determinable, physically possible, and licit.

Finally, while negotiating an employment contract, the parties are required to observe the declination of the principle of good faith, both in the preliminaries and in the formation of the contract (Art. 102 of the CT). In principle, the parties have the autonomy to determine the content of the agreed relations. However, there are also non-negotiable elements in cases expressly provided for by law, as well as the observation of possible collective labour agreements, as means of labour regulation.[12] Negotiation limitations on the content of an employment contract are also observed in terms of its object or purpose, in cases where they are contrary to the law or public order (Art. 124 of the CT).[13] The employment contract clause agreed to be in violation of mandatory norms is replaced by the mandatory norm itself, as provided for in Art.121 of the CT, considering that partial nullity or annulment does not render the entire employment contract invalid, unless it is proven that it would not have been signed without the specific illicit section in question.

C. The (individual) subordinate employment relationship

The individual subordinate employment relationship can be characterised as a complex legal relationship, whose contents are integrated by a set of rights and duties assumed by the employee and the employer, resulting from an individual employment contract. In other words, the employment contract is the legal fact which creates the employment relationship.

In this context, it is necessary to mention that there are employment relationships that, despite being formally autonomous (i.e. the worker self-organises and determines the activity in the

12. As a non-negotiating element, note, for example, the possibility of extending a collective agreement or arbitration decision to employers and workers within the scope of the activity and professional sector defined in that instrument (Art. 514 of the CT).

13. In this case, the party aware of the illegality loses the benefits derived from the contract in favour of the service responsible for the financial management of the social security budget. The party may not, however, exempt itself from complying with any contractual or legal obligation, or recover what it provided (or its value), in case the counterparty ignores the illegality.

benefit of others), are nevertheless materially close to subordinate employment and therefore require similar protection. This occurs in particular when the worker is economically dependent on whoever receives the product of his activity. Art. 10 of the CT provides for the applicability of personality rights, equality, and non-discrimination, as well as safety and health at work, to those situations in which the individual providing the work is not legally subordinated but economically dependent on the beneficiary of the activity—for example, remote work, presently regulated by Law No. 101/2009.

Although there are certain employment contracts that are subject to specific regulations, this does not mischaracterise the underlying labour relationship as subordinate, and these contracts do not fall outside the scope of labour law (Fernandes 2014). The CT provides for the application of the general rules that are compatible with employment contracts with special regimes (Art. 9). Table 4.3 lists employment contracts with a special regime, as well as associated legislation.

TABLE 4.3 Employment contracts with a special regime

Employment contract	Description	Legislation
Domestic Service	Domestic service is characterised essentially by the inherent provision of work to the direct satisfaction of the personal needs of a household or similar figure (for example, non-profit legal entities)	Decree No. 235/92
Rural work	Rural work includes activities directly linked to agricultural exploitation and the collection of products, and those aimed at ensuring that exploitation	"PRT for Agriculture" published in BTE, 1st Series, No. 21, 06/08/79
Port work	Port work (e.g. stowage, loading and unloading, etc.) falls outside the direct application of the CT, exclusively in those aspects that are directly regulated by special law	Decree No. 280/93 and Decree No. 298/93
On-board work	Work on board of vessels	Decree No. 74/73 (commercial marine) and Law No. 15/97 fisheries vessels
Sports work	For sport professionals	Law No. 28/98
Showbusiness professionals	Showbusiness professionals	Law No. 4/08
Work in public functions	Public employment	Law No. 35/14

Source: Authors' elaboration based on Fernandes (2014).

In addition to those mentioned in the table, employment contracts with a special regime also include (although their specific regulation is in the CT): contracts for subordinate provision of remote work (Art. 165 to 171 of the CT) and contracts for the provision of service commission activities (Art. 161 to 164 of the CT) (Fernandes 2014).

A final consideration is the regulation since 2018, through Law No. 45/2018, of the transport of passengers via electronic platforms. This piece of legislation is, in a certain

sense, an exception to what was previously mentioned, given that in accordance with the law, the driver can be employed or carry out a self-employed activity, while the platform exercises some managerial powers, including the control of working hours (Amado, 2019). Further features of this law are reported in the next subsection.

D. Non-standard forms of employment

In accordance with the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND, 2017), atypical contracts are generally defined as employment contracts that do not conform to a standard, open-ended and full-time contract.

One of the challenges of labour law refers to the adaptability of norms to the actual conditions of economic activities, specifically in terms of the lack of adaptation to new forms of labour provision and organisation (Fernandes 2014). Further examples of the increase in employment ties outside the typical labour relationship model are temporary employment contracts, working from home arrangements, multi-employment, and the use of independent (self-employed) or para-subordinate workers. In this sense, there is a rising "deregulation" in the current Portuguese labour law (Palma Ramalho 2013).

It is also important to note that scientific and technological progress have further contributed to a progressive shift towards atypical employment relationships, especially regarding the collaborative economy. The term "collaborative economy" refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary use of goods or services, often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills—these can be private individuals offering services on an occasional basis ('peers') or service providers acting in a professional capacity ('professional service providers'); (ii) users of these services; and (iii) intermediaries that connect providers with users (via an online platform) and facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions generally do not involve change of ownership and can be carried out for profit or not (European Commission, 2016). A representative example is the abovementioned Law No. 45/2018, which regulates the transport of passengers via electronic platforms.

The preamble of Law No. 45/2018 contains two fundamental points that should be highlighted as a premise. First, "the technological companies that institute and organise, transport service markets based on digital platforms, act as business intermediaries of this type and not as providers of the services contracted from these platforms". As a result, it is added that "in addition to not granting transport contracts themselves, these platforms are under no obligation to provide the service, nor are they characterised by providing human and material resources or services".

As reported by Amado and Moreira (2019), the law distinguishes between the figure of the TVDE (*transporte em veículo descaracterizado a partir de plataforma eletrónica*) operator, a collective person that carries out individual paid passenger transport, and the figure of the operator of electronic platforms, defined as "electronic infrastructures owned or operated by legal persons that provide, according to their own business model, the intermediation service between TVDE users and operators adhering to the platform, following [reservation] carried out by the user through a dedicated computer application" (Art. 16). In these terms, the operators of electronic platforms would dedicate themselves, above all, to providing intermediation services for the connection between the user (i.e. the passenger) and the TVDE service operator, as well as processing the payment for the TVDE service on behalf of the respective operator (charging an intermediation fee, which cannot exceed 25 per cent of the value of the trip, under the terms of Art. 15, paragraph 3). According to Portuguese law, companies such as Uber will typically be electronic platform operators, providing intermediation services between users/passengers and TVDE operators. And these TVDE operators, as legal entities dedicated to carrying out individual paid passenger transport, will provide this service and hire the necessary drivers for that purpose, under the terms of an employment contract. The driver will not engage in any contract with the operator of the electronic platform, even though to exercise the activity the driver must be registered with the electronic platform. Yet the law places the typical duties of the employer in the sphere of the electronic platform's operator, namely in terms of controlling the driver's working time and respecting the established maximum limits.

E. Termination of the employment contract

As a premise, the termination of the employment contract bears different consequences for the employer and the employee. For the former, it has an economic and organisational impact, whereas for the latter it implies a change in status and broader economic impacts, considering that the remuneration resulting from the contract often is by far their major (if not the only) source of income. This explains the asymmetry of the legal regime regarding the termination of the employment contract between the employer and the employee. Further, pursuant to Art. 339 of the CT, the applicable regime is not susceptible to different regulations, except for some quantitative aspects (indemnities and terms).

It is also worth expanding on the evolution of the regime of employment contract termination. Despite some CT modifications introduced in 2003 and 2009, the modalities of employment contract termination remained largely unchanged. In fact, since the amendments introduced in 2011 and 2012, the compensations for lawful contract termination were significantly reduced and the requisites for dismissals for objective causes were reconfigured through Law No. 23/2012, to expand applicability.

Art. 340 lists the modalities of employment contract termination, as reported in Table 4.4.

TABLE 4.4 Modalities of employment contract termination, Art. 340 of the CT

Contract termination modality	Main features
a) Expiry	Causes for expiry: a) Contractual term; entails the employee's right to compensation which depends on the duration of the expired contract. b) Due to supervening, absolute and definitive impossibility of the worker to provide his work or of the employer to receive it; same right to compensation as above in relation to the employer's impossibility to receive the work. c) With the retirement of the worker due to old age or disability; no compensation is due.
b) Revocation (Art. 349)	Formal written agreement signed by the parties; entails a global pecuniary compensation for the worker.
c) Dismissal due to a fact attributable to the worker (disciplinary dismissal)	Art. 351 defines as just cause for disciplinary dismissal the employee's culpable conduct, which, for its severity and consequences, makes the subsistence of the employment relationship immediately and practically impossible. Section 2 of the same article includes examples of situations featuring just cause. Art. 328 includes the dismissal without indemnity or compensation in disciplinary sanctions. Finally, regarding the judicial procedure for disciplinary dismissal, it is worth remembering that the 2009 reform amended the discipline of the employee's response to the so called '*nota de culpa*', through which the employer describes the facts imputable to the employee. It was deemed unconstitutional by the Constitutional Court for the violation of defence guarantees that are applicable to all processes in which sanctions may be imposed (Ac. TC 338/10, P 175/09, Borges Soeiro).
d) Collective dismissal	Collective dismissal (Art. 359 to 366 of the CT) is fundamentally different from individual dismissal due to two features: it affects a plurality of employees and is based on a common reason for dismissal. However, this dismissal cannot be based on subjective grounds (the evaluation of personal conduct, which relies on factors such as the employee's fault and due diligence—which are individual, and, as such, require the application of the rules governing individual dismissal), but only on reasons inherent to the organisation of the production. Art. 359 defines 'collective dismissal' as the termination of employment contracts promoted by the employer and operated simultaneously or successively in a three-month period, covering at least two to five workers, depending on whether they are respectively micro or small businesses, or medium or large businesses, whenever the occurrence is based on the closure of one or more (company) sections or equivalent structure, or a reduction in the number of workers determined by market, structural or technological reasons. Therefore, the validity and efficacy of collective dismissal depends on the existence of an organisational or technical reason which justifies it. Posterior judicial control is particularly difficult, as it deals with a decision of managerial, technical or economic nature that is interlinked with subjective factors, such as expectations, forecasts and trends of the employer or managers.
e) Dismissal due to the extinction of the position (dismissal for objective cause)	Art. 367 requires dismissals due to the extinction of the position to be based on economic grounds (related to either the market, structural or technological reasons). Regarding the 'practical impossibility' of the subsistence of the employment relationship, the legislator clarifies that such impossibility exists when the employer does not have another employment position compatible with the professional category of the worker (Art. 368, 4). This was amended through Law No. 32/2012, to increase the possibility of dismissal but was deemed unconstitutional (together with the modification of Art. 368, 2) by the Constitutional Court in Ac. TC 602/2013, P. 531/2012 (Pedro Machete) for violating Art. 53 of the Portuguese fundamental law.

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Contract termination modality	Main features
f) Dismissal due to worker's inadaptation (dismissal for objective cause)	Since the amendment of Law No. 23/2012, this type of dismissal includes two partially different regimes: the first relies on the occurrence of 'modifications in the workplace' (Art. 375, 1), whereby the dismissal is justified by the difficulty of the workers to adapt to the such modifications. The second includes the substantial modification of the employee's provision of work, whereby the dismissal is justified by the definitive loss of quality or yield of the work provided. In both instances, the employee's inadaptation, must be demonstrated by several factual indications (Art. 374 and 375, 2a), including for example a continuous reduction in productivity or product quality and the repeated malfunctioning of equipment. The law requires the employer to observe several steps prior to dismissing the worker, to determine the practical impossibility of the continuation of the employment relationship, modulated based on the two aforementioned regimes (listed in Art. 371, 2 for modifications in the workplace and Art. 375, 2 for the latter regime).
g) Employee's resolution	Termination of the employment contract by the employee. The contractual resolution comes into effect immediately and the employee must identify and demonstrate the existence of a just cause among those exhaustively listed in Art. 394. Just causes are differentiated between culpable (Section 2) and non-culpable (Section 3). If this termination is irregular, the employer has the right to compensation.
h)Employee's denounce with previous communication	Termination of the employment contract by the employee. This is a more 'ordinary' solution, whereby the employee communicates to the employer in advance his intention to resolve the contract. The notice period, in accordance with Art. 400, ranges from 30 to 60 days, depending on the employee's level of seniority.

Source: Authors' elaboration.

We will now discuss common traits of the abovementioned dismissals. It is worth recalling as a premise the constitutional prohibition of dismissal without just cause or for political or ideological reasons, contained in Art. 53. According to the Constitution, 'just cause' includes any situation that results in the practical impossibility of the subsistence of the relations required by the employment contract (Fernandes 2014). This practical impossibility, understood as the unenforceability of the employment relation, results from a juridical reasoning pondering the interest to dismiss as opposed to the interest to maintain the contract; a factual judgement on the practical viability of the reciprocal contract.

First, Art. 351 of the CP identifies just cause for dismissal in "the culpable behaviour of the employee, which, for its gravity and consequences, make the subsistence of the employment relation immediately and practically impossible." This hypothesis refers to the 'disciplinary' dismissal, which corresponds to a type of sanction imposed according to the severity of the employee's conduct, which is culpable and in violation of his duties of conduct.

Since 1989, the notion of 'just cause' has been integrated by 'objective reasons'. The most prominent example is dismissal due to the extinction of the position, a unilateral decision of the employer (Art. 371), which is based on market, structural or technological grounds related to the firm (Art. 367), in which there is no fault of the employer or of the employee. Likewise, dismissal due to employee's subsequent inadaptation relies on objective reasons, which are not based on any of the employee's faults.

Two further observations are required. First, the law provides the employee with the judicial means to provisionally oppose to all types of dismissal: the individual can act before the competent tribunal within five days from the communication of dismissal to ask for its suspension (Art. 386). The judge will, based on procedural rules, form a provisional judgement on the lawfulness of the dismissal—relying on their formal conditions as well as the effective subsistence of just cause—and consequently suspend (or not) the effects of the act.

Further, a common feature of all dismissals is the possibility to declare dismissal by the employer judicially unlawful on procedural or substantive grounds. Art. 389, regarding unlawful dismissals, states that the employer must: compensate the employee for the patrimonial and non-patrimonial damages caused, and reinstate the worker in the same establishment, in the same category and without adversely affecting his seniority. Exceptions include when the employee opts for compensation rather than reinstatement (Art. 391), and when the employer requests the court to deny the reinstatement of a micro-enterprise or a worker in an administrative or managerial position, based on facts and circumstances that make the return of the worker seriously harmful and disruptive to the operation of the company (Art. 392). Finally, within the context of disciplinary dismissal, the same Art. 389 clarifies that in case of mere irregularity based on procedural flaw due to the omission of probatory diligences (as required by Art. 356) and the effective recognition of just cause invoked by the tribunal, the dismissal is valid and the employee has is entitled to a lower compensation than normal.

F. Collective labour relations

Certain collective phenomena associated with labour are extremely relevant from a social perspective and can form the object of legal norms. It is important to note that the incidence of collective labour law on individual interests and relations is mediated and instrumental: the norms created do not directly shape individual employment relations, or create rights or duties for either the employee or the employer. Collective labour norms exclusively regulate or condition certain modes of production of norms applicable to employment contracts that involve the composition of certain collective interests.

While a fundamental element of the individual employment relationship is legal subordination, the relations among collective subjects (such as trade unions, employers' organisations and enterprises) can be legally qualified as coordinated relations, in which there is no subordination. Likewise, the collective action of employees can concern the powers of the employer, particularly those related to the direction and organisation of the company. For example, collective agreements often touch on subjects (such as internal regulations, organisation of working hours, exercise of disciplinary actions) that are traditionally the prerogatives of the employer.

Fernandes (2014, p. 652) defines the collective labour relationship as the legal relationship established between two groups: employers and labour providers, represented by a union, or between an employer and a workers' union, to regulate the working conditions of the represented members and the behaviour of the groups related to the individual labour relations considered or the collective interests of the same groups.

Portugal's system can be summed up in three levels (Naumann, 2018, p. 95):

a) The tripartite, macro-level negotiations carried out by the employers' and trade union confederations as well as the national government at the Standing Committee for Social Concertation (CPCS);

b) collective bargaining, mostly in the form of branch-level agreements signed by basic or intermediate-level organisations (employers' associations or federations of associations, and trade union federations or individual unions); and

c) company-level negotiations and consultations on working conditions, dominated by trade unions (union delegates and committees), with a secondary role for the workers' councils (*comissões de trabalhadores*).

De jure, there is a two-tier system of worker representation (unions and workers' councils), but in fact the system is strongly dominated by the unions. A major reason for this is that unions have the exclusive legal right to sign binding collective agreements.

The CP explicitly guarantees the formation of workers' committees and trade unions. Art. 54provides for the workers' right to form workers' committees to defend their interests and democratically intervene in the functioning of their enterprise. In parallel, Art. 55 enshrines the workers' freedom to form, belong to, and operate trade unions as a condition and guarantee of the defence of their rights and interests. Conversely, the CP does not make any reference to employers' associations. Table 4.5 reports the rights and other constitutional features that the constitution affords to workers' committees and trade unions.

Finally, regarding the freedoms to form, belong and operate trade unions, the Constitution further guarantees to workers:

a) The freedom to form trade unions at every level.

b) Freedom of membership. No worker may be obliged to pay dues to a union to which he does not belong.

c) The freedom to decide the organisation and internal regulations of trade unions.

d) The right to engage in trade union activities in their firm.

e) The right to political views, in the forms laid down by the respective by-laws.

TABLE 4.5 Constitutional provisions inherent to workers' committees and trade unions

Workers' committees (Art. 54)	
Workers' committees' rights	**Other constitutional features**
a) To receive all information needed to do their work b) To monitor the management of their enterprises c) To participate in corporate restructuring processes, especially in relation to training actions or when working conditions are altered d) To take part in drawing up labour legislation and economic and social plans that address their sector e) To manage or participate in the management of their enterprise's social activities f) To promote the election of workers' representatives to the governing bodies of enterprises that belong to the State or other public entities, as laid down by law	Decisions to form workers' committees must be taken by the workers themselves, who must approve the committees' by-laws, and must elect their members by direct, secret ballot Possibility to create coordinating committees Equal legal protection of committee members to that of trade union delegates
Trade unions (Arts. 55–56)	
Trade unions' rights	**Other constitutional features**
a) To take part in drawing up labour legislation b) To take part in the management of social security institutions and other organisations that seek to fulfil the interests of workers c) To pronounce themselves on economic and social plans and monitor their implementation d) To be represented in social dialogue bodies, as laid down by law e) To take part in corporate restructuring processes, especially regarding training actions or when working conditions are altered f) In addition, trade unions have the competence to exercise the right to enter into collective agreements, as established by law	• Governance through principles of democratic organisation and management (periodic election of governing bodies by secret ballot) and worker participation in activities • Independence • Right of the workers' elected representative to be informed and consulted, as well as the right to adequate legal protection against any form of submission to conditions, constraints or limitations to the legitimate exercise of their functions

Source: Authors' elaboration.

In accordance with the CT, a trade union is a voluntary "permanent workers' association for the defence and promotion of their socio-professional interests" (Art. 442). Pursuant to Art. 447, the trade union acquires legal personality as a result of the registration of its statute before the Ministry of Labour, which will be responsible for publishing it in the Labour and Employment Bulletin. The only grounds on which the Ministry can refuse this registration is a lack of documentation. In case of any unlawful aspect, after having registered and published the

trade union statute, the Ministry can either demand the trade union to rectify the statute within 180 days or submit it to the public prosecutor and tribunal. *Ex post* judicial control can eventually result in the extinction of the trade union through the cancellation of the registration (Art. 456). Finally, in accordance with Art. 440, in addition to trade unions there are federations, unions and confederations.

In turn, the right to form employers' associations is provided for in Art. 440 of the CT: these associations group and represent employers (either individuals or legal entities) to defend and promote their collective interests, especially regarding the establishment of collective agreements. The CT's rules for the establishment of employers' associations are the same as those for trade unions: the legal personality is acquired through statute registration before the Ministry of Labour, consequent publication in the Labour and Employment Bulletin and eventual *ex-post* judicial control in case of illegality. Entrepreneurship associations can acquire the quality of employers' associations, as disposed by Art. 448.

Finally, in accordance with Art. 416 of the CT, a workers' commission is an organisation with legal personality composed of firms' employees as members, elected through voting. These are also subject to registration on behalf of the Ministry of Labour. It is important to clarify that while a workers' commission is legally competent to intervene in a company, it remains fundamentally external, in the sense that the commission is neither included in the company's juridical structure (as a legal entity) nor inserted in its functional structure (as a productive organisation). To ensure the independence of workers' commissions, the CT provides that the funding of their activities cannot be guaranteed by any entity other than the company's employees. Further, funding modalities have to be specified in the statutes of the commissions (Art. 434).

As mentioned, collective labour relations are instrumental in supporting and developing key legal sources in labour law—i.e., collective labour regulation instruments (IRCTs). IRCTs are a tool to reconcile conflicting collective interests: therein converge both the interests of workers (to eliminate competition among themselves, increase their bargaining power and diminish status inequalities within a same profession or activity) and those of employers (to standardise labour costs and make them relatively stable, which allows for and facilitates planning) (Fernandes 2014). The object of IRCTs (which largely corresponds to the determination of working conditions) has evolved considerably over time, shifting from a mere regulation of salaries to more qualitative matters, such as the definition of professional categories and careers, the organisation of working hours, the configuration of the right to rest and the intervention of workers in the company's functioning.

Collective bargaining is not only recognised by the legal system, but also protected and promoted as preferential tool to arrange collective interests. Thus, the regulation of collective bargaining differs from that of individual negotiation as an expression of private autonomy. Indeed, there is no absolute freedom for collective bargaining: the collective subjects must reasonably strive for

the effective functioning of such a mechanism. While an absolute duty to bargain for collective subjects does not exist in Portugal's legal system, the CT contains some rules which go in the opposite direction. These include the observance of bargaining protocols (where they exist) and mandatory participation in meetings, aiming to prevent/resolve conflicts (Art. 489) as well as, and most importantly, compliance with requirements concerning the initial declarations of the collective subjects: pursuant to Art. 487, once an initial proposal is presented, the recipient must reply in writing indicating their motivations, within 30 days from the receipt. The reply must express a position in relation to all clauses of the proposal. In addition, the parties must observe principle of good faith (as in individual negotiations). Non-compliance with these rules stands as a grave misdemeanour, punishable with a fine to be established by administrative authorities.

In Portugal's legal system, pursuant to Art. 2 of the CT, IRCTs are divided into negotiable and non-negotiable, depending on the type of stakeholder participation, as depicted in Table 4.6.

TABLE 4.6 Negotiable and non-negotiable IRCTs (Art. 2 CT)

ICRTs	Negotiable	Collective conventions	Company agreement
			Collective agreement
			Collective contracts
		Accession agreement	
		Voluntary arbitration	
	Non-negotiable	Obligatory arbitration	
		Necessary arbitration	
		Extension ordinance	
		Working conditions ordinance	

Source: Fernandes (2016, 9).

Collective conventions can occur at the enterprise, industry or profession levels. If the convention is granted by a single employer, it is designated as a company agreement; if various employers are autonomously involved, a collective agreement will ensue. Finally, if the convention is celebrated by one or more employers' associations, it is denominated a 'collective contract'. In Portugal, company agreements are typical among larger companies– including those belonging to the public sector, whereas collective agreements are quite rare, considering that they are used when an employers' association in a given industry does not exist or when some companies (of considerable size) in an industry are not represented. Collective contracts concerning a whole industry are the most widespread. This can be explained by the predominance of small and medium companies (Fernandes 2014). Finally, the CT admits the concurrence between a collective contract and a collective agreement or a company agreement, and establishes that the special convention must prevail (Art. 482).

The CT imposes some limits to the object of the convention, by indicating the subjects that are applicable as well as by explicitly excluding other matters. Parties are almost completely

free to choose the themes to be bargained for, as long as they respect the above-mentioned provisions of Art. 478 and include the mandatory identifying elements listed in the first section of Art. 492 (such as the designation of celebrating entities, sectoral, professional and geographical application of the convention, date of celebration, etc.). The lack of these elements, pursuant to the fourth section of Art. 494, implies the refusal to deposit the convention. Further, the other elements listed in sections 2 and 3 of the same Art. are not to be mandatorily included in the collective convention.

On the other hand, Art. 478 prohibits a set of subjects which are termed "regulation of economic activities" (e.g. the fiscal regime, the formation of prices and the activities of temporary employment firms). In addition, the same norm clarifies that collective conventions cannot be contrary to imperative legal provisions and limits the retroactive application of the convention to clauses with a pecuniary nature.

From a formal perspective, the CT requires the collective convention to be in written form (Art. 477) and deposited (through a specific process regulated by Art. 494) before the Ministry of Labour. Moreover, the collective convention deposit might be refused based on grounds detailed in the seventh section of Art. 494, including, for example, the omission of the elements listed in the first paragraph of the abovementioned Art. 492. Finally, pursuant to Art. 519, the collective convention must be published in the Labour and Employment Bulletin.

To conclude this section on collective conventions, it is worth recalling some norms which established the relations among sources of regulation, including individual employment contracts and collective conventions. The CT specifically regulates the relations between sources of regulation of an employment contract and the limits of normative changes by individual and collective negotiation, in the following terms (Art. 3):

1. The legal norms regulating employment contracts may be excluded by a collective labour regulation instrument, unless otherwise provided for.

2. The legal norms regulating employment contracts cannot be removed by ordinance of working conditions.

3. The legal norms regulating employment contracts can only be excluded by a collective labour regulation instrument that provides a more favourable situation for employees regarding the following matters: a) personality, equality and non-discrimination rights; b) parenthood protection; c) child labour; d) workers with reduced working capacity, disability or chronic illness; e) working student; f) information duty of the employer; g) limits on the duration of normal daily and weekly work periods; h) minimum length of rest periods, including the minimum duration of the annual holiday period; i) maximum duration of night shifts; j) form of compliance and guarantees of remuneration, including supplementary labour;

l) chapter on prevention and repair of occupational accidents and diseases and respective regulatory legislation; m) transmission of company or establishment; n) rights of the elected representatives of the employees.

4. The legal norms regulating employment contracts can only be excluded by individual contracts that establish conditions that are more favourable to the worker, unless otherwise provided for.

5. Whenever a norm regulating an employment contract determines that it can be derogated by a collective labour regulation instrument, it is understood that it cannot be (derogated) by an employment contract.

In turn, Art. 476 CT admits the derogation of the IRCTs' dispositions by an employment contract only when it establishes more favourable conditions for the employee.

The last part of sub-section 2c deals with collective labour disputes and strikes. As already mentioned, an underlying 'tension' exists in industrial relations, originating from the opposing interests of employees and employers. Therefore, a collective labour dispute occurs, as a result of collective action, when there is a disagreement in interests between an organised category of employees and an employer (or an organised category of employers) concerning the (existing or future) regulation of labour relations (Fernandes 2014). The disagreement between collective interests must be explicitly manifested (and not merely latent) and can occur in different forms, ranging from conflict in the bargaining process to its 'exteriorisation' through a strike.

In Portugal's legal system, while the object of collective disputes typically concerns working conditions, there are two categories of collective conflicts. 'Legal conflicts' are those related to the interpretation and application of a normative already in place (usually a collective convention). The second category concerns conflicts of interest and those of an economic nature, which aim at the modification of a pre-existing norm or the creation of new ones. In the former category, the conflict fundamentally translates into a violation of rights originating from the non-application or erroneous interpretation of the collective norm, which is already pre-defined; in the second category, conflict resolution depends on the effective composition of conflicting interests which results in the modification or the creation of norms.

The solution to legal conflicts relies on the interpretation of the common will of the parties. The CT includes the possibility to create, through collective convention, a commission (integrated by the parties) that can interpret and integrate its clauses (Art. 492, 3). While the functioning and competence of these commissions can, in principle, be freely defined by the parties in the convention, the CT determines in Art. 493 that the deliberations

of the commission are only valid if half of the representatives of each party is present; deliberations adopted unanimously are to be deemed an integral part of the convention (to be deposited and published as a consequence).

In parallel, conflict of interest typically occurs when the parties are incapable (or unwilling) to carry on through the bargaining channel. In this context, an intervention is desirable for several reasons. Perhaps the most substantial is the prevention or temporary limitation of social tension and the resulting containment of economic losses attributable to labour disputes. The mechanisms to resolve this kind of disputes provided by the CT are conciliation, mediation and arbitration (Art. 523). While it does not fall within the scope of this paper to analyse in detail the regulation of these mechanisms, it is important to bear in mind that:

a) The resort to these mechanisms is in principle facultative.[14]

b) There is no precedence between the mechanisms.

c) The process laid down in legislation is, with some exceptions, largely suppletive: as such it can be derogated by the rules agreed by the parties.

Regarding the right to strike. In accordance with Art. 57 of the CP, workers are guaranteed the right to strike and are responsible for defining the scope of interests to be defended through the strike.[15] The same norm prohibits employer lockouts. It should be stressed that no law can limit the scope of interests to be defended through industrial action: the legislation can only define the conditions of provision—during the strike—of services necessary for the security and maintenance of equipment and installations, as well as minimum services indispensable for the satisfaction of imperative social needs. The CT reaffirms the right to strike as a Constitutional right of workers, adding the element of non-resignation (Art. 530, paragraph 3).

As reported by Fernandes (2014, 871) the exercise of the right to strike unfolds in several steps: decision, declaration (through notice), adherence, provision of essential services, and termination.

Decision. The strike's judgment of opportunity is not legally conditioned: it is exclusively up to the workers and representative organisations to choose the moment when the strike will be put into practice. Further, there is no necessary link between the decision to strike and the use

14. With the exception of mandatory arbitration.

15. The CP also guarantees the relative reserve of legislative competence to the Assembly of the Republic for legal regulation of the right to strike (Art. 165, paragraph 1b).

of conflict resolution processes (conciliation, mediation and arbitration): these can be outright rejected, or left to a subsequent phase.[16]

The decision to strike rests primarily with the trade union association. This holds particularly true for stoppages covering a branch of activity or an entire profession. However, in stoppages limited to a single company, there is still the possibility that the decision to resort to a strike will be reached in a workers' assembly, when the majority of workers are not unionised (Art. 531,2). In this case, however, it is necessary to observe several prerequisites: a minimum quorum for convening the assembly (20 per cent or 200 workers); participation of the majority of workers; and an absolute majority of votes in favour of the strike. The same possibility exists when it comes to a company belonging to an industry covered by a strike declaration, but in which the majority or all of the workers are not affiliated with the promoting union.

Declaration/notice. The decision to carry out a strike is not enough in itself to exercise the corresponding right. This decision must be expressed in advance in relation to the moment of its implementation. Art. 534, in effect, requires prior notice "addressed to the employer or the employers' association" and to the Ministry of Labour.

In general, the minimum notice period is 5 working days, but for "companies or establishments that are destined to satisfy unavoidable social needs" (Art. 537), it is fixed at 10 days.

The notice must constitute an unambiguous statement, containing a set of indications about the modalities of the strike. These include the identification of the establishments or services affected, as well as the indication of the promoting trade union(s) (or, in the case of Art. 531,2, of workers' assembly). The notice must also contain at least the date and time of the start of the strike; however, it does not need to indicate when it will end. The indication of the start of the strike (and eventually of its termination) is binding for those who issue it and, therefore, for the adhering workers.

16. However, some important details must be addressed at this point. The first concerns the problem of whether, over the course of a collective agreement, it is permissible to initiate a strike to achieve the amendment of the same convention–provided the absence of a social peace clause (Art. 542, 1 CT). The strike can be carried out if a modifying claim is legitimately expressed.

A different hypothesis is when the modifying claim has retroactive efficacy. In this case, the answer would have to be negative in principle. However, the law allows an exception to this rule: in the face of an abnormal change in circumstances, the strike can be carried out—even if a peace clause exists—in support of the claim of early modification of the convention, as can be deduced from Arts. 520,2 and 542,2 of the CT.

Another problem arises in connection with the few cases in which, either by virtue of collective agreement clauses or by virtue of legal provisions (e.g., Art. 508 CT), the use of conflict resolution processes proves mandatory. Will it be necessary to extract from these precepts the subordination of the exercise of the right to strike to the previous exhaustion of the referred processes? The answer should be negative in principle, considering on one hand the voluntary nature of conflict resolution mechanisms in the CT (except for Art. 508) and the constitutional protection afforded to strikes. However, in the most striking case—that of arbitration being declared mandatory, pursuant to Art. 508, the possible triggering or continuation of a strike against (and despite) the arbitration decision does not seem admissible. Since the mandatory arbitral award is a 'substitute' for a collective agreement, the exercise of the strike must be assessed in parallel. However, a strike enacted or maintained against a solution just reached is clearly contrary to the principle of good faith. This will only be the case, of course, if the strike is directed against an unresolved aspect of the agreement or arbitration decision.

Finally, the notice must be given "by suitable means, namely in writing or through the media". This communication should effectively reach the recipients identified by Art. 534,1: the employer, or the employers' association, and the Ministry of Labour (for conciliation purposes).

Adherence. The decision to strike is not legally binding for each worker represented by the union or assembly. It represents a collective will to which individuals can conform or not; it offers the collective framework necessary to exercise the right to strike as an individual freedom. This takes the form of joining the strike, which is a manifestation of will that translates into the individual's abstention from the provision of his activity.

Provision of essential services. Art. 536,1 provides that "the strike suspends the employment contract of the adhering worker, including the right to remuneration and the duties of subordination and attendance".

In short, the strike puts workers 'out of the contract' by suspending it, although the employment relationship remains and, along with it, so do acquired seniority and the status of social security beneficiary.

On the other hand, the law attributes to striking workers certain duties which may even imply the need to provide their normal activity.

The CT establishes, in Art. 537, a set of obligations during the strike that answer to two different purposes. Generally, during the strike, "the services necessary for the security and maintenance of equipment and installations" of the company must be provided (Art. 537,3); when the strike affects services that are deemed to satisfy imperative social needs, "minimum indispensable services" must be contextually provided (Art. 537,1).

Termination. The strike ends "by agreement between the parties or by resolution of the entities that have declared it" (Art. 539). The strike can end also if it no longer has any adhering members, even if there is no 'agreement between the parties' or 'deliberation' by the union.

4.1.4 Employment and labour market indicators, trade unions and collective bargaining (2015–2019)

This section provides key quantitative information. In particular, sub-section a) includes several indicators that are instrumental in representing Portugal's employment rates, unemployment rates and its labour market. Sub-section b) deals with the country's trade union density and collective bargaining coverage rate, and sub-section c) addresses the country's industrial action. Taken together, sub-sections b) and c) outline the Portuguese industrial relations. All indicators were selected from International Labour Organisation's (ILO) 'Key Indicators of the Labour Market' (2016) and refer to the period ranging from 2015 to 2019 to observe relevant trends.

A. Employment and labour market

Table 4.7 reports Portugal's population projections from 2015 to 2019. The country is by far the least populated among the group of selected countries, considering that the population of South Korea—second least populous country—is more than twice the size of Portugal's.

TABLE 4.7 Portugal's population projections, 2015–2019 (in thousands)

Category	2015	2016	2017	2018	2019
Total	10,368	10,326	10,289	10,256	10,226
Male	4,910	4,885	4,865	4,850	4,837
Female	5,458	5,441	5,423	5,406	5,390

Source: Authors' elaboration based on UNDESA (2020).

Since 2010, the country's population has been declining (Rodrigues 2017). The population was projected to decrease by 1.3 per cent between 2015 and 2019, as observed in Table 4.7. Furthermore, the population aged 65 and older is growing rapidly. Both demographic trends influence the labour market in several ways. The most evident is perhaps the decline of the working-age population (14 to 64 years of age): it declined by 5.9 per cent from 2008 to 2018 (Banco de Portugal, 2019).

As Table 4.8 shows, the working age population declined by 14,000 individuals between 2015 and 2018, and rose again to similar levels in 2019. Another indicator to be considered is Portugal's labour force,[17] working-age individuals (either employed or unemployed), excluding students, pensioners and those who are not actively looking for employment (i.e. the inactive population).

TABLE 4.8 Portugal's working-age population 2015–2019 (in thousands)

Category	2015	2016	2017	2018	2019
Total	8,866	8,859	8,853	8,852	8,864
Male	4,145	4,138	4,132	4,131	4,128
Female	4,722	4,721	4,722	4,721	4,735

Source: Authors' elaboration based on ILOSTAT (2020).

TABLE 4.9 Portugal's labour force 2015–2019 (in thousands)

Category	2015	2016	2017	2018	2019
Total	5,195	5,178	5,219	5,233	5,253
Male	2,657	2,652	2,667	2,661	2,658
Female	2,538	2,526	2,553	2,572	2,594

Source: Authors' elaboration based on ILOSTAT (2020).

17. The labour force comprises all working-age individuals who supply labour to produce goods and services during a specified period. It refers to the sum of all working-age people who are employed and those who are unemployed.

The decline observed in the working-age population is not reflected in the labour force. As reported by Banco de Portugal (2019, p. 43) this increase is partly due to the typical procyclical behaviour of the labour force participation rate (see below), which is also visible in the sharp falls observed in the last recession. The same report also points out that the labour force in 2018 was still 4.4 per cent below the figure recorded before the economic and financial crisis.

Given these parameters, it is possible to determine Portugal's labour force participation rate.[18] The labour force participation rate is a measure of the proportion of a country's working-age population that engages actively in the labour market, either by working or looking for work; it provides an indication of the size of the labour supply available to engage in the production of goods and services, relative to the working-age population (ILOSTAT, 2020).

TABLE 4.10 Portugal's labour force participation rate, 2015–2019 (as a percentage)

Category	2015	2016	2017	2018	2019
Male	64.10%	64.10%	64.50%	64.40%	64.40%
Female	53.80%	53.50%	54.10%	54.50%	54.80%
Total	58.60%	58.50%	59%	59.10%	59.30%

Source: Authors' elaboration based on ILOSTAT (2020).

Taking 2019 as reference year, the table indicates that almost 60 individuals in 100, aged 15 years old or older, were actively engaged in the labour market. It is also possible to determine the inactivity rate:[19] slightly more than 40 per cent of working-age individuals were outside the labour force—i.e., neither employed nor unemployed.

Since 2011, the abovementioned changes in the demographic structure of the population produced a negative impact (aging) on the variation of the activity rate, reflecting the growing weight of the older groups, with lower activity rates, and the reduction of the percentage of individuals aged between 25 and 34 years. This impact was however mitigated by the increased female participation in the labour market (Banco de Portugal, 2019). Incidentally, Portugal has the highest female participation rate of the selected countries.

The analysis now focuses on employment indicators. The first provides information on the ability of an economy to create employment: the employment-to-population ratio—i.e. the number of persons who are employed as a percent of the total of working-age population (ILOSTAT, 2020).

18. The labour force participation rate is the number of people in the labour force as a percentage of the working-age population.

19. This indicator conveys the number of working-age people outside the labour force (that is, neither employed nor unemployed), expressed as a percentage of the working-age population. The working-age population is commonly defined as persons aged 15 years or older, but this varies from country to country. In addition to using a minimum age threshold, certain countries also enforce a maximum age limit.

TABLE 4.11 Portugal's employment to population ratio, 2015–2019 (as a percentage)

Category	2015	2016	2017	2018	2019
Male	56.30%	57.10%	59.10%	60.20%	60.70%
Female	46.90%	47.50%	49.00%	50.40%	50.90%
Total	**51.30%**	**52.00%**	**54%**	**55.00%**	**55.40%**

Source: Authors' elaboration based on ILOSTAT (2020)

TABLE 4.12 Portugal's employment distribution by economic activity, 2019 (ISIC-Rev.4, in thousands)

C. Manufacturing	836.6259
G. Wholesale and retail trade; repair of motor vehicles and motorcycles	706.4138
Q. Human health and social work activities	475.2489
P. Education	416.6139
I. Accommodation and food service activities	320.7577
O. Public administration and defence; compulsory social security	309.0291
F. Construction	304.5577
A. Agriculture; forestry and fishing	270.1004
M. Professional, scientific and technical activities	221.8849
H. Transportation and storage	218.5738
N. Administrative and support service activities	171.3968
J. Information and communication	134.0389
S. Other service activities	119.6445
T. Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use	114.7687
K. Financial and insurance activities	98.9771
R. Arts, entertainment and recreation	68.2823
L. Real estate activities	52.2074
E. Water supply; sewerage, waste management and remediation activities	39.0064
D. Electricity; gas, steam and air conditioning supply	19.4503
B. Mining and quarrying	12.7225
U. Activities of extraterritorial organisations and bodies	
X. Not elsewhere classified	

Source: Authors' elaboration based on ILOSTAT (2020).

As can be inferred from Table 4.11, the total employment-to-population ratio has increased by 4.1 percentage points from 2015 to 2019. Furthermore, the ratio increased constantly, for both women and men, during the period considered. The employment-to-population ratio decreased from 54.6 per cent in 2010 to 52.8 per cent in 2011, dropping further to 50.8 per cent in 2012 and 49.6 per cent in 2013, the lowest ratio recorded since 1983—the first year of the PORDATA time series (PORDATA, 2020).

Table 4.12 depicts Portugal's employment distribution by economic activity[20] in 2019, classified according to the International Standard Industrial Classification of All Economic Activities (ISIC), Rev. 4.

Around 4,913,086 individuals were employed in Portugal in 2019. The five activities with highest number of employed people were: manufacturing, wholesale and retail trade; repair of motor vehicles and motorcycles, human health and social work activities, education and accommodation and food service activities. Using aggregate economic sectors, Portugal's situation is as follows:

TABLE 4.13 Portugal's employment distribution in 2019 (aggregate economic sectors, as a percentage)

Agriculture	Manufacturing	Construction	Mining/ quarrying; electricity, gas, water supply;	Trade, transportation, accommodation and food, and business and administrative services	Public administration, community, social and other services and activities
5.50%	17.00%	6.20%	1.40%	39.20%	30.70%

Source: Authors' elaboration based on ILOSTAT (2020).

It is also possible to observe if there were any relevant trends in employment distribution by broad economic sectors between 2015 and 2019.

TABLE 4.14 Portugal employment distribution by broad economic sectors, 2015–2019 (in thousands)

Year	Agriculture	Non-agriculture	Industry	Services	Total
2015	342.5217	4206.148	1107.553	3098.596	4548.67
2016	318.3741	4286.873	1128.29	3158.583	4605.247
2017	304.4356	4452.183	1176.81	3275.373	4756.619
2018	294.1603	4572.507	1209.203	3363.304	4866.668
2019	270.1004	4642.986	1212.363	3430.623	4913.086

Source: Authors' elaboration based on ILOSTAT (2020).

The first key observation is that the total number of employed individuals grew by almost 7.5 per cent from 2015 and 2019. Additionally, the number of employed individuals across all years in each broad economic sector grew as follows: services grew by 9.6 per cent, followed by non-agriculture, which grew by 9.4 per cent, and industry, which grew by 8.6 per cent. Agriculture, on the other hand, is the only broad economic sector whose activity decreased, by almost 72,500 employed individuals (a reduction of almost 27 per cent).

20. The employed population comprises all working-age persons who, during a specific period, belonged to the following categories: a) paid employment (whether at work or with a job but not at work); or b) self-employment (whether at work or with an enterprise but not at work).

Portugal's distribution of employment can also be assessed in terms of employment status. Breaking down employment information by employment status[21] provides a statistical basis for describing workers' conditions of work and for defining an individual's socio-economic group (ILOSTAT, 2020).

TABLE 4.15 Portugal's distribution of employment by status in employment, 2015–2019 (as a percentage)

Category	2015	2016	2017	2018	2019
Employees	81.60%	82.20%	83.00%	83.40%	83.10%
Employers	4.80%	4.80%	4.70%	4.80%	4.80%
Own-account workers	13.10%	12.40%	11.80%	11.40%	11.70%
Contributing family workers	0.50%	0.60%	0.50%	0.40%	0.40%

Source: Authors' elaboration on the basis of ILOSTAT (2020).

The table indicates that the 'employee' category, which comprises wage and salaried workers, is by far the most widespread in Portugal, indicating advanced economic development. The share of employees grew steadily over time, except for 2019. Conversely, the share of employers remained stable at around 4.8 per cent each year, with a slight drop in 2017. The two categories together represent the 'non-vulnerable employment' indicator for decent work under the former Millennium Development Goals (MDGs). 'Own-account workers' and 'contributing family workers' are jointly a proxy for vulnerable employment, being more prone to informality. The percentage of own-account workers constantly decreased each year, except for 2019: from 2015 to 2019, the ratio decreased by almost 12 per cent. This is probably linked to the drop in employment in the agricultural sector, considering that informal employment is not that widespread in the country (see below). Likewise, the share of 'contributing family workers'–typically widespread in developing economies–remained at less than 1 per cent.

A further indicator to be considered is the share of temporary employees as a percentage of total employees,[22] which provides an estimation of the incidence of temporary employment.

TABLE 4.16 Portugal's share of temporary employees, 2015–2019 (as a percentage)

2015	2016	2017	2018	2019
22.00%	22.30%	22.00%	22.00%	20.80%

Source: Authors' elaboration based on ILOSTAT (2020).

21. The 'employed' comprise all persons of working age who, during a specified brief period, were in one of the following categories: a) paid employment (whether at work or with a job but not at work); or b) self-employment (whether at work or with an enterprise but not at work). Data are disaggregated by status in employment according to the latest version of the ICSE-93. 'Employment status' refers to the type of explicit or implicit employment contract the person has established with other persons or organisations. The basic criteria used to define the groups are the type of economic risk and the type of authority over establishments and other workers which the job incumbents have or will have.

22. This indicator represents temporary employment as a percentage of employees. Temporary employment, whereby workers are engaged only for a specific period, includes fixed-term, project- or task-based contracts, as well as seasonal or casual work, including day labour. There are significant differences in definitions used across countries, which should be kept in mind when making cross-country comparisons.

As shown in Table 4.16, between 2015 and 2018, around 22 per cent of employees were in temporary employment. In 2019 this figure decreased to slightly less than 21 per cent (a decrease of almost 6 per cent).

Table 4.17 displays the incidence of part-time employment[23] in Portugal in the timeframe considered.

TABLE 4.17 Incidence of part-time employment in Portugal, 2015–2019 (as a percentage)

2015	2016	2017	2018	2019
26.80%	29.90%	29.70%	28.80%	28.70%

Source: Authors' elaboration based on ILOSTAT (2020).

The lowest incidence of part-time employment was recorded in 2015, while the highest was registered the following year, a 10 per cent increase. After 2016, the share of part-time employment progressively decreased each year.

Few data are available in relation to Portugal's informal employment. In this respect, the latest data available was retrieved in ILO's report "Women and men in the informal economy: a statistical picture" (2018), which relies on the 2012 EU statistics on income and living conditions (EU-SILC). The report states that the country's share of informal employment in total employment is 12.1 per cent.

The annual growth rate of output per worker conveys is an indicator related to labour productivity[24] which provides an indication of the efficiency and quality of human capital in the production process in a country and is closely linked to economic growth, competitiveness and living standards (ILOSTAT, 2020).

TABLE 4.18 Portugal's annual output growth rate per worker, 2015–2019 (GDP constant 2011, USD PPP, as a percentage)

2015	2016	2017	2018	2019
0.60%	0.60%	-0.50%	-0.30%	1.90%

Source: Authors' elaboration based on ILOSTAT (2020).

23. The incidence of part-time employment, also known as the part-time employment rate, represents the percentage of employment that is part time. Part time employment in this table is based on a common definition of less than 35 actual weekly hours worked. It is derived from the indicator on employment by sex and actual weekly hours worked.

24. This indicator conveys the annual growth rates of labour productivity. Labour productivity represents the total volume of output (measured in terms of gross domestic product—GDP) produced per unit of labour (the number of employed persons) during a given time period. The indicator allows data users to assess GDP-to-labour input levels and growth rates over time, thus providing general information about the efficiency and quality of human capital in the production process for a given economic and social context, including other complementary inputs and innovations used in production.

TABLE 4.19 Portugal's mean nominal monthly earnings of employees, 2015–2018 (2017 PPP USD)

2015	2016	2017	2018
1,230.2	1,275	1,289.8	1,346.7

Source: Authors' elaboration based on ILOSTAT (2020).

Earnings come next in the analysis, focusing first on the mean nominal monthly earnings of employees[25] for comparative purposes and then on the average basic remuneration and average gains[26] disaggregated by sex, in EUR.

TABLE 4.20 Portugal's monthly average basic remuneration and gains, 2015–2018 (EUR)

	Monthly average basic remuneration			Monthly average gain		
Year	Male	Female	Total	Male	Female	Total
2015	990.1	825.0	913.9	1,207.8	957.6	1,096.7
2016	997.4	840.3	924.9	1,215.1	982.5	1,107.9
2017	1,012.3	861.2	943.0	1,236.9	1,011.0	1,133.3
2018	1,039.1	888.6	970.4	1,274.0	1,046.6	1,170.3

Source: Authors' elaboration based on PORDATA (2020).

The monthly average remuneration increased by 5.8 per cent, while gains increased by 6.2 per cent from 2015 to 2018. The value of the minimum wage, EUR505 in 2015, increased progressively to EUR635 in 2020 (a 20 per cent increase). There is a gender gap regarding both average monthly remuneration and income. The average monthly remuneration gap decreased progressively over time: in 2015, this gap was around EUR165 between men and women, whereas in 2018 it was EUR150. The gender gap in average monthly gains also decreased each year (except for 2018)—with the highest gap (EUR250) recorded in 2015.

25. The earnings of employees relate to the gross remuneration in cash and in kind paid to them, as a rule at regular intervals, for time worked or work done together with remuneration for time not worked, such as annual vacation, other types of paid leave or holidays. Earnings exclude employers' contributions on behalf of their employees paid to social security and pension schemes, and the benefits received by employees under these schemes. Earnings also exclude severance and termination pay. Statistics of earnings relate to the gross remuneration of employees, i.e., the total before any deductions are made by the employer. This is a harmonised series: (1) data reported as weekly and yearly are converted to monthly in the local currency series, using data on average weekly hours if available; and (2) data are converted to USD as the common currency, using exchange rates or using 2017 purchasing power parity (PPP) rates for private consumption expenditures. The latter series allows for international comparisons by taking accounting for the differences in relative prices between countries.

26. The basic monthly remuneration is the amount that the employee is entitled to receive each month for normal working hours. The monthly gain is the amount that the employee actually receives every month. In addition to the basic remuneration, it includes other remunerations paid by the employer, such as overtime, holiday pay or bonuses (PORDATA 2020).

To conclude this sub-section, two further indicators are presented: Portugal's unemployment rate[27] and the proportion of youth (aged 15-24 years) not in education, employment or training (the NEET rate).[28]

TABLE 4.21 Portugal's unemployment, NEET and inactivity rates, 2015–2019 (as a percentage)

Categories		2015	2016	2017	2018	2019
Unemployment rate	Total	12.40%	11.10%	8.90%	7%	6.50%
	Male	12.20%	11%	8.40%	6.60%	5.80%
	Female	12.70%	11.20%	9.30%	7.40%	7.10%
NEET rate		11.30%	11.30%	10.60%	9.30%	8%

Source: Authors' elaboration based on ILOSTAT (2020).

The unemployment rate progressively decreased each year. The share of unemployed women was constantly higher than that of men. The two highest unemployment rates were recorded in 2012 (15,5 per cent) and 2013 (16.2 per cent), clearly connected with the economic and financial crisis (PORDATA, 2020). In parallel, there was also a constant decrease in the NEET Rate, which dropped from 11.3 per cent in 2015 to 8 per cent in 2019 (a 41 per cent reduction over 5 years). This fact is particularly relevant as the NEET group is neither improving their future employability through investment in skills nor gaining experience through employment. This group is particularly at risk of both labour market and social exclusion (ILOSTAT, 2020).

B. Trade union density and collective bargaining coverage rate

Data for both indicators is available only up to 2016. Before focusing on the analysis of trade union density and collective bargaining coverage rate, this subsection focuses on the evolution of registered workers' and employers' associations between 2006 and 2015.

As shown Table 4.22, the number of trade unions fell from 346 in 2006 to 300 in 2015, a 15.3 per cent decrease. The number of employers' organisations decreased by 139 units (or almost 39 per cent) between 2006 and 2015. Moreover, the most significant drop in the number of trade unions can be observed in between 2010 and 2011, while the sharpest drop

27. The unemployment rate conveys the number of persons who are unemployed as a percentage of the labour force (i.e., employed plus unemployed). The unemployed include all persons of working age who were: a) without work during the reference period—i.e., were not in paid employment or self-employment; b) currently available for work—i.e., were available for paid employment or self-employment during the reference period; and c) seeking work—i.e., had taken specific steps in a specified recent period to seek paid employment or self-employment.

28. The NEET rate conveys the number of young people not in education, employment or training as a percentage of the total youth population. It provides a measure of youth who are outside the educational system, not in training and not in employment, and thus serves as a broader measure of potential youth labour market entrants than youth unemployment, since it also includes young persons outside the labour force not in education or training. This indicator is also a better measure of the current universe of potential youth labour market entrants compared to the youth inactivity rate, as the latter includes those youth who are not in the labour force and are in education, and thus cannot be considered currently available for work (ILOSTAT, 2020).

in employers' organisations was recorded between 2010 and 2013. Both trends can be largely explained by the amendment of Art. 456 in the CT, through Law No. 7/2009, which provides for the judicial extinction of trade unions or employers' organisations that did not request the publication of the board members within six years from the previous publication in the Labour and Employment Bulletin.

TABLE 4.22 Portugal's registered workers' and employers' trade unions, 2006–2015

Trade unions										
Type of organisation	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Trade unions	346	344	348	351	350	318	304	300	299	300
Federations	28	27	29	29	31	26	25	25	26	27
Unions	39	39	39	41	56	50	47	45	46	43
Confederations	8	8	8	8	8	7	7	7	7	6
Total	421	418	424	429	445	401	383	377	378	377
Employers' organisations										
Type of organisation	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Employers' organisations	497	502	503	502	496	457	408	377	361	358
Federations	21	22	22	21	20	13	15	13	13	13
Unions	9	9	8	8	8	8	5	4	4	4
Confederations	7	7	7	7	8	8	9	9	9	9
Total	534	540	540	539	532	487	437	403	387	384

Source: Authors' elaboration based on Gabinete de Estratégia e Planeamento do Ministério do Trabalho, Solidariedade e Segurança Social (GEP) (2016).

The trade union density rate[29] casts some light on the extent to which freedom of association is exercised within a given country. Like all industrial relations indicators presented in this sub-section and the next, the trade union density rate is highly dependent on the applicable national legal framework.

Portugal's trade union density rate was substantially higher than the average of OECD countries until 1988-1989. If the first year of reference is considered, the Portuguese rate stood around 60.8 per cent, whereas the OECD average was 34 per cent, a difference of almost 27 percentage points. This gap decreased over time, particularly in the 1980s. From 2000 to 2009 Portugal's rate was relatively stable, ranging from 21.4 per cent to 20.4 per cent, while further decline can be observed from 2010 onwards. It bears noting that 2014 was the last year when Portugal's trade union density rate was higher than the OECD average: from that point

29. The trade union density rate conveys the number of union members who are employees as a percentage of the total number of employees in a given year.

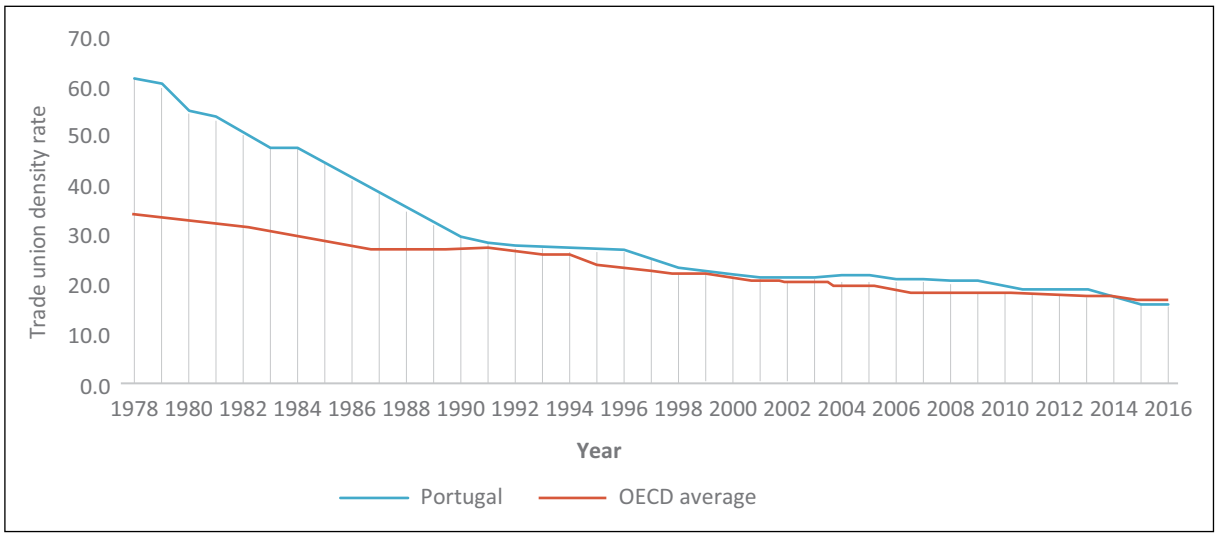
onwards, the OECD average surpassed the Portuguese one, and the difference progressively increased: from slightly over half a percentage point in 2015 to percentage point in 2016.

TABLE 4.23 Portugal's trade union density rate, 2006–2016 (as a percentage)

2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
21.1%	21 %	20.7%	20.4%	19.6%	18.7%	18.9%	18.7%	17.2%	16.1%	15.3%

Source: Authors' elaboration based on OECD STAT (2020).

FIGURE 4.1 Portugal's trade union density rate and the average for OECD countries, 1978–2016 (as a percentage)



Source: Authors' elaboration based on OECD STAT (2020).

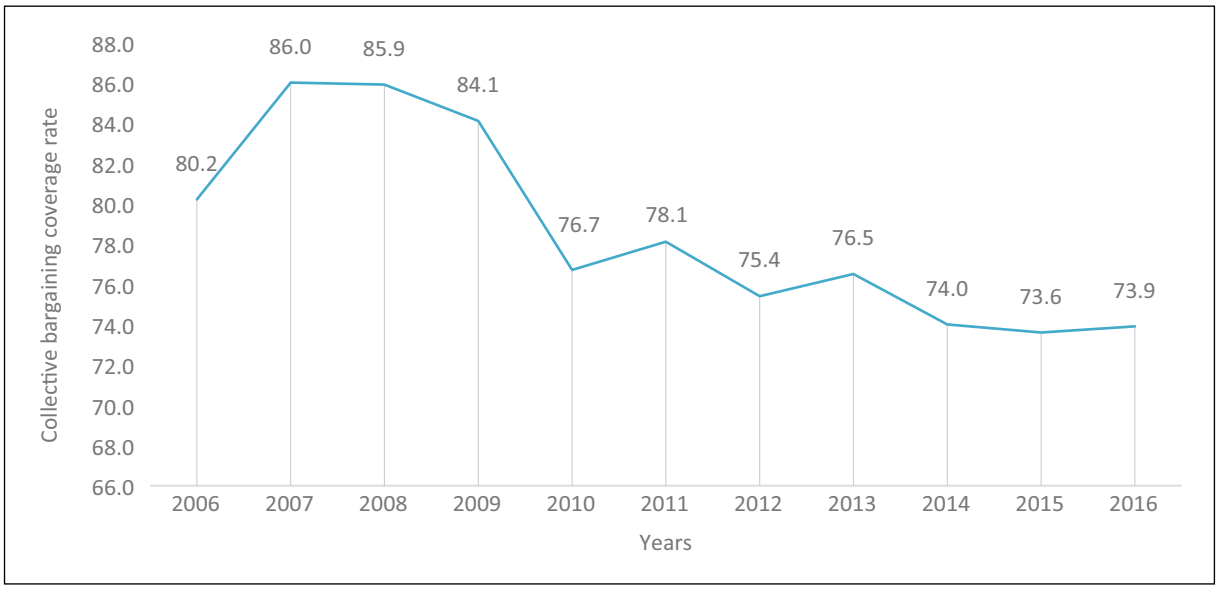
Overall, Portugal's trade union density rate dropped from 60.8 per cent in 1978 to 15.3 per cent in 2016; likewise, the OECD average decreased from 34 per cent in 1978 to 16.3 per cent in 2016. This indicates that the decline in trade union density rate is not a new trend or a strictly Portuguese characteristic. The literature identifies several factors to explain the change in union density, including globalisation, demographic changes in the workforce, de-industrialisation and the shrinking size of the manufacturing sector, the fall of public sector jobs, and the dissemination of flexible contracts (OECD, 2019).

The collective bargaining coverage rate[30] provides an indication of the extent to which collective bargaining rights are exercised within a country. It is necessary to consider that

30. Workers covered by collective bargaining are all those whose pay and/or employment conditions are determined by one or more collective agreement(s). Collective bargaining agreements refer to all agreements in writing regarding working conditions and terms of employment established between an employer, a group of employers, or one or more employers' organisations, on the one hand, and one or more representative workers' organisations on the other. Collective bargaining coverage includes, to the extent possible, workers covered by collective agreements by virtue of their extension, as well as workers covered by collective agreements concluded in previous years but still in force (ILOSTAT, 2020).

countries with low trade union density rates might conversely have high collective bargaining coverage rates and vice versa.

FIGURE 4.2 Portugal's collective bargaining coverage rate, 2006–2016 (as a percentage)



Source: Authors' elaboration based on OECD STAT (2020).

Figure 4.2 indicates a less linear trend for Portugal's collective bargaining coverage rate than what was observed for its trade union density rate. In particular, the rate grew by almost six percentage points from 2006 to 2007. In 2007 the highest rate was recorded for the considered period. The rate remained relatively stable in 2008 and 2009 and then decreased considerably in 2010. In the following years, the collective bargaining coverage rate ranged between 78 per cent and 73.6 per cent. Unlike what was observed for trade union density rate, Portugal's collective bargaining coverage rate is considerably higher than the OECD average: for example, in 2016 the rate was around 74 per cent in Portugal, while the OECD average was slightly above 32 per cent.

Against this background, several amendments to the legislation should be highlighted for their impact on collective agreements and ultimately on the indicator (Naumann, 2018). First, in 2003 the new CT abolished the principle of *favor laboratoris* and the practical interminability of collective agreements, whereby an agreement could not be cancelled without substituting it for another. Furthermore, both the 2003 and 2009 reforms introduced the legal option of withdrawing from an existing collective agreement.

In addition, the Memorandum of Understanding signed in 2011 between Portugal and the Troika in the aftermath of the financial and economic crisis had a substantial effect on the extension regime for collective agreements. Prior to that moment, the extension mechanism could be defined as quasi-automatic. Up to 2010, the Ministry of Labour extended any

collective agreement by an Extension Ordinance (*Portaria de Extensão*) if so requested by the signatory parties, with the effect of extending the agreement to: all workers of the companies in the sector that were not affiliated with the signatory employee's association; and workers of the companies affiliated with the signatory employers' associations but who were not members of the signatory trade unions.[31] Before the extension, collective agreements bound only the signatory organisations and members.

In 2011, the government decided to suspend the issuance of Extension Ordinances. Further, in 2012 a 50 per cent representation threshold was introduced for employers' associations that requested the extension of collective agreements, as explicitly demanded in the Memorandum of Understanding. The impacts of the financial crisis and the change in the extension mechanism resulted in a rapid decrease in the number of updated collective agreements. The share of workers covered by updated agreements in the private sector fell from 52 per cent in 2010 to 13 per cent in 2012, and reached its absolute lowest point in 2013-14, with a coverage rate of 8 per cent to 10 per cent. The accumulated coverage rate of all existing agreements remained almost unchanged, but the deadlock in collective bargaining suspended the increase of collectively agreed wages in many sectors and further reduced the already limited capacity of collective bargaining to regulate wages (Naumann, 2018, p. 106). In 2014 an alternative option was introduced: if 30 per cent of an employers' association's members are small or medium-sized enterprises (SMEs), an extension may be granted even if the signatory employers' association(s) represent less than 50 per cent of the sector's employees. Finally, the new government elected in 2015 withdrew all prerequisites of employers' association representatives (Resolution No. 82/2017).

C. Industrial action

Two premises should be made clear before analysing industrial action in Portugal. First, it should be recalled that lockouts are prohibited by Art. 57 of the CP: therefore, this sub-section will exclusively focus on strikes. Moreover, the data on strikes, working days lost and workers involved refer exclusively to the private sector. Nevertheless, it was possible to retrieve 'strike warnings' communicated to the General Directorate for Public Administration and Employment (DGAEP), which do not necessarily correspond to the number of strikes.

In 2014, 67 strike warnings were communicated to the DGAEP: only one was regarding a general strike, while the remaining 75 were sectoral (DGAEP 2020). In addition, there were also 90 private sector strikes (71 at the company level while 19 involved more than one company), with the participation of 18,078 workers and a loss of 26,344 working days (Gabinete de

31. The second form of extension is less relevant because, irrespective of these Extension Ordinances, it seems to have been the common practice of affiliated companies to apply the agreements signed by their associations to all their staff, irrespective of union membership, even if there was no Extension Ordinance (Naumann, 2018).

Estratégia e Planeamento, 2015). Overall, there was a decrease in each of the three indicators compared to 2012 and 2013 due to the lack of large, multi-company strikes. The most affected sector was transport and storage (accounting for half of the overall number of strikes—45), in which 80 per cent of strikes took place in the 'land transport and transport by (oil and/or gas) pipeline' (21 cases), involving around 30 per cent of the overall number of workers who adhered to strikes and which led to 32 per cent of overall working days lost in 2014, and 'transport and storage' sub-categories (15 strikes). The second most affected sector were 'manufacturing industries', in which 28,9 per cent of the strikes took place. The highest number of strikes was recorded in companies with over 1,000 employees and those with between 200 and 499 employees (50 companies with strikes for each category), followed by companies with 100-299 people (40 companies with strikes).

TABLE 4.24 Portugal's strikes, working days lost and workers involved, 2014–2018

	2014	2015	2016	2017	2018
Strikes	90	75	76	106	144
Working days lost	26,000	20,000	12,000	29,000	51,000
Workers involved	18,000	12,000	7,000	20,000	36,000

Source: Authors' elaboration based on PORDATA (2019).

The main reported reasons for strikes were 'other claims'[32] (32,5 per cent), 'wage demands' (28,4 per cent), 'working conditions' (19,3 per cent) and 'employment & formation' (11,9 per cent).

In 2015, there was an increase in public administration strike warnings, which reached 87 communications to DGAEP—all of these being sectoral (DGAEP 2020). Conversely, the number of strikes in the private sector decreased by 15 cases, totalling 75 (64 related to one company and 11 involving more than one company) (GEP 2016). 11,812 workers were involved, and 19,653 working days were lost. Compared to the previous year, the indicators decreased by 6,266 workers and 6,691 working days. In 2015, 77,3 per cent of the strikes were concentrated in the 'transport and storage' category (35 cases), followed by 'manufacturing industries' (23 strikes): overall, these two categories accounted for more than half of the workers involved (52,8 per cent of the total) and 68,4 per cent of the loss in working days. The sub-category 'land transport and transport by (oil and/or gas) pipeline' involved 44,4 per cent of the overall number of workers participating in strikes in 2015 and 54,8 per cent of the working days lost. More than half of the strikes occurred within companies with more than 500 employees (19 cases for companies with 500-999 employees and 35 for those with over 1,000 employees) for both single and multi-company strikes. The predominant underlying causes remained the same as in the previous year, with an increase in 'other claims', which accounted for 49,4 per cent of the claims in 2015 (71,7 per cent of those in multi-company strikes), whereas the

32. Including claims of a more political nature, stoppages for plenary sessions or presence in demonstrations.

remaining claims relatively declined—'wage demands' (17,9 per cent), 'working conditions' (15 per cent) and 'employment & formation' (6,3 per cent).

In the following year, 79 sectoral strike warnings were registered by DGAEP in public administration, a relative decline compared to 2015 (8 less cases) (ibid.). The number of strikes remained stable, with only one additional case in (i.e., 76 cases), sub-divided into 63 strikes concerning a single company and 13 affecting more than one company. The number of workers involved decreased by 44 per cent, totalling 6,537. The number of working days lost also further decreased by around 40 per cent (11,757 days in 2016). 29 strikes occurred in 'transport and storage', which was again the most affected sector, with the most workers involved (2,610) and working days lost (6,820). The number of strikes were almost equally shared between the following sub-categories: 'land transport and transport by (oil and/or gas) pipeline', with 10 cases (477 workers involved and 1,825 working days lost), 'storage and auxiliar activities—including handling', with 10 cases (820 workers involved and 3,493 working days lost), and 'postal/courier activities', with 10 cases (1,313 workers involved and 1,502 working days lost). The second most affected sector was once again 'manufacturing industries', with 21 strikes in 2016, 1,046 workers involved, and 1,289 working days lost. Companies with over 1,000 employees were by far the most affected by strikes in 2016 for both single and multi-company cases (12 and 18, respectively). The least affected were those employing less than 100 people (9 cases for companies under 50 employees and 10 for those with between 50 and 99 employees). The distribution of strikes by cause differed from the previous year: most strikes in 2016 were due to 'wage demands' (50,4 per cent), 'other claims' (27 per cent), 'working conditions' (12 per cent) and 'collective regulation process' (7,2 per cent).

A 47 per cent increase in public administration strike warnings communicated to DGAEP was registered in 2017, with a total of 151 cases—albeit with no general strikes. The number of private sector strikes increased by 30 (106 cases, 79 concerning a single company and 27 more than one company). Further, the number of workers involved increased consistently, from 6,537 in 2016 to 19,505 in 2017 (an increase of 66 per cent), together with the number of working days lost (a near 60 per cent increase), amounting to 29,274 days. 'Manufacturing industries' were the most affected with 28 strikes, followed by 'transport and storage' (25) and 'administrative activity and support services' (24). 'Transport and storage' had the highest number of working days lost (6,954) despite having less strikes and workers involved compared to 'manufacturing industries'. Likewise, 16 strikes were registered for the 'commerce retail' (except for motor vehicles and motorcycles) sub-category, however, these involved the highest number of workers (4,378) and the second highest number of working days lost (4,831). The companies with the most amount of strikes were those with over 1000 employees (54 companies with strikes), followed by those with 200-499 employees (34 companies with strikes each). Strikes in 2017 largely stemmed from 'other claims' (49,4 per cent in total—78.5 per cent in multi-company strikes), 'employment & formation' (18,3 per cent) and 'working conditions' (13.8 per cent).

In 2018 were recorded the highest figures in each of the indicators for the reported period. The DGAEP received 260 sectoral strike warnings public administration (an increase of almost 42 per cent compared to 2017 and of 70 per cent since 2016) (DGAEP 2020). Private sector strikes increased by 26 per cent, totalling 144—92 concerning a single company and 52 involving more than one company (DGAEP 2019). The number of workers involved (36,441) grew 46 per cent compared to 2017 and 82 per cent compared to 2016. There was a loss of 50,939 working days (an increase of 40 per cent over the previous year and of 76 per cent compared to 2016). The most affected economic sectors were 'manufacturing industries', followed by 'transport and storage' and 'health activities and social support', with 36 cases each. This last sector was characterised by the highest number of workers involved (10,838) and working days lost (18,512). Additionally, 'transport and storage' had also higher figures in the two indicators (6,772 workers involved and 11,845 working days lost) than manufacturing industries (5,424 workers and 6,560 days). The number of companies with workers on strike went from 144 in 2017 to 312 in 2018, with the largest increase registered in companies with less than 100 employees (26.9 per cent in 2018, compared to 17.4 per cent in the previous year). Finally, among the reasons underlying 2018 strikes, 'wage demands' were the most predominant (28.7 per cent), followed by other claims (26.9 per cent) and 'collective regulation process' (22.6 per cent).

4.2 LABOUR DISPUTE RESOLUTION SYSTEM

4.2.1 Organisational structure of the labour dispute resolution system

The CP includes, in Art. 211, the possibility to create courts of first instance with specialised jurisdiction or specialised in trials concerning certain matters. At statutory level, in accordance with the Law for the Organisation of the Judicial System (*Lei da Organização do Sistema Judiciário*—LOSJ) labour disputes are resolved within the context of ordinary civil courts, provided that district courts (*tribunais de comarca*) can be unfolded in judgments (*juízos*), which can have a specialised labour competence (Art. 81, 3, let. h).

Justice organisation. Bearing in mind the relevant Constitutional provisions exposed in Section 1, a subsequent important point of the analysis is the reorganisation of the judicial system resulting from the LOSJ, as amended by Law No. 40-A/2016, Law No. 110/2018 and Decree No. 38/2019. The reform relies on three fundamental pillars (Government of Portugal, 2015): the widening of the territorial base of the judicial districts, the creation of specialised jurisdictions at the national level and the implementation of a new model for managing district courts. The management of each judicial court of first instance is guaranteed by a tripartite management structure, composed of the presiding judge of the court, the coordinating public prosecutor and the judicial administrator.

In accordance with Art. 33 of the LOSJ, courts of first instance include courts with extended territorial jurisdiction and district courts. The Portuguese territory is divided into 23 counties/districts: to each of these corresponds a district court (Art. 33, 2 and 3). Conversely, first instance courts with extended territorial jurisdiction have competence over more than one district or over areas specifically referred to in the Law (Art. 83, 1). Courts with extended territorial jurisdiction have specialised competence and hear certain subjects (Art. 83,2); which correspond to the intellectual property court, the competition, regulation and supervision court, the maritime court, the court for the enforcement of sentences and the central court of criminal investigation (Art. 83,3).

As general rule, judicial courts have a residual jurisdiction for those cases that are not assigned to other jurisdictional orders (Art. 40)–i.e., Constitutional, administrative, fiscal and arbitration. In parallel, district courts are competent to prepare and judge cases relating to cases not covered by jurisdiction from other courts (Art. 80). District courts are divided into judgments (*juízos*), to be created by decree-law, which may be of specialised jurisdiction, generic competence and proximity (Art. 31). Among the district courts of specialised jurisdiction figure labour courts (Art. 81, 3, let. h). In principle, to each district corresponds a labour court: yet in the most populated districts there might be more. Labour courts are, as courts of specialised jurisdiction, competent for civil matters of labour nature (listed in Art. 126, 1). In addition, labour courts are also responsible for judging appeals against decisions by administrative authorities in administrative offenses in the fields of labour and social security (Art. 126, 2).

Further, both the TSJ and the appellate courts may operate in specialised sections (Art. 211, 4 CP) which are divided into civil, criminal and social sections (Art. 47, 1 and 67, 3 LOSJ). The first paragraph of Art. 54 of the LOSJ determines that the social sections of the TSJ will judge the causes referred in Art. 126, which in turns regulates the jurisdiction of labour courts in civil matters. Likewise, Art. 74 of the LOSJ provides for the applicability of Art. 54 to the appellate courts.

Justice management. As reported by de Sousa Santos (2014), in Portugal the governance of the courts relies on a model of bipartite competence, shared between the Ministry of Justice and the high councils of the judiciary and public ministry. On the one hand, the Ministry of Justice has the competence to centralise financial management, assets, technologies and information on justice, planning and the strategic management of the justice policy. On the other hand, the management of careers, control and discipline of magistrates is exercised respectively by the high councils of the judiciary and public ministry.

The LOSJ reconfigured the management model of the courts, enhancing decentralised management, whose starting point is the court. The main change is the reconfiguration of the professional profile of the presiding judge of the court, as well as the strengthening of another local management figure—the judicial administrator. The new shape of the functional profile of the president of the court and the creation of the judicial administrator are at the core of the reform.

The presiding judge assumes not only the powers of representation and the direction of the court, but also responsibilities in terms of the management of judicial officials, procedural management, the execution of the objectives defined for the court, the management of organisational performance, and the planning of needs and activities.

The functional profile of the judicial administrator, in turn, focuses on the management of spaces, security, accessibility of court facilities, maintenance, conservation and rationalisation of the use of equipment. With the 2013 amendments, the judicial administrator's powers have been extended, especially regarding budget execution. In addition to these competences, the judicial administrator can also exercise those delegated by the Ministry of Justice or by the presiding judge.

Art. 92 of the LOSJ clarifies that the presiding judge is nominated by the CSM: the nomination has a validity of three years, which can be extended for another three (Art. 93). Art. 94 lists the abovementioned competences of the presiding judge. When more than five judges act in the same judgement, the presiding judge can propose to the CSM the nomination of a coordinator magistrate with a view to delegate competences.

Art. 99 provides for the institution, in each district (*comarca*), of the Coordinator MP. This nomination also lasts three years, albeit the nominee is appointed by the High Council of the MP. Art. 101 nominally lists each of the competences of the Coordinator MP.

Art. 104 regulates the figure of the judicial administrator, present in each *comarca*. The judicial administrator is appointed on a service commission for a period of three years by the presiding judge after hearing the coordinating public prosecutor, chosen from among five candidates, previously selected by the Ministry of Justice. As mentioned above, the judicial administrator, even though exercising his own powers, acts under the general guidance of the judge presiding over the court, except for matters relating exclusively to the functioning of the Public Prosecution Service, in which case he acts under the general guidance of the coordinating public prosecutor. The competences that the law affords to the judicial administrator are listed in Art. 106.

In accordance with Art. 108, the management council is composed of the presiding judge, the coordinator MP and the judicial administrator. The council will deliberate on the following topics:

a) approval of the half-yearly reports (see Art. 94 (2) (g) and Art. 101 (1) (b), relating to the status of services and quality of response, which are referred for information to the CSM, the Superior Council of the Public Ministry (CSMP) and the Ministry of Justice; approval of the draft budget for the comarca, to be submitted for final approval by the Ministry of Justice, based on previously established appropriation;

b) promotion of budgetary changes;

c) planning and evaluating the results of the comarca, taking into account, in particular, the assessments referred to in Art. 94 (4) (b) and Art. 101 (1) (o);

d) approval of a proposal to amend the personnel map, subject to the limits established for the district secretariat, which must be communicated to the Ministry of Justice before the deadline for submitting applications; and

e) approval, at the end of each judicial year, of the management report containing information regarding the degree of compliance with the established objectives, indicating the causes of the main deviations, which is communicated to the High Councils and the Ministry of Justice.

Court composition. Law No. 107/2019 eliminated the possibility of resolving labour disputes before labour tribunals with collegial composition in the CPT (see Art. 68 CPT and 127 LOSJ).

Courts and personnel distribution. The CSM is responsible, among other attributions, for nominating, placing and transferring judicial magistrates (Art. 155, let. a LOSJ). Art. 166, let. a) attributes to the CSMP the competence for the nomination, placement and transferral of PMs. In turn, Art. 84 of the LOSJ disposes that: a) the judicial framework of first instance courts and PM's framework are fixed in the Decree setting the applicable regime to the organisation and functioning of judicial tribunals (i.e. Decree No. 49/2014, as amended) (Art. 84,1); b) these frameworks set in principle a minimum and a maximum intervals of judges and PMs (Art. 84,2); and c) the CSM and the CSMP coordinate to determine the number of judges and PMs in first instance courts (Art. 84,3).

Decree No. 49/2014 (as amended) serves as implementing regulation of the LOSJ. Annex III and IV of the Decree determine the composition (*quadro de juízes*) of first instance judicial courts (Art. 7, 2), while Annex V determines the composition (*quadro de magistrados do Ministério Público*) of TSJ, second and first instance courts (Art. 8,1). Additionally, Annex I establishes the composition (*quadro de juízes*) of the TSJ (Art. 5,1) and Annex II likewise for second instance courts (Art. 6,1).

Territorial distribution. The number of first instance labour courts can be derived from Decree No. 49/2014 (as amended), regulating the LOSJ and setting the regime applicable to the organisation and functioning of the judicial courts. In accordance with Chapter 6 of the Act (Art. 66 to 102), organising the district courts, there are currently 45 labour courts in the whole Portuguese territory, plus the *Juízo Misto de Família e Menores e do Trabalho da Praia da Vitória*. Further, there are 5 courts of second instance (*Tribunais da Relação*) in the cities of Coimbra, Évora, Guimarães, Lisboa, and Porto.

Lay magistrates. The CP explicitly allows the possibility to regulate by law the participation of lay magistrates in judgements concerning labour-related matters (Art. 207, 2). Crucially, however, this possibility was recently abolished by Law No. 107/2019, which revoked Art. 127 of the LOSJ—i.e., the statutory provision which identified the instances in which lay magistrates had to participate in labour-related proceedings.

Alternative Dispute Resolution. The Portuguese legal system also allows for alternative dispute resolution (ADR). ADR channels include arbitration centres and public mediation systems, which are in principle quicker and more economically and bureaucratically accessible alternatives for conflict resolution. Arbitration centres provide information, mediation and conciliation to those involved in the conflict, when there is no agreement. Mediation is regulated by Law 29/2013, Art. 526 of the CT and by Art. 27-A of the CPT.

To reduce litigation in the labour courts, the Labour Mediation System (*Sistema de Mediação Laboral*—SML) was implemented in 2006. The SML contains its own manual of procedures and good practices, and guidance on emerging dismissal agreements. It is an independent institute operated by accredited mediators, drawn from a list organised by the Directorate-General for Justice Policy (DGPJ), after attending training courses. In addition, mediators are governed by the European Code of Conduct for Mediators. It should be noted that mediation is a voluntary process and that there are conflicts that cannot be mediated, such as conflicts that imply inalienable[33] workers' rights, such as the right to strike.

The CT has a specific chapter regulating arbitration (Art. 505 et seq.), which governs the admissibility of voluntary, mandatory and necessary arbitration and the respective processes. In voluntary arbitration,[34] the parties may agree to submit to labour arbitration issues resulting from the interpretation, integration, conclusion, or revision of collective agreements.[35]

Mandatory arbitration is applied in 3 cases: 1) in the case of the first convention, at the request of either party, provided that there have been prolonged and fruitless negotiations, conciliation or frustrated mediation and it has not been possible to resolve the conflict through voluntary arbitration, due to bad faith of the other party, after hearing the Permanent Social Consultation Commission (CPCS); 2) if there is a recommendation to that effect by the CPCS;

33. Labour mediation can last up to 3 months (average of 28 days), have more than one meeting and can be interrupted at any time by either party. The parties involved may request to renew the mediation term.

34. See the Voluntary Arbitration Law. In particular, Art. 4, paragraph 4: "The submission to arbitration of disputes arising from or related to employment contracts is regulated by special law, being applicable, until its entry into force, the new regime approved by this law, and, with the necessary adaptations, paragraph 1 of Article 1 of Law No. 31/86, of 29 August, as amended by Decree-Law No. 38/2003, of 8 March.". Art. 1, No. 1, of Law No. 31/86 states: "Provided that by special law it is not subject exclusively to a judicial court or the necessary arbitration, any dispute that does not respect unavailable rights may be committed by the parties, through an arbitration agreement, to the decision of arbitrators". Law No. 63/2011 and Law No. 31/86.

35. Note that Articles 387 and 387, paragraph 1 of the CT determine that issues of regularity and lawfulness of dismissal can only be assessed by a judicial court.

and 3) at the initiative of the Labour Minister, after hearing the CPCS, when essential services aimed at protecting people's lives, health and safety are at stake.

Necessary arbitration can be invoked in cases of lapse in one or more collective agreements applicable to a company, group of companies or activity sector, a new agreement is not concluded within the next 12 months, and there is no other agreement applicable to at least half the workers in the same company, group of companies or industry. Finally, Art. 529 of the CT provides that collective labour conflicts that do not result from the conclusion or revision of collective agreements may be resolved by voluntary arbitration, under the terms of Arts. 506 and 507.

The collective labour conflict resulting from the conclusion or revision of a collective agreement can also be resolved through mediation (Art. 526 of the CT). Mediation can take place: a) by agreement between the parties, at any time over the course of conciliation; b) at the initiative of one of the parties, one month after the start of conciliation, by means of written communication to the other party.

Regarding conciliation, Art. 492, No. 3 of the CT provides for the establishment of joint commissions for the resolution of collective legal conflicts under the charge of collective labour agreements. The conventions must provide for the establishment and regulate the functioning of these commissions, with the competence to interpret and integrate their clauses. Art. 523 of the CT provides for the possibility of resolving collective labour disputes– namely resulting from the conclusion or revision of collective agreements–by conciliation. It also provides that conciliation may take place at any time by agreement of the parties or through the initiative of one of the parties, in the event of failure to respond to the proposal for the conclusion or revision of a collective agreement, or upon eight days' notice, in writing, to the other party.

The conciliation is carried out by the competent service of the ministry responsible for labour (DGERT), advised, when necessary, by the competent service of the ministry responsible for the sector of activity (Art. 524 of the CT). In case of revision of the collective agreement, the union or employers' association participating in the negotiation and not involved in the application must be invited to participate in the conciliation process. In turn, conciliation can be transformed into and resolved through mediation (arts. 525 of the CT). In the absence of agreement, the process may continue in court. Finally, we should make note of the voluntary nature of this option for conflict resolution.

Jurisdiction (last stage of judgement). In specific instances, labour courts can function as appellate courts: in accordance with the second paragraph of Art. 126 of the LOSJ, labour courts are also responsible for judging appeals against decisions by administrative authorities in cases of administrative offenses in the fields of employment and social security. Generally, rulings issued by first instance courts can be appealed before the *Tribunais da Relação* and

subsequently before the TSJ. It is important to recall that both the TSJ and the appellate courts may operate in specialised sections (Art. 211, 4 CP) which are divided into civil, criminal and social sections (Art. 47, 1 and 67, 3 LOSJ).

Administrative authorities. From an administrative perspective, the regulatory authority of the Authority for Working Conditions (ACT) stands out: it aims to promote the improvement of working conditions in Portuguese territory. It exercises the control of normative labour compliance in private labour relations, and also promotes safety and health at work in the public and private sectors. Also worth mentioning is the General Labour Inspectorate, an administrative service for monitoring and controlling compliance with rules regarding working conditions, employment, unemployment, and the payment of social security contributions. Its actions are developed within the scope of public authority powers, guided by the principles of ILO Conventions No. 81, 129 and 155. The General Labour Inspectorate is subject to the supervision of the Minister of Labour and Solidarity.

Finally, the Insurance Suspension and Pension Fund Authority (ASF) ensures the smooth functioning of the insurance and pension funds market in Portugal, with regulatory, authorisation, registration or certification, on-site and off-site supervision, enforcement, and revocation powers. Art. 137 of the CPT refers to this regulatory body in pension related proceedings.

4.2.2 Labour dispute resolution system procedures

Evolution of labour justice. As reported by Martins (2019, p. 22-28), in 1889 the *tribunais de árbitros-avindores* were established in places with a high concentration of industries. These courts were composed of a president, two vice-presidents and an equal number of *vogais*–half elected by employers and half by employees' organisations. In 1928, the functioning of this type of court and their process structure were modified: first, evidence had to be alleged contextually with the demand; in addition, a conciliation attempt was foreseen in the aftermath of the contestation of the demand, attended by the parties, the president of the court and the tribunal registrar.

The National Labour Statute was established in 1933, which entailed the creation of special labour tribunals with a predominantly conciliatory function. In the following year, Decree No. 24369/1934, in addition to setting the labour jurisdiction, also provided for the creation in each administrative district of a labour court, composed of a judge, a MP, a secretary, and a court bailiff (*oficial de diligências*). The court had jurisdiction over causes arising from individual labour contracts, instruction and judgment of issues arising from accidents at work, causes arising from collective contracts and labour agreements and controversies in matters of social security, and processes for the dissolution and liquidation of social security institutions. Contextually, the *tribunais de árbitros-avindores* and the *tribunais de desastres do trabalho* (created in 1919 to address work-related injuries and diseases) were abolished.

In 1940 was enacted the first Code of Labour Procedure (*Código de Processo do Trabalho*—CPT): the first part regulated civil and commercial processes, while the second was dedicated to the criminal process. In addition, civil and criminal procedure codes could be subsidiarily applied. In 1964 a new code was enacted, resulting from the need to adapt its dispositions to the 1961 Code of Civil Procedure. The jurisdiction was extended to all workers and their families, the accumulation of demands was allowed and ordinary and summary forms for the declarative process were introduced. Further, for disputes arising from an accident at work or an occupational disease, two phases were established: a conciliatory phase, taking place before the MP and litigation before the judge, with attachments to be processed simultaneously or separately, in addition to the possibility of establishing a provisional pension. The code was repealed in 1981 with a new one, which was subsequently modified in 1989 and 1991, once again to adapt to new the civil procedure regulations.

The current CPT was introduced by Decree No. 480/99, which had no significant modifications until 2009, when, as previously mentioned, the CT was amended and therefore there was a need to adapt the CPT to these new provisions. In 2013, Law No. 63/13 introduced a new form of lawsuit—the action for the acknowledgment of the existence of the employment contract—whose regime was modified again four years later, by Law No. 55/17.

Further changes to the CPT were introduced by Law No. 107/2019, whose main objectives were to adapt the CPT to the alterations of the Code of Civil Procedure, as well as change the judicial provisions to the LOSJ reform. In addition, the law attempted to harmonise the CPT with substantive labour law. The main include(CEJ, 2019): (i) precautionary and executive labour procedures; (ii) extinction of collective courts, limit on the number of witnesses, time limits for the delivery of sentences and the lodging of appeals and review appeals; (iii) executive titles (inclusion of agreements entered into in extrajudicial conciliation chaired by the Public Ministry); (iv) legal challenge to the regularity and lawfulness of the dismissal; (v) special process for challenging collective dismissal; social security institutions' litigation concerning family benefits, trade unions, employers' associations or workers' commissions (revocation of the special regime); (v) protection of the worker's personality; and (vi) judicial impugnation of an administrative authority decision imposing fines and accessory sanctions in labour proceedings.

Relevant features of labour dispute resolution. The second paragraph of Art. 18 of the CP states that the law may only restrict rights, freedoms and guarantees in cases expressly provided for in the CP, and such restrictions must be limited to those needed to safeguard other constitutionally-protected rights and interests. In addition, the third paragraph provides that laws restrictive of rights, freedoms and guarantees must have a general and abstract nature and may not have a retroactive effect or reduce the extent or scope of the essential content of the constitutional precepts.

The applicability of this article serves as a corollary for workers' protection in the face of labour laws that may restrict constitutional rights, freedoms and guarantees. The failure to comply

with the legal or conventional guarantees of the worker represents a just cause for resolution of the employment contract (Art. 394, b, of the CT).

Procedural labour law is characterised by a specific set of principles and features which distinguish it from procedural civil (and criminal) law. The CPT explicitly provides for the subsidiary application of procedural civil and criminal legislation for the instances not covered by the CPT, as far as these norms are compatible with the procedure regulated in the code (Art. 1 CPT).

As reported by Martins (2019, 68), the labour procedure is governed by the following principles:

- Principle of the right to access the law and effective judicial protection (Art. 20 CP).
- Principle of the prohibition of self-defence (Art. 1 CPC).
- Principle of the right to fair process (Art. 14-1 International Covenant on Civil and Political Rights, among other sources), which includes: the right to a fair trial with guarantees concerning the impartiality and independence of the tribunal; equality of the parties; trial publicity; principle of the natural judge; and delivery of the ruling within a reasonable time frame.
- Adversarial principle (Art. 3 CPC) which entails the right to prior hearing, right to reply, and the right to contradictory hearing.
- Principle of formal adequacy (Art. 547, 591, 597 and 630 CPC), which implies: the realisation of acts not provided for in the procedural protocol; and dispensation from acts which are not suitable to the purpose of the process (substitutive protocols correspondingly allowed).
- Principle of legality of procedural protocols (Art. 131 CPC).
- Principle of the reasonable duration of the process (Art. 156 CPC).
- Principle of the right to evidence (Art. 410 CPC): the burden of proof and the rules concerning the use of evidence in the process, as well as prohibited evidence, are particularly relevant.
- Dispositive principle (Art. 3, 259 and 609 CPC): parties' autonomy in defining the purpose of the process they start; parties' dominion of the facts to be alleged and evidence to be used.
- Principle of parties' equality and self-responsibility (Art. 4 and 5 CPC).

- Inquisitorial principle.
- Cooperation principle (Art. 7 CPC), including: the duty of procedural bona fides, (Art. 8 CPC), reciprocal correction (Art. 9) and cooperation to reach the truth (Art. 417).
- Preclusion principle (Art. 5, 1 CPC).
- Judge's own motion in matters of law (Art. 5,3 CPC).
- Principle of the prevalence of the merit of the decision.
- Principle of acts limitation (when useless, Art. 130 CPC).
- Principle of the stability of the judicial instance (Art. 260 CPC).
- Principle of the submission to the limits of substantive law.
- Principle of procedural acquisition.
- Principle of the immediacy of evidence.
- Principle of orality.
- Principle of the free evaluation of the evidence.
- Principle of trial and court hearing publicity.

The judge cannot favour or hinder either of the parties, thereby ensuring the procedural equality of the subjects. On the other hand, processual labour law is characterised by the prevalence of the principle of material truth over the dispositive principle, which translates into: i) the expansion of the matter of fact by the judge (Article 72, paragraph 1 of the CPT);[36] ii) ex officio production of evidence;[37] iii) condemnation *extra vel ultra petitum* (Article 74 of the CPT);

36. In this respect, note the wording of the legislation: "1. Without prejudice to the provision of paragraph 2 of Article 5 of the Code of Civil Procedure, if in the course of the production of evidence essential facts arise which, although not articulated, the court deems relevant to the good decision of the case, the judge should, to the extent necessary for the determination of the material truth, expand the evidence issues set out in the order mentioned in Article 596 of the Code of Civil Procedure or, if not, take them into account in the decision, provided that discussion has been focused on them. 2. If the themes of the event are expanded under the terms of the previous item, the parties may indicate the respective events [. . .]"

37. Note the wording of Art. 35 of the CPT (Means of Evidence): "2 — The court may, unofficially or at the reasoned request of the parties, determine the production of any evidence that it considers indispensable to the decision. "[Underlined]. As an example, see Art. 71, paragraph 4 of the CPT (Consequences of the non-appearance of the parties at trial): "4 — If one or both parties are only represented by a judicial representative, the judge will order the production of the evidence that has been requested and if it proves possible and the others that you consider indispensable, judging the cause according to the law."

iv) possible participation in the process of a wide set of subjects (Arts. 3–5, 27, paragraph 2, let. a, 108 and 127 of the CPT); v) determination of the practice of acts necessary to supply the lack of procedural requirements susceptible of being corrected, inviting the parties to complement and correct pleadings (Art. 27, No. 1 and No. 2, let. a and b of the CPT); and vi) representation of workers and their families by the MP (Arts. 7–9 of the CPT).

According to Mesquita (2006, p. 209) the specific principles governing the labour procedure can be summed up as follows:

- Hyper-valuation of conciliation
- Procedural celerity
- Procedural simplicity
- Immediacy between the judge and the parties
- Ex officio procedural impulse (and correction of procedural irregularities/vices)
- Substantive (not merely legal) equality of the parties
- Prevalence of inquisition over disposition
- Condemnation *ultra vel extra petitum*
- Legal assistance by the MP

Portugal's procedural labour law favours the peaceful composition of the labour dispute through the institute of the conciliation. Yet, it is worth noting that, echoing Martins (2019, 75), in cases of dismissal impugnation, in practice the probability of reaching a conciliation which maintains the employment relationship is very low. In most cases, a conciliation is reached which exclusively concerns monetary compensation.

In conclusion, labour procedural law:

- Derives from substantive labour law and its application is confined to the subordinate (individual and collective) employment relationship.
- Includes processes which are promoted by the State through the MP: this is the case for processes originating from accidents at work and occupational diseases (see below), the process for the declaration of invalidity of a collective agreement

disposition in violation of gender equality (Art. 186-G), and the action for the recognition of the existence of the employment contract (Art. 186-K).

- Explicitly seeks the material truth by allowing for condemnation *extra vel ultra petitum*.
- Favours conciliation to maintain the employment relationship.
- Includes processes which are in principle free of costs, like those originating from accidents at work and occupational diseases.

Finally, as further analysed below, labour procedure is also free of costs for workers (or their families), falling within the scope of Art. 4, let. h) Decree Law No. 34/2008 (as amended).

Types of labour court proceedings. The CPT encompasses the procedures necessary to safeguard the effectivity of a given judicial action: this is the case of the precautionary process aiming at obtaining a conservative or anticipatory precautionary measure for a right, in correspondence of a pending final decision. (Article 2, paragraph 2, of the CPC).[38] The CPT provides for a common precautionary procedure (Art. 32) and several specific precautionary procedures—i.e., the suspension of individual and collective dismissals (Art. 33 to 40-A and 41 to 43, respectively) and the precautionary procedure for the protection of health and safety at work (Art. 44 to 46). The regime set forth in CPC's Art. 365 and subsequent articles (Art. 32 of the CPT) is applicable to both types of precautionary procedures (common or specific).

Further, pursuant to Art. 48 of the CPT, there are two types of labour procedures: declarative and executive. The former type is further divided into common and special procedures: the first is applied to instances for which there is no corresponding special procedure, whereas the second is implemented in cases expressly provided for in the law (Art. 48,2 CPT). As reported by dos Reis (1982, p. 2), the creation of special procedures is related to the idea of adapting the form to the object of the judicial action, establishing a harmonic correspondence between procedures and the right to be recognised or enforced.

Pursuant to Art. 49, the common declarative procedure is regulated by Art. 54 and following articles (Title IV of the CPT): the Code of Civil Procedure can be applied subsidiarily (Articles 49 and 51 of the CPT). The ordinary and summary procedures were extinguished (Martins, 2019). Nevertheless, some typical characteristics of the summary procedure can be identified in the common declarative procedure, such as: i) judgment of the actions not contested due to adherence to the grounds of the initial petition; ii) final hearing held only when justified by the complexity of the case; iii) oral discussion of the legal aspect of the case,

38. Subsidiary application of the CPC in precautionary procedures (Articles 32, 33 and 47 of the CPT).

with limitations of one hour for the intervention of lawyers; iv) natural judge; v) recording of the hearing; vi) immediate decision of the matter of fact.[39]

In turn, the special declarative procedures are regulated by Title VI of the CPT (Art. 98-B et seq.). The cases provided for by law for this species include: 1) judicial challenge of the regularity and lawfulness of the dismissal; 2) those arising from work accidents and occupational diseases; 3) impugnation of collective dismissal; 4) some processes related to the litigation of social security institutions, family benefits, union associations, and employers' associations;[40] 5) challenge of the confidentiality of information or the refusal to provide it or consultations; 6) protection of the worker's personality; 7) equality and non-discrimination based on sex; and, 8) recognition of the existence of an employment contract.

Both common and special declarative labour procedures, pursuant to Art. 10 of the CPC depending on their purpose, include: actions which aim to exclusively recognise the existence of a given right or fact; actions to demand the provision of a thing/fact, presupposing or preventing the violation of a right; and actions authorising a modification in the existing legal order.

Finally, the executive (or execution) procedure is governed by CPT's Title V (Art. 88 and subsequent articles) and based on a right declared in a specific case, embodied in an executive title (Art. 88). Executive titles include: a) all titles to which the CPC or special law attributes executive power; b) the conciliation records; and c) the agreements entered into in extrajudicial conciliation chaired by the MP. It is possible for the court to initiate the execution of inalienable rights—in case of inertia of the author within the legal deadline (Article 90, paragraph 2 of the CPT).

We will now outline the common declarative labour procedure (Martins 2019, 156). First, it should be noted that Art. 132 of the CPC also applies to this procedure, which provides for digitalisation—as a result of the amendment introduced by Decree-Law No. 92/2018.

The conciliation attempt represents a fundamental feature of this procedure, distinguishing it from the civil one. In particular, the attempt is mandatory during the hearing of the parties (before the presentation of the defence) (Art. 55) and at the beginning of the final hearing (Art. 70).[41] Further, conciliation can eventually occur whenever the parties jointly request it or the judge deems it suitable. In this vein, there can be a conciliation attempt during the preliminary

39. See point 4 of the introductory note to the CPT: "it can even be said that the unique form now defined constitutes a symbiosis of the old ordinary and summary forms, simultaneously adapted to the current reality of the working world, incomparably more dynamic, unstable and flexible than that existing at the time of the Code from 1963 [. . .]".

40. Nominally: (i) call for general meetings; (ii) challenge to the statutes. resolutions of general assemblies or electoral acts; (iii) judicial challenge of disciplinary decision; (iv) liquidation of the sharing of assets of social security institutions, trade unions, employers 'associations or an employers' commission; (v) annulment and interpretation of clauses in collective labour agreements.

41. The conciliation is also mandatory at the beginning of the final hearing of the precautionary procedure for dismissal suspension (Art. 36); and in several special procedures (Art. 98-I, 108 and 160).

hearing (Art. 62). The conciliation attempt, presided by the judge, is mainly regulated by Art. 51 to 53. It is especially important to note that the conciliation attempt results in the redaction of an act: if there is a conciliation, therein will be defined the associated provisions, terms and place of execution; if there is no agreement at all (or partial disagreement), the act contains the allegations which justify the persistence of the *litis* and those on which there is disagreement. The judge must verify the judicial capacity of the parties, the lawfulness of the agreement and the disposability of the rights concerned (Art. 51-53 and 88 of the CPT). The judge must also actively attempt to obtain the most suitable solution to the terms of the dispute (Art. 51, 2).

The process, according to the CPC, usually begins with an initial petition, followed by the contestation/defence and the reply to the contestation, with further eventual procedural acts. The initial petition, in addition to the indication of the tribunal and parties concerned, contains the description of the factual elements which allow to determine the existence of an employment contract, as well as the indication of the essential facts which constitute the cause of the petition and the underlying legal motivation, concluding with the formulation of the demand/petition. Further, the petition must indicate the means of evidence and the value of the dispute. The worker can also appoint a representative, as well as request the intervention of the MP and legal aid.

The petition is subsequently distributed to a labour court and the judge, after having analysed it, can either reject it, ask the author to clarify or integrate any point of the petition, or designate the hearing of the parties. The defendant is notified by mail of their expected attendance. As a result of the principle of immediacy, the parties must show up to this hearing in person, where the above-mentioned conciliation attempt will take place. If there is no agreement, the defendant is notified to present his contestation within 10 days. Further, the date and time of the final audience are defined, which can be modified only through a preliminary hearing. The non-attendance of the notified defendant implies a confession of the facts as stated by the author.

The contestation has the purpose of allowing the defendant to describe the factual and legal reasons based on which he opposes to the petition of the author, with particular reference to the alleged exceptions. Further, the defendant can include counterclaims in the contestation.

The following step is the reply to the contestation. After the defendant presents their documents, the petitioner has the right to exercise the adversarial principle and comment on the evidence. The CPT (Art. 28) explicitly allows for the petitioner to indicate, in the reply to the contestation, new demands (and underlying causes), if these correspond to the same type of procedure. Additionally, if new facts are alleged, the defendant is notified to contest the addendum and its admissibility.

In the initial management of the process, the judge can subsequently, if deemed suitable, emit a pre-remedial order (*despacho pré-saneador*), which serves the following purposes:

- Provide for the supply of dilatory exceptions.
- Provide for the integration of the (abovementioned) procedural acts.
- Request the intervention of any individual in the procedure.
- Determine the inclusion of documents.

Regardless of having ordered the pre-remedial order, the judge must decide whether he:

- Deems the dispute 'complex', thus justifying a preliminary audience.
- Deems the dispute 'not complex', thus dismissing the preliminary audience.
- Deems that the dispute does not require a preliminary hearing due to non-attendance (of the party), or because the process will end as a result of dilatory exceptions already discussed in the pleadings.

Regarding the preliminary hearing, the following procedural acts are foreseen:

- Carrying out of the conciliation attempt.
- Discussion concerning the factual and legal aspects of the dispute, in case the judge has to assess dilatory exceptions or wants to immediately examine, totally or partially, the merit of the cause.
- Discussion concerning the standing of the parties to establish the terms of the dispute.
- Provision of a remedial order to: examine dilatory exceptions and breaches of procedure put forward by the parties, or which must be examined by the judge's own motion; examine immediately the merit of the cause, provided that the process allows for the total or partial assessment of the judicial demands/peremptory exception without further evidence.
- Determine, after the debate, the formal adaptation and simplification of the procedure.
- Emit, after the debate, the order concerning the identification of the object of the dispute and the enunciation of evidence.
- After having heard the representatives/lawyers, schedule the actions to be undertaken in the final audience (to avoid delays).

If, on the contrary, the preliminary hearing does not occur (i.e., the complexity of the dispute does not justify it), the judge can nevertheless emit: a remedial order; an order to determine the formal adaptation/simplification of the process; an order identifying the object of the dispute and the enunciation of evidence; and an order establishing the actions to be carried out in the final audience.

The judge, in addition to verifying the admissibility of counterclaims, procedural requirements, eventual breaches and the adequacy of the procedural form, must evaluate the means of evidence presented or requested and set the value of the dispute.

As a result of the new CPC, the procedural phase of the instruction of the dispute does not exist anymore: the means of evidence are generated through procedural acts ranging from the petition/demand to the final audience. The instruction (Art. 63 to 67 CPT) concerns testimonial evidence exclusively, while any other type of evidence is covered by the abovementioned procedural acts. The maximum number of witnesses allowed for each party is 10, in principle, but can be reduced to 5 depending on the value of the dispute.

The final audience, in which the discussion and the contextual judgement occur, also requires the personal attendance of the duly notified parties. If one of the parties is absent, the facts alleged by the other party that are personal to the absent are deemed to have been proven. Conversely, if both parties are absent, the facts alleged by the author that are personal to the defendant are exclusively deemed proved and not vice-versa. However, the process unfolds regularly if one or both parties do not appear (even without justification) but are duly represented by a lawyer.

Moreover, as mentioned above, a conciliation attempt can take place at the beginning of the final audience. Likewise, at this stage, the author's or defendant's representative/lawyer can respond to exceptions, whereas he could not do so in the previous stages.

The hearing must also have the participation (either personally or remotely) of witnesses enrolled by the parties and accepted by the judge, as well as technical experts, interpreters and translators. The final hearing is always carried out before the monocratic court and recorded. Additionally, to avoid delays, the postponement of the hearing is only allowed when (Art. 70 CPT): following an impediment of the tribunal; in case a lawyer is missing and the definition of the hearing's date occurred without previous agreement; or due to a reason which falls within the scope of justifiable impediment (Art. 140 CPC). In this hearing, the factual basis can be still exceptionally expanded by the judge (Art. 72 CPT), with the consequent possible modification of the means of evidence. Further, the (oral) final allegations of the lawyers concerning the factual and legal basis will take place: the principle of *favor laboratoris* can be applied exclusively to the interpretation of labour clauses and norms (and not to the factual basis).

The ruling, if not pronounced by the end of the final hearing, must be issued within 30 days and be contextually notified. The ruling contains the identification of the parties and the object of the dispute, the questions to be resolved, (distinguishing between proven and non-proven facts and

identifying the applicable norms), the final decision and the sentencing to the processual costs. The sentencing, pursuant to Art. 74 CPT, can be *extra vel ultra petitum*. The unlawful exercise of this faculty of the judge can be configured as a breach and be the object of appeal.

Procedures for specific categories of workers. Portuguese labour law provides for specific regulations and/or procedures for certain categories of workers. There is a specific legal regime for labour relations arising from the field of domestic services. Labour conflicts arising from these types of contracts are regularly processed in labour courts, following the general rule of jurisdiction established in Art. 126, No 1, let. b) of the LOSJ. Regarding public administration, however, the General Labour Law for Public Functions (*Lei Geral do Trabalho em Funções Públicas*—LTFP) establishes specific procedures for disputes arising from these types of relationships. Accordingly, it is up to the administrative courts—and not labour courts—to resolve conflicts in public administration.

Finally, Portuguese labour law guarantees the enjoyment of the same rights and duties of Portuguese nationals to foreign workers or stateless persons authorised to exercise subordinate work in Portuguese territory (Art. 4 of CT). This means that the processing of labour disputes for this class of workers follows the same procedures applied to Portuguese workers.

The role of the MP. The Public Prosecution Service (MP) plays a key role in resolving labour disputes. Essentially, the functions of the MP include information, consultation and legal representation, thereby facilitating citizens' access to justice. This also occurs through informal means of social collaboration. See, for example, the MP's possible collaboration and partnership with other state institutions, private entities or civil society, prior to the initiation of legal proceedings.[42]

The activity of the MP in labour jurisdiction corresponds to that disciplined in the legal norms pertinent to the material competence of the labour courts and to the functions attributed by the CP and the law to the MP in the scope of work.[43]

42. Example from Dias, J.P (p. 20): in case of non-compliance with the employment contract from the employer, the MP can in a first phase, inform the worker, and, subsequently, promote an attempt of conciliation between the parties (promoting individual and joint meetings and solutions to disputes). In a second stage, if the irregularity subsists, the MP can refer the process to the competent entity (for example, the General Labour Inspectorate). Finally, the MP can legally represent the worker when the judicial solution is considered the best way to resolve the dispute, or forward to the request for legal aid.

43. As reported by **Invalid source specified.**MP functions: Art. 219, No. 1 of the CR. 1—Intervention as a justice body. 1.1—Direction of the conciliatory phase of the work-related accident process (Article 99, No. 1, CPT). 1.2—Labour and Social Security offense processes: 1.2.1—Labour and Social Security offense process (Article 186-J of the CPT and Law No. 107/2009—am. By Law No. 63/2013); 1.2.2—Processes sent by ACT (labour), ISS, IP (Social Security) and SEF. 1.3—Control of the legality of the CP and the statutes of trade unions and employers 'associations: 1.3.1—Private sector: i) Trade unions and employers' associations (Arts. 447 and 449 of the CT); ii) Workers' commissions (Art. 439 of the CT); 1.3.2—Public Administration: i) Union associations (Art. 339, No. 1, of the General Labour Law in Public Functions—aw No. 35/2014); ii) Workers' commissions (Art. 333 of Law No. 35/2014)—ii.1) Active procedural legitimacy of the MP— Art. 5th-A, al. a) CPT. 1.4—Control of the legality of IRCT clauses (instruments of collective labour regulation) in matters of equality and non-discrimination—Art. 479º of the CT; ii.1) Active procedural legitimacy of the MP—Art. 5th-A, al. b) CPT. 1.5—Action to recognize the existence of an employment contract—Art. 186º–K of CPT and Law nº 63/2013. 1.6—Inspection regarding Constitutionality and legality —Art. 280 of the CRP and Art. 3rd, No. 1, al. f) the EMP. 2—Representation of workers and their families. 2.1—Workers: i) Employment contract actions (Arts. 3, No. 1, al. D) and 5, No. 1, al. d) EMP and 7th, No. 1, al. d) CPT) * Passive side—Art. 58 of the CPT; ii) Actions for accidents at work and occupational diseases (Article 119, paragraph 1, of the CPT). 2.2—Claims and legal beneficiaries (Article 119, paragraph 1, of the CPT). 2.3—People with occupational disease and family beneficiaries (Article 155 of the CPT): i) The exercise of representation in any jurisdiction in which the rights of workers and their families must be defended—insolvency proceedings and civil executive action—Circ. of PGR 5/2011, of 10-12-2011; ii) Resolution of eventual conflicts of representation and representation (Art. 69 of the EMP).

The MP has active legitimacy in the following actions and procedures (Art. 5-A of the CPT): a) actions relating to the control of the legality of the CP and the statutes of trade unions, employers' associations and workers' commissions; b) actions for annulment and interpretation of clauses of collective labour agreements under the terms of the CT; c) actions to recognise the existence of an employment contract and precautionary procedures for suspension of dismissal regulated in Art. 186-S of the CPT. In addition, the MP also plays a key role in representing workers and their families, without prejudice to the legal aid regime, when the law determines so or the party requests it (Art. 7, let. A).

For the effective exercise of this right, the MP also provides public services in the labour courts, where after the visit of interested parties, there is a screening and identification of the cases needing judicial protection. These are essentially issues relating to employment contracts, accidents at work and occupational diseases. Having received the representation request, and prior to the initiation of legal actions/procedures, the MP tries to reconcile the parties. This reflects, in practice, an effective contribution to the swift and peaceful settlement of labour disputes. If the case is related to an accident at work or occupational disease, the conciliatory phase is undertaken by the 'legality service' (*serviço de legalidade*), as a body of justice. Finally, in these instances the MP does not represent the party, considering that representation is assumed only in the event of litigation.

Oral vs written form. Whereas the procedural acts of a labour dispute are, in practice, written, the process is guided, whenever possible, by the general fundamental principle of orality. There are some procedures that can be carried out orally, in person or by means of technological equipment.[44] This is the case for the final allegations presented by the parties' lawyers during the final hearing (Article 72, paragraph 3 CPT). There is also the possibility of interviewing witnesses through audio-visual means—in real time—when they reside outside the court's municipality or when they reside in a municipality not covered by the court's of territorial jurisdiction (Art. 67 of the CPT). Finally, as recently amended, Art. 32, No. 1, al. c) of the CPT also provides for an oral decision in precautionary procedures.

Labour credits. Art. 337 of the CT provides that "The credit of an employer or worker emerging from an employment contract, of its violation or termination, expires one year after the day following the day on which the employment contract ended." In turn, the credit for procedural costs and the right to return amounts deposited over the course of any lawsuits expire after five years, counting from the date of notification of the beneficiary. In addition, when the enforcement is shelved in cases where it is verified that the defendant has no assets, the statute of limitations starts from the date of filing (Art. 37 of the Procedural Costs Regulation–RCP, Decree No. 34/2008).

44. See Arts. 132 and 135 of the CPC.

As already briefly mentioned, the Portuguese CPT contains ad hoc procedures for discrimination cases, as well as for accidents at work and occupational diseases, both categorised as special declarative procedures (Title VI CPT). Conversely, Portugal's labour law does not provide for small claims procedures.

Non-discrimination is regulated, from the perspective of substantive law, by Arts. 23–32 of the CT, emanating from the constitutional principle of equality (Art. 13 of the CR). Special attention is dedicated to gender equality and non-discrimination—governed by Art. 30 to 32. Further, the CT attributes to the competent service of the ministry responsible for labour a 30-day term to assess the lawfulness of the instrument's provisions concerning equality and non-discrimination (Art. 479). If discriminatory provisions exist, the parties are notified to proceed with the respective changes, within 60 days. After the deadline has expired without the necessary changes to the instrument being made, the matter is forwarded by the MP to the competent court. In turn, if the existence of an illegal provision is found, the MP promotes the judicial declaration of the nullity of these provisions, within 15 days. The judicial decision that may declare the provision null and void is sent by the court to the competent service of the ministry responsible for labour for publication in the Bulletin of Labour and Employment. Pursuant to the second paragraph of Art. 186-G CPT, the judicial declaration must observe the procedural forms provided in Arts. 183 and following of the CPT (i.e., action for the annulment and interpretation of collective labour convention clauses).

Further, the CPT clarifies that the provisions regulating the common (declarative) procedure are applicable to disputes arising from gender equality and non-discrimination (Article 186-G, paragraph 1 of the CPT). On the other hand, two ad hoc rules are contextually provided. Art. 186-H provides that the judge must require information concerning the registration of any judicial decision relevant to the case from the body responsible for gender equality and non-discrimination in labour, employment and professional training. Likewise, when the dispute is judicially settled, the judge must communicate the corresponding decision to the abovementioned body, for subsequent registration (Art. 186-I).

Chapter 2 of CPT's Title VI (special procedures) regulates disputes arising from accidents at work and occupational diseases, contextually establishing several procedures, namely:

- Procedure for the enforcement of rights originating from accidents at work (Section I of Chapter 2)
- Procedure for the extinction of rights originating from accidents at work (Section II)
- Procedure for the enforcement of rights of third parties originating from accidents at work (Section III)
- Procedure for the enforcement of rights originating from occupational diseases (Section IV)

We will now provide an analysis of the procedure for the effectuation of rights originating from accidents at work. It can be divided into a (necessary) conciliatory phase and an (eventual) litigation phase. The first phase is directed by the MP and begins with the communication to the competent tribunal (i.e. the geographically-competent labour court—where the accident occurred)—or, if one does not exist, a geographically-competent general court—of the accident and its consequences. In principle, the civil procedure presupposes the impulse of one of the parties to start a lawsuit: conversely, in this case, the process begins with the aforementioned institute. This results in consequences concerning the lapse (prescription) of the right to demand the benefits enshrined in Law No. 98/2009 (NLAT), regulating the remedial regime for accidents at work and occupational diseases. In particular, the prescription term starts from the date the injured worker's clinical discharge, or alternatively, from their date of death: the related right must be exercised within one year (Art. 179 NLAT).

Art. 86 of NLAT requires the insured (or, in case of death, the legal beneficiaries thereof) to report the accident to the employer within 48 hours (unless the employer witnessed the accident or is aware of it in any sense) In turn, the employer must communicate the accident within 24 hours of his knowledge of the fact to the insuring company. Additionally, in case the accident results in the death of the worker, the insurance company to which the employer has compulsorily and legally transferred the civil liability for accidents at work has the obligation to report the accident to the competent court immediately after becoming aware of it by e-mail, fax or other means, with the same registering effect (Art. 90). The participation must be accompanied by the documentation referred to in the second paragraph of Art. 99 of the CPT, including clinical documents, a copy of the insurance policy and the declaration of the worker's remuneration for the month preceding the accident.

In case the accident does not result in the worker's death, the insurer's obligation to participate applies only to accidents which result in permanent disability or temporary disabilities which, consecutively or jointly, exceed 12 months (Art. 90 of NLAT). In addition, the director of the hospital, care centre or prison must immediately report the death of the hospitalised worker as a result of the accident to the court and the responsible entity (Art. 91).

Finally, Art. 92 of NLAT provides for the eventual participation of the following subjects

a) The victim, directly or through an intermediary.

b) The relative or equivalent of the victim.

c) Any entity entitled to receive the value of insurance instalments.

d) The police or administrative authority that became aware of the accident.

e) The director of the hospital, assistance or prison establishment where the victim is hospitalised.

These participations are presented to the MP, who will in case of urgency order the diligences deemed convenient (Art. 22 CPT). Pursuant to Art. 26 of the CPT, the process runs on its own motion—i.e., it does not depend on the procedural impulse of one of the parties/interested subjects. The mandatory conciliatory phase, directed by the MP (who in this instance is defending the public interest), has the purpose of establishing potentially conflicting interests. The procedural acts to be carried out in this phase are outlined in Table 4.25.

TABLE 4.25 Procedure for the effectuation of rights originating from accidents at work: conciliation phase

Procedural acts to be carried out	Preliminary instruction of the process	Medical examination	Conciliation attempt
Brief description	The MP must: a) ensure, through necessary investigation, the truthfulness of the elements of the process and that of the declaration of the parties (Art. 104 of the CPT), to promote a certifiable agreement; b) instruct the process (e.g. verification of the territorial competence of the court, verification of the compliance with terms of participation, etc)	The MP requests a medical examination to the medico-legal delegations or cabinets of the National Institute of Legal Medicine (Art. 101 CPT). The medical examination is secret, yet the MP can pose questions in case of doubt (Art. 105 CPT). The medical examination report must contain the elements listed in Art. 106 of the CPT and it is notified to the parties summoned for the conciliation attempt.	• The agreement of the parties susceptible of certification by the judge, which, depending on the case, can be global (Art. 109), partial or provisory/temporary (Art. 110). • The agreement is proposed by the MP relying on the result of the medical examination and the circumstances which can influence the 'general earning capacity' of the injured. • If the conciliation occurs, the agreement is in effect from the date of its conclusion, independently from homologation (Art. 115); the act must clearly indicate any resulting rights and obligations. • If conciliation does not occur, the act must clearly indicate whether there was an agreement in relation to the existence and characterisation of the accident, of the causal relationship between the injury and the accident, the retribution of the injured and the nature and degree of the disability.
In the event of permanent incapacity	✓	✓	✓
In the event of death	✓	X	✓
In the remaining cases	✓	✓	✓

Source: Authors' elaboration.

If the conciliation attempt results in an agreement between the interested parties, it is immediately submitted to the judge, who after having verified its conformity with procedural elements and legal and conventional norms, homologates it (Art. 114 of the CPT). Conversely, if there is no agreement and the responsible entity recognises the legal obligations corresponding to the factual elements verified through the lawsuit, and the victim only disagrees with the due amount, the MP asks the judge to make a decision

regarding the merit and establish the compensation amount (Article 116 of the CPT). Otherwise, the litigation proceeds.[45]

From a more general perspective, actions related to gender equality and non-discrimination, as well as those arising from accidents at work and occupational diseases, are of an urgent nature (Art. 26 of the CPT).[46] Therefore, these cases have priority over any other non-urgent judicial service, resulting in a significant increase of procedural celerity.

Role of technical experts. The regime of forensic and medical reports is regulated by Law No 45/2004. Technical experts play a role in the following instances:

- Process for the enforcement of rights originating from accidents at work, both in the conciliation phase (Art. 105-106 of the CPT) and litigation phase (Art. 134 and 139 of the CPT).
- Process for the impugnation of collective dismissal (Art. 157 to 159 CPT).
- Finally, Art. 507 of the CT provides for the possibility of using experts in voluntary arbitration.

4.2.3 Access to labour justice

Conditions for accessing labour justice. Martins (2019) identifies the following conditions to access labour justice, which are in principle also common to the civil process:

- Jurisdiction of the court: international and internal (as to the matter, hierarchy, value (and form), and territory) (CPC, Art. 64);
- Judicial personality (CPC, Art. 11 to 14);
- Judicial capacity (CPC, Art. 15 to 29);
- Legitimacy of the parties: singular and plural (CPC, Art. 30 to 39); Voluntary and necessary litis consortium (CPC, Art. 32 and 33);
- Procedural interests to act (CPC, Art. 286);
- Legal representation (CPC, Art. 40); and
- Juridical protection and judiciary support (Law No. 34/2004).

45. The regulation of the legal regime for accidents at work and occupational diseases occurring in public service proceeds in administrative litigation, therefore outside the scope of labour courts.

46. The same article also lists other processes of the same nature, namely those originating from: the action for the impugnation concerning the regularity and lawfulness of the dismissal; the action concerning the dismissal of a member of a workers' representative body; the action concerning the dismissal of the pregnant, breastfeeding worker/ worker who has recently given birth / worker in parental leave; the action for the impugnation of the collective dismissal; the action for the impugnation of the confidentialty of information or the refusal to provide such information or realize consultations; the action concerning the defence of the personality of the worker; and, the action for the recognition of the existence of the employment contract.

Among these, judicial capacity presents some specificities in the labour process, since minors under 16 years of age, in accordance with the provisions of Art. 68 and 69 of the CT, can litigate directly as authors, in accordance with Art. 2, No. 1, of the CPT, differently from what happens in civil proceedings. Additionally, the same norm allows the representation in court of minors under the age of 16 by the MP "when it is verified that their legal representative does not legally pursue their interests".

Likewise, procedural labour law also allows the structures of collective representation of workers, "even without legal personality", to be able to stand in court, actively and passively.

In particular, Art. 5, regulating the legitimacy of collective worker representation structures and employers' associations, disposes that:

1. Trade unions and employers' associations are legitimate parties as plaintiffs in actions relating to rights concerning the collective interests they represent.

2. Union associations may also exercise the right of action, in representation and replacement of workers who authorise it:

    f) in actions relating to measures taken by the employer against workers who belong to the management bodies of the union association or exercise any position in it;

    g) in actions relating to measures taken by the employer against its associates who are elected representatives of workers;

    h) in actions relating to the general violation of individual rights of the same nature of workers associated with them.

3. For the purposes of the preceding paragraph, the existence of the authorisation is presumed when the worker to whom the union association has communicated in writing the intention to exercise the right of action in its representation and replacement, with indication of the respective object, declares nothing otherwise, in writing, within 15 days.

4. If the right of action is exercised under the terms of paragraph 2, the worker can only intervene in the process as an assistant.

5. In actions in which individual interests of workers or employers are at stake, the respective associations may intervene as assistants to their associates, provided that there is a written declaration of acceptance by the interested parties.

6. The collective representation structures of workers are a legitimate party as an author in actions in which the information is classified as confidential or there is a refusal to provide information or consultations by the employer.

Likewise, the MP has active legitimacy in the following actions and procedures (Art. 5-A):

a) Actions regarding the control of the legality of the constitution and the statutes of trade unions, employers' associations and workers' commissions.

b) Actions for annulment and interpretation of collective labour agreements clauses, in accordance with the terms of the Labour Code.

c) Actions to acknowledge the existence of an employment contract and precautionary procedures for suspension of dismissal regulated in Article 186-S.

The second paragraph of Art. 20 of the CP recognises everyone's right to be accompanied by a lawyer before any authority. Likewise, the statute of the Bar association (Law No. 145/2015) states in its Art. 66 that "judicial mandate, representation and assistance by a lawyer are always admissible and cannot be prevented before any public or private jurisdiction, authority or entity, namely for the defence of rights, sponsorship of disputed legal relationships, composition of interests or in processes of mere investigation, even if administrative, unofficial or of any other nature". Also, the LOSJ confirms that the representation of a lawyer constitutes an essential element of justice administration and is admissible in any process (Art. 12). Law No. 49/2004 defines the meaning and scope of the acts of lawyers and solicitors and typifies the crime of unauthorised legal practice (*procuradoria ilícita*).

Further, as mentioned in the paragraph above, employees' and employers' organisations can assist their associates (with their consensus) in processes in which individual interests are at stake.

Finally, in accordance with Art. 7, without prejudice to the legal aid regime, when the law determines it or the parties request it, the MP represents:

a) workers and their families;

b) hospitals and care institutions, in the actions referred to in paragraph d) of paragraph 1 of Article 126 of Law No. 62/2013, and in the corresponding executions, provided that they do not have litigation services;

c) people who, as determined by the court, have provided the services, or made the supplies referred to in paragraph d) of paragraph 1 of Article 126 of Law No. 62/2013.

It should also be noted that there may be a refusal to afford representation for claims that are unfounded or manifestly unfair, or when the possibility of the author having recourse to the litigation services of the union association is verified (Art. 8 of the CPT). Finally, the CPT also stipulates the cessation of representation or unofficial representation when constituted a judicial representative, without prejudice to the accessory intervention of the MP (Art. 9).

Legal aid. Law No. 34/2004 (as amended) regulates the access to law and courts. The regime established in the law aims to guarantee that no one is hindered or prevented, due to their social, cultural or economic condition, to exercise or defend his right (Art. 1). Access to law and courts is configured by the law as a responsibility of the State and comprises both legal information/consultation and legal aid (Art. 2). Pursuant to Art. 7, Portuguese nationals and European citizens (as well as foreigners and stateless individuals with a legal residence permit in a Member State) who demonstrate to be in a situation of economic insufficiency are entitled to legal aid. Economic insufficiency relates to objective conditions which hinder the individual from being able to bear the costs of a process (Art. 8) and is determined based on the average monthly income of the party's household (Art. 8-A).

Procedural costs and fees. Procedural costs are regulated by Decree No. 34/2008 (RCP, as amended). The RCP gathers cost provisions applicable to the different procedures regardless of their nature—judicial, administrative or fiscal—regulating, in a unified manner, all exemptions from costs that were dispersed in separate legislation (CEJ, 2016). Pursuant to Art. 3 of the RCP, processual costs include the justice tax as well as the party's charges and costs. The justice tax, due for the procedural impulse, is fixed based on the value and complexity of the dispute. On the other hand, the RCP also provides for various instances (Art. 4) in which the payment of procedural costs are not due: these can be divided into subjective and objective exemptions. Included in the former category are: the MP; collective non-profit private entities (when acting within the scope of their special attribution or defending the interests afforded by their statute or applicable law); workers and family members[47] (in matters of labour law, when they are represented by the MP or by the union's legal services, when they are free of charge to the worker, provided that they are insolvent at the date of filing the action or incident or, when applicable, at the date of dismissal, does not exceed 200 UC (*Unidade de Conta Processual*); and the Salary Guarantee Fund (in the actions in which it has to intervene).

Finally, objective exemptions from procedural costs (listed in Art. 4, 2 of the RCP) include mandatory retirement payments, liquidation and sharing of assets of social security institutions, and trade union and class associations.

47. On the other hand, only workers or family members can benefit from that exemption, provided that that the respective gross income of the worker at the date of filing of the action, incident or dismissal, does not exceed 200 UC. Considering the value of the UC (¼ of the IAS), it is concerned a gross annual value of EUR20,400. In case the worker benefits from legal aid, there is a correspondent exemption from the justice tax and other charges associated to the process, as long as economic insufficiency is maintained.

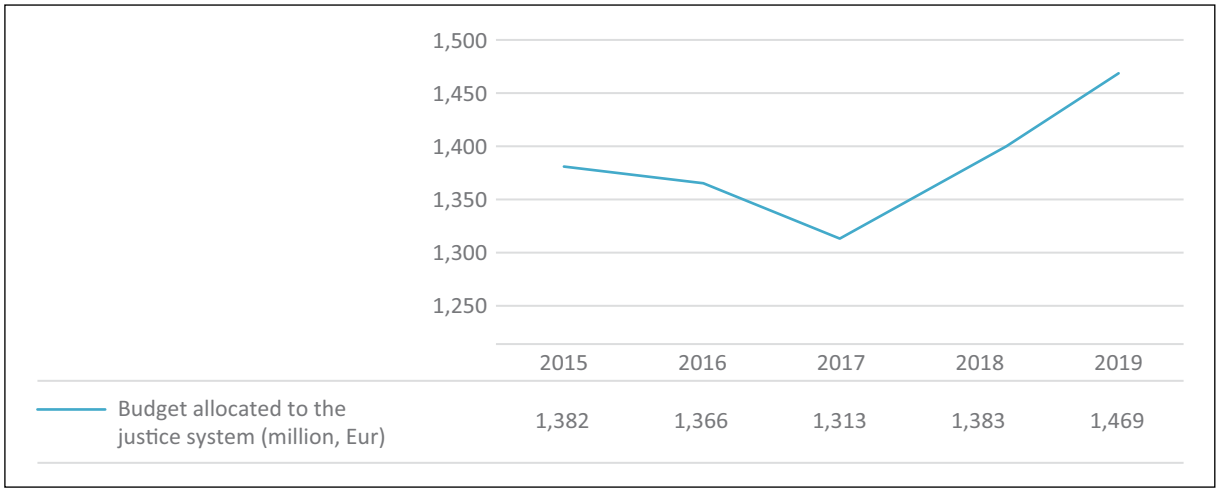
4.3 ADMINISTRATIVE ORGANISATION OF THE LABOUR DISPUTE RESOLUTION SYSTEM

4.3.1 Justice System organisation

Art. 1 of Decree No. 123/2011, which establishes the competences of the Ministry of Justice, includes the management of human, financial and material resources (without prejudice to the competence of other administrative bodies and departments.). The same law attributes to the Directorate General for Justice Administration (DGAJ) the responsibility to coordinate the preparation, execution and evaluation of the budgetary, financial and accounting management of the courts without administrative autonomy, as well as participate in the preparation and management of budgets, in relation to the courts of first instance (Art. 11, 2, let. f). Finally, it is attributed to the Institute of Financial Management and Justice Equipment (IGEFJ) the definition, execution and evaluation, in collaboration with the respective services and bodies, the budget and investment plans of the Ministry (Art. 14, 2, let. b). As already mentioned above, the district's management council (Art. 108 of the LOSJ) approves the draft budget (subject to final approval by the Ministry of Justice) and can also promote budget changes.

Figure 4.3 shows the budget allocated to the justice system between 2015 and 2019.

FIGURE 4.3 Justice system budget, 2015–2019 (in EUR millions)



Source: Authors' elaboration.

4.3.2 Human resources

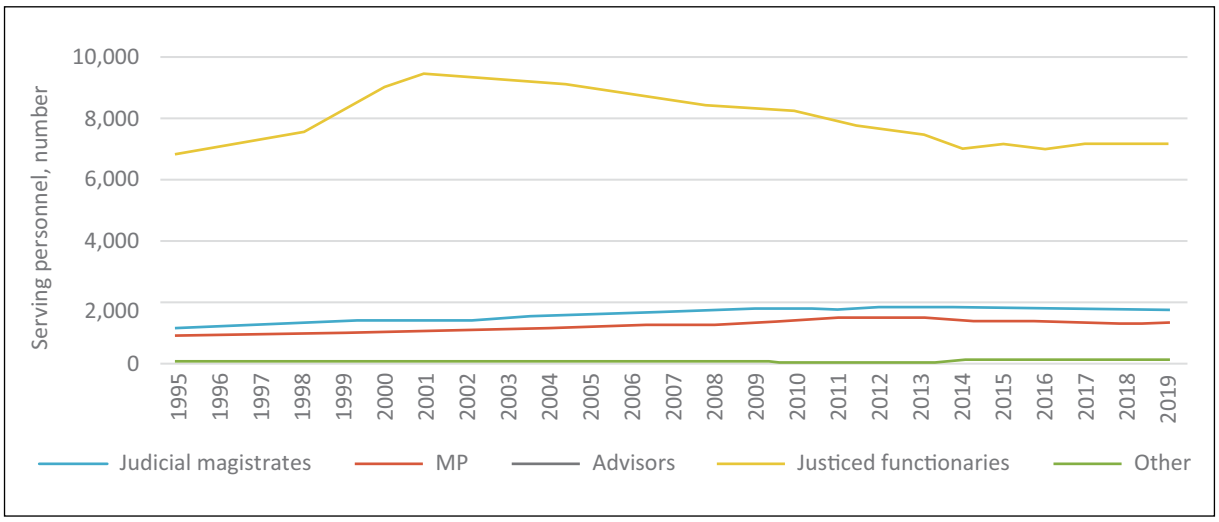
Legal staff composition of Portugal's justice system. Table 4.26 and Figure 4.4 report the evolution of personnel serving in judicial tribunals between 1995 and 2019, disaggregated by career and category.

TABLE 4.26 Evolution of personnel serving in judicial tribunals, 1995–2019

Career/Category		1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Magistrates	Judicial magistrates	1165	1231	1267	1324	1382	1368	1440	1438	1479	1560	1611	1650	1679
	MP	942	939	964	982	999	1068	1070	1100	1106	1176	1184	1248	1271
Advisors		0	0	0	0	0	0	29	33	23	13	14	13	14
Justice staff		6900	7185	7400	7605	8213	9040	9446	9298	9211	9139	9030	8813	8604
Other		9	3	10	0	12	49	0	1	21	53	52	43	41
Career/ Category	**(cont.)**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	
Magistrates	Judicial magistrates	1712	1776	1777	1748	1803	1816	1786	1787	1765	1771	1743	1734	
	MP	1266	1347	1381	1459	1465	1468	1395	1416	1393	1344	1292	1327	
Advisors		14	12	12	11	13	14	13	13	13	11	14	13	
Justice staff		8364	8354	8231	7899	7631	7455	6986	7114	7004	7182	7219	7214	
Other		46	65	34	21	20	17	103	115	117	118	120	124	

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

FIGURE 4.4 Evolution of personnel serving in judicial tribunals, 1995–2019



Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

Despite some exceptions, the number of magistrates has been growing over time. In 1995, there were 1,165 active magistrates, while in 2019 this figure increased to 1,734 (an increase of almost 49 per cent). The most significant exceptions to this trend can be observed in 2010–2011, 2013–2014, 2015–2016 and 2017–2018, when the number of magistrates decreased by at least 20 individuals. 2013 was the year in which the highest number of serving magistrates was registered (1,816): since then, this figure decreased by almost 5 per cent (82 magistrates).

A similar situation happened with MPs. There were 942 MPs in 1995, and 1,327 in 2019—an increase of almost 41 per cent—during the same time frame. A steady increase in the number of MPs can be observed between 1996 and 2013, when the highest figure was recorded, with 1,468 MPs. Since then, the number of MPs in Portugal has decreased: between 2013 and 2019, there was a decrease of almost 10 per cent. Exceptions include the periods between 2014–2015 and 2018–2019.

The report "European judicial systems—efficiency and quality of justice"[48] (Council of Europe and European Commission for the Efficency of Justice, 2018) informs that there were 18,4 professional judges[49] per 100,000 inhabitants in Portugal in 2010, while in 2016 this figure increased to 19,3 judges per 100,000 inhabitants. The number of MPs per 100,000 inhabitants went from 13,9 in 2010 to 14,5 in 2016, with the highest figure—14,9 MPs per 100,000 inhabitants—recorded in 2012. In 2016, the 46 Member States of the Council of Europe averaged 21,5 judges and 11,7 MPs per 100,000 inhabitants.

Table 4.27 reports the people employed in courts up to 31 December 2019, disaggregated by sex, career/category and instance.

TABLE 4.27 Persons employed in Portugal's courts (up to 31 December 2019), disaggregated by sex, career/category and instance

	Magistrates				Advisors		Justice staff					Others	
	Judicial		MP				Total		Clerks	Registrars	Other justice staff		
	Sex		Sex		Sex		Sex					Sex	
	M	F	M	F	M	F	M	F				M	F
Higher courts	268	204	39	29	5	7	107	183	6	192	92	2	3
Supreme Court	36	17	4	7	5	6	18	33	1	26	24	2	1
Courts of second instance													
Coimbra	39	17	7	3	0	1	11	26	1	21	15	0	1
Évora	35	23	3	4	0	0	13	21	1	19	14	0	1
Guimarães	30	36	7	1	0	0	11	19	1	22	7	0	0
Lisboa	70	74	5	9	0	0	31	51	1	62	19	0	0
Porto	58	37	13	5	0	0	23	33	1	42	13	0	0
First instance tribunals	395	867	405	854	0	1	2302	4622	80	6563	281	66	53

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

48. 2018 Edition (2016 data).

49. Those who were recruited, trained and are remunerated to perform the function of judge as main occupation. This category does not concern professional judges sitting on an occasional basis.

Also, within this context, the number of labour judges can be inferred from Decree No. 49/2014 (as amended). Table 4.28 reports the relative number of serving judges for each labour court.

TABLE 4.28 The labor courts and serving judges in Portugal

Labour court	Assigned judges	Labour court	Assigned judges	Labour court	Assigned judges	Labour court	Assigned judges
Ponta Delgada	1	Barreiro	2	Covilhã	1	Vila Nova de Gaia	3
Aveiro	2	Loures	2	Coimbra	2	Penafiel	4
Águeda	1	Torres Vedras	1	Figueira da Foz	1	Santarém	2
Oliveira de Azeméis	1	Vila Franca de Xira	2	Évora	1	Tomar	2
Santa Maria da Feira	2	Sintra	3	Faro	2	Setúbal	2
Beja	1	Cascais	3	Portimão	2	Sines	1
Braga	2	Funchal	1	Guarda	1	Viana do Castelo	2
Barcelos	2	Portalegre	1	Leiria	3	Vila Real	2
Guimarães	2	Porto	3	Caldas da Rainha	1	Viseu	2
Vila Nova de Famalicão	1	Maia	2	Lisboa	8	Lamego	1
Bragança	1	Matosinhos	3	Almada	(2)[50]	Juízo misto da Praia da Vitória	1
Castelo Branco	1	Valongo	2				

Source: Authors' elaboration.

Hence, the overall number of magistrates serving in labour courts is 86. This represents 7 per cent of the total number of judges serving in courts of first instance (Direção-Geral da Administração da Justiça 2020).

Judges' remuneration. Pursuant to Art. 22 of Law No. 21/85 (as amended), the magistrates' wage system is composed of a basic remuneration and several supplements provided for in the same legislation. The remuneration must be adequate to the magistrates' functions and responsibilities to guarantee the independence of the judicial branch. Further, these components of the wage system cannot be reduced, except due to transitory and exceptional circumstances.

In accordance with Art. 23, the monthly remuneration of magistrates is determined by a grading scale annexed to the same Law. The same Art. clarifies that seniority is counted from the day of the individual's entry in the Centre for Judicial Studies as justice auditor (see next subsection). In addition, the remuneration is automatically updated and consists of 14 monthly payments.

50. Not yet installed.

In 2016, the starting annual gross salary of judges in Portugal corresponded roughly to EUR35,699, whereas that of a Supreme Court judge amounted to around EUR85,820. In both cases, the figures are below the average of 46 Council of Europe's Member States (Council of Europe and European Commission for the Efficency of Justice, 2018). Further, in Portugal the remuneration increases substantially during the career: the weight of the remuneration of judges at the top of their careers is 5.34 points above the average annual gross salary, which is greater than the average of European countries.

To conclude this sub-section, Table 4.29 provides an overview of the minimum and maximum salary ceilings for judges.

TABLE 4.29 Maximum and minimum ceilings for judge salaries

Category / position	Amount (EUR)
1st instance tribunals, minimum	2,549.91
1st instance tribunals, maximum	5,609.80
2nd instance tribunals, maximum	5,778.10
Supreme Court, maximum	6,129.97

Source: Authors' elaboration based on Franco (2019).

4.3.3 Recruitment, selection and training

Recruitment and qualification. Portugal's model for the recruitment of judges is that of a full-time, exclusive dedication professional career, which relies on a public tender and initial and continuous training.

Several sets of law related to the exercise of the jurisdiction list a number of rights and prerogatives of the judge, such as independence, immovability, immunity, freedom of association, participation in own management and discipline bodies and own financial statute. Likewise several duties are ascribed to them, such as impartiality, availability, confidentiality and reservation, prohibition of political activity as well as responsibility and loyalty during the exercise of their function (Alves, 2016).

The CP dedicates several provisions to the recruitment of judges. First, it remits to the law the determination of the requisites and the rules governing the recruitment of judges of the courts of first instance (Art. 215, 2). In addition, it specifies that the prevailing criterion for recruiting judges of courts of second instance is merit, to be determined by a competitive curricular selection process between judges of first instance (Art. 215, 3). Likewise, a competitive selection process is open to judges, MPs and other meritorious jurists for a chair in the Supreme Court, as determined by the law (Art. 215, 4).

As detailed in Art. 217 of the CP, the CSM is the entrusted with appointing, assigning, transferring, and promoting judges. Likewise, in accordance with Art 219, the competences to appoint, assign, transfer and promote agents of the Public Prosecutors' Office and exercise disciplinary action pertain to the Attorney General's Office.

At statutory level, the main framework of reference is Law No. 2/2008 (as amended) regulating admission to the judiciary, the training of magistrates and the nature, structure and functioning of the Centre for Judicial Studies (*Centro de Estudos Judiciários*—CEJ).

Chapter 2 of the law establishes rules pertaining to the magistrate's initial training. In accordance with Art. 6, the access to initial training is obtained through public competition. The same Art. provides for access to initial training for those candidates who, once prevailing over the competition, have graduated in a position falling within the number of places available, observing fixed admission quotas. General requirements for access to initial training and admission to the competition include (Art. 5):

a) Be a Portuguese citizen or citizen of Portuguese-speaking countries, with permanent residence in Portugal to whom it is recognised, under the terms of the law and under conditions of reciprocity, the right to exercise the functions of magistrate.

b) Hold a law degree or legal equivalent.

c) Hold a Master's degree, PhD or legal equivalent, or have professional experience in the forensic field or in other related areas relevant to the exercise of the magistrate's functions, and effective for not less than five years.

d) Meet the other general requirements for the provision of public functions.

The Superior Council of the Judiciary, the Superior Council of the Administrative, Tax Courts and the Attorney General of the Republic transmit to the Minister of Justice, by 15 May, information regarding the foreseen number of magistrates required in the respective judiciary branch (Art. 7). Consequently, in accordance with Art. 8, when the need for magistrates justifies holding an admission contest, the Minister of Justice authorises the call for competition, establishing the number of vacancies to be filled in each magistracy.

Once the competition has been authorised, it will be given ample publicity by the director of the CEJ in the Portuguese Official Gazette (Art. 10). The application entails a request addressed to the director of CEJ, to be presented within 15 days from the publication date of the opening notice, accompanied by the documents required to process the individual application. The candidate must declare which area of magistracy he is competing for—MP, judicial

magistrate, administrative and fiscal tribunals, etc. In addition, a payment must be made in an amount to be set annually by a resolution of the Minister of Justice.

The director of the CEJ must verify the fulfilment of the admission requirements and the subsequent release of the list indicating those candidates that have been admitted or rejected. As disposed by Art. 13, the director is responsible for determining the number of selection panels based on the number of admitted candidates. The panels can vary depending on admission modality, selection method and the respective selection phases. On the other hand, the law provides for the minimum composition of selection panels, as represented in Table 4.30.

TABLE 4.30 Minimum composition for the selection panels

Written phase selection panel (Art. 13,3)
Minimum mandatory composition, 3 members. a) A judicial magistrate or, in competitions to fill vacancies for judges of the administrative courts and inspectors, a judge of administrative and tax jurisdiction b) An MP c) A jurist of recognised merit or a personality of recognised merit from other areas of science and culture
The jury of the oral phase of knowledge tests and the jury of the curriculum evaluation are composed of five members (Art. 13,4)
Minimum mandatory composition: 5 members. a) Two magistrates, one being a judicial magistrate or, in competitions to fill vacancies for judges of the administrative and tax courts, a judge of administrative and tax jurisdiction, and an MP b) Three personalities, namely lawyers, people of recognised merit, in the legal field or other areas of science and culture, or representatives of other sectors of civil society

Source: Authors' elaboration.

The selection methods envisioned in the law, as determined by Art. 14, include:

a) knowledge tests;

b) curriculum evaluation; and

c) psychological selection exam.

Art. 15 clarifies that in the event of candidates who have professional experience in the forensic field or in other related areas, relevant to the exercise of the magistrate's functions, and an effective term of not less than five years (Art. 5, let. c, second part) the oral procedure is replaced by the curriculum evaluation provided for in Art. 20.

Knowledge tests are modulated based on the subjects mentioned in the competition bid and are carried out in two eliminatory phases, written and oral (Art. 15). The written phase aims

to assess the quality of the information transmitted by the candidate, the ability to apply the law to each case, the relevance of the content of the responses, their analytical and synthetical capacity, the simplicity and clarity of the exhibition and mastery of the Portuguese language (Art. 16). The same article identifies the following knowledge tests:

a) proof of resolution of civil and commercial law and civil procedural law cases;

b) proof of resolution of cases of criminal law and criminal procedural law;

c) evidence of the development of cultural, social or economic themes.

While specific rules are established for competitors based on Art. 5, let. c, second part and administrative/tax jurisdictions (see Art. 16,3, 16,4 and 16,5), candidates who obtain a rating equal to or greater than 10 in each of the knowledge tests included in the written phase are admitted to the oral phase or curriculum evaluation (last paragraph of Art. 16).

The curricular evaluation is a public test undertaken by the candidate, to gauge the consistency and relevance of their professional experience in forensics or related areas, to exercise judiciary activities (Art. 20). This evaluation involves:

1. A discussion of the candidate's curriculum and professional experience.

2. A discussion, based on the candidate's experience, of legal matters which can also result in the exposition and discussion of a practical case.

Candidates who obtain a classification equal to or greater than 10 in their curriculum evaluation are admitted to the psychological selection exam.

The oral phase aims to assess the candidate's legal knowledge, critical argumentation and exposition skills, oral expression and mastery of the Portuguese language (Art. 19). This phase comprises the following knowledge tests:

d) A discussion of issues of Constitutional law, European Union law and judicial organisation.

e) A discussion of civil law, civil procedural law and commercial law.

f) A discussion of criminal law and criminal procedural law.

g) A discussion of issues of administrative law, economic law and family law.

If the competition is related to administrative or tax law, a different set of knowledge tests is foreseen (see Art. 19,3). Candidates who obtain a classification equal to or greater than 10 in all knowledge tests of the oral phase are admitted to the psychological selection exam.

The psychological selection exam consists of a psychological assessment carried out by a competent entity and aims to assess the capacities and personality characteristics of the candidates for the exercise of the judiciary (Art. 21).

In accordance with Art. 24, candidates who obtain a "favourable" rating in the psychological selection examination are approved. Conversely, those candidates who obtained a score inferior to 10 in the knowledge tests of the written and oral phases, those who obtained a "not favourable" rating in the psychological assessment, and those who desist from the procedure through written notice are excluded.

Pursuant to Art. 25, the final classification of the approved candidate is the result of the simple arithmetic average of the classification obtained in the written and oral phases of the knowledge tests.[51] Subsequently, two lists, homologated by the CEJ director, are produced by the selection panel(s): one is dedicated to the graduation of admitted candidates and the other contains rejected candidates as well as the reason for their rejection (Art. 26). Appropriate publicity must be given to both lists.

The graduation of approved candidates is done in decreasing order of final classification (Art. 27). The approved candidates, following the graduation and until the total number of vacancies in the competition are filled, respecting admission quotas, are then qualified to undertake the training course (Art. 28). Those candidates who were not admitted to the course due to a lack of openings are exempted from tests in the following competition.

Finally, as required by Art. 29, the candidates admitted to the course have to state, in writing, their preference for either judicial magistracy or magistracy of the Public Prosecutor. These preferences are subsequently evaluated, according to the graduation ranking, taking into account the number of available openings: if there is an imbalance between the number of vacancies for the magistracy and the preferences expressed, priority will be given to those candidates with the highest graduation score. Candidates with preferences with no vacancies can, within three days decurrent from the notice, request to change their option: if they do not do so, they are excluded from the course (Art. 29).

Initial training and continuous training. The approved candidates attend the theoretical/practical training course with the status of justice auditor, formally acquired through a contract established between the CEJ and the candidate (Art. 31). The justice auditor is subject to

51. The classification of the approved candidate results from the average of results obtained in the curricular evaluation (70 per cent weight) and knowledge tests (30 per cent weight).

the rights, obligations and incompatibilities stemming from Law No. 2/2008,[52] CEJ's internal regulation and, additionally, the civil servant regime. The justice auditors approved in the training course are appointed judges of law and PM, on an internship basis, in accordance with the terms set in Art. 68 (Art. 32).

As provided for in Art. 30, the initial training of magistrates for the judicial, administrative and tax courts comprises, in each case, a theoretical-practical training course, organised in two successive cycles, and an internship. The first cycle of the training course is held by the CEJ, while the second cycle as well as the internship course take place in the courts, within the scope of the chosen magistracy.

The overall purpose of the course is to provide the justice auditors with the development of skills and the acquisition of technical competencies to exercise the function of judge in (judicial, administrative or tax) courts or the MP (Art. 34). Moreover, the same norm identifies both skills and technical competences to be acquired through the course: for example, the understanding of the judge's and the MP's roles in guaranteeing and implementing the citizens' fundamental rights. One of the competences mentioned in Art. 34 is the mastery of the juridical and judicial techniques to approach, analyse and resolve practical cases. The law also sets specific goals for both cycles, in Articles 36 and 49.

The first cycle lasts for 10 months. Art. 35 specifies that it begins on 15 September following the CEJ competition (unless otherwise determined by the government's justice appointee) and ends on 15 July. The second cycle starts on 1 September, after the termination of the first cycle, and lasts until the 15 July of the following year.

The first cycle of the training course includes a general training component, a specialty training component, a professional component, and an area of applied research relevant to the judicial activity (Art. 37). Art. 39 lists several subjects to be studied during the course when it provides access to judicial tribunals. Art. 40 does the same for courses that give access to administrative and tax tribunals. Finally, Art. 38 identifies several subjects which are common to both. The CEJ director is responsible for preparing study plans which, in addition to defining the objectives and methodology of formative activities, divide the subjects into teaching modules, taking into account the different functions of each magistracy (Art. 41).

Pursuant to Art. 43, the justice auditors are evaluated by teachers and trainers on their aptitude for the exercise of magistrate functions, according to a global assessment model based on a set of elements to be further specified in an internal regulation. The same norm also requires the continuous evaluation of justice auditors through tests which culminate in the periodical elaboration of individual reports by course teachers. The reports and the results of the tests will

52. See subsection 2D for the law in question, which regulates the disciplinary regime of the auditors of justice. In particular, Art. 58 determines the duties and obligations of auditors, whereas Art. 60 establishes the incompatibilities.

determine a proposal by the CEJ director of a final scoring scheme, which can range from 0 to 20. Afterwards, the pedagogical council evaluates the classification and graduation proposals presented by the director and deliberates on the aptitude of the auditors for the exercise of their functions (Art. 46). The law sets a minimum scoring threshold equal to or over 10 in the training components, but the pedagogical council can determine otherwise. The qualified auditors graduate according to their scoring: results are published at the CEJ in two different lists in accordance with the chosen magistracy. Before the end of the first cycle, the list of the available locations for second cycle training is published: within three days decurrent from the publication, the auditors must indicate, in descending order of preference, the courts where they intend to be placed.

The second cycle takes place eiter in the judicial courts of first instance, administrative or tax courts. Training is provided by supervising magistrates (Art. 50). The justice auditors during this phase are, in accordance with Art. 51, allowed to:

a) Elaborate drafts of procedural documents.

b) Intervene in preparatory acts of the process.

c) To assist the magistrate-trainer in the management and instruction of the process.

d) Assisting wtih the various procedural steps, especially gathering evidence, hearing witnesses and holding audiences.

e) Attend the deliberations of jurisdictional bodies.

At this stage, the auditors are also evaluated, according to a global assessment model, on their aptitude for the exercise of the functions of magistrate in the respective magistracy (Art. 52). The assistant director elaborates a proposal for the classification and graduation of the auditors relying on the results of the tests and reports of the second cycle. The proposal is then submitted to the pedagogical council, which decides on the aptitude of the auditors. Once again, the minimum scoring threshold corresponds to a value equal or superior to 10. The final classification is determined by weighting the first cycle classification (40 per cent) and the second cycle (60 per cent) (Art. 55). The pedagogical council then publishes the lists with the classification of justice auditors to determine entrance into the internship phase and the court where it is to take place. Before the end of the second cycle, the list of available internship spots is published by the CEJ: justice auditors can indicate their preference within 5 days from the publication.

The auditors who pass the course are appointed judges (or PM) in internship regime by the CSM, the High Council of Administrative or Fiscal Tribunals or the High Council of the Public Prosecutor

(Art. 68). Those who pass the course but are not appointed maintain the status of justice auditor. The objectives of the internship are set in Art. 69. During the internship phase, lasting 12 months (Art. 70,1), the interns exercise the functions inherent to the respective judiciary with the assistance of trainers, albeit under their own responsibility, including all respective rights, duties and incompatibilities (Art. 71). The competent High Council is responsible for collecting elements regarding the aptitude, merit and performance of the judge-intern: both the CEJ and the High Council can determine the candidate's inaptitude. If that is not the case, at the end of the internship, magistrates are effectively appointed: if vacancies are not available, magistrates are appointed as auxiliaries (Art. 72).

Continuous training. Chapter 4 of the law regulates the continuous training of magistrates, which aims to develop the skills and competences appropriate to their professional performance and personal enhancement. The first paragraph of Art. 74 enshrines the right/duty of magistrates to participate in continuous training. The objectives of continuous training include (Art. 73):

a) Updating, deepening and specialising the technical and legal knowledge relevant to the exercise of jurisdictional function.

b) Developing technical and legal knowledge regarding European and international judicial cooperation.

c) Deepening the understanding of the realities of contemporary life through a multidisciplinary perspective.

d) Raising awareness of new realities, with an emphasis on judicial practice.

e) Deepening the analysis of the social function of the magistrates and their role in the context of the constitutional system.

f) Understanding the phenomenon of social communication in the information society.

g) Examining themes and issues of professional ethics and deontology to promote the harmonisation and exchange of individual experiences between the different agents that interact in the administration of justice and an efficient personal and interinstitutional relationship.

h) A judicial culture of good practices.

Continuous training has either a generic or specialised scope and can be specifically directed at a given magistracy: in any case, the training has to touch upon human rights (Art. 74).

The annual plan for continuous training is designed and planned by the CEJ, in conjunction with the High Councils of the Judiciary, the Administrative and Tax Courts and the Public Prosecutor's Office, according to the courts' needs. The CEJ must observe the principles of decentralisation, diversification of functional areas, specialisation and multi-disciplinarity (Art. 75). Continuous training activities include courses of short/medium duration colloquia, seminars, meetings, conferences, and lectures, as well as specialisation courses for special competence courts.

The continuous training plan is circulated among magistrates by 15 September. Those who wish to participate in the activities must ask the respective High Council for authorisation by 30 September. In turn, the High Council will communicate to the CEJ the list of authorised magistrates. Subsequently, the CEJ informs the magistrates of the authorisation. It is important to note that the participation of the magistrate in continuous training is taken into consideration in their professional performance evaluation, as well as for their placement in courts with specialised competence, and in their career progression (Art. 78).

Evaluation and promotion of judges. Law No. 21/1985 (as amended) regulates the statute of judicial magistrates. The first Article of the law clarifies that judicial magistrates exercising jurisdictional functions are titularies of the sovereign court and represent a single body, regulated by a single statute. The judicial magistracy is composed by the judges of the Supreme Court, and of courts of first and second instance (Art. 2). Art. 6, which provides for the immovability of magistrates, also specifies that their nomination is lifelong. Therefore, magistrates cannot be transferred, suspended, promoted, retired, or dismissed. Further, their situation cannot be changed in any way except in the cases provided for in the same law.

Art. 31 establishes rules for the evaluation (and classification) of magistrates. The same norm, in setting the principles of evaluation, clarifies that judges are evaluated complementarily to the inspection of the respective tribunal: the inspection is preferably carried out by people who exercise functions in the same jurisdiction as the inspected judge, and all judges of the same seniority are inspected in the same year. The principles to be observed in the evaluation are:

a) Legality, equality, justice, reasonableness, and impartiality.

b) Independence, under which the inspection services cannot, in any case, interfere with the independence of the judges, namely asserting on the substantial merit of the decisions.

c) Continuity, which requires permanent monitoring of the courts and of the service of the judges.

Further, Art. 33 establishes various criteria to evaluate the performance of judges:

a) Technical training and intellectual capacity.

b) Personal and professional reputation and prestige.

c) Observance of duties.

d) Volume and management of the service in charge.

e) Management of the respective court or section, taking into account the human and material resources available.

f) Productivity and observance of the deadlines defined for the practice of judicial acts, considering the existing procedural volume and the means and resources available.

g) Ability to simplify procedural acts.

h) Circumstances in which the work is performed.

i) Level of participation and contributions to the smooth running of the service.

j) Service ratings assigned in previous inspections.

k) Curricular elements.

l) Length of service.

m) Disciplinary sanctions applied during the period to which the inspection refers.

Judges are rated according to their merit, with the following terms (Art 32): 'very good', 'good with honours, 'good', 'sufficient' and 'mediocre'. If the evaluation results in a 'mediocre' rating, an investigation will be carried out, which can determine the suspension of the judge in question (Art. 33,2).

Art. 34 provides for the mandatory rating of the magistrate at the end of the first year of effective exercise of its function: the evaluation in this instance can either be 'positive' or 'negative'. In the latter case, corrective actions are proposed and the CSM, after a year decurrent from the notification of the report, will undertake an extraordinary inspection.

The law foresees an ordinary inspection after the abovementioned first classification, whereby judges are again rated after four years and then every five years. The renewal

of a 'very good' rating in principle exempts the magistrate from the following inspection: however, the CSM can order otherwise. Additionally, the CSM can initiate extraordinary inspections any time (Art. 36).

Chapter 5 of the law regulates the placement of judges. Judicial movement/placement occurs in the month of July, giving publicity to the foreseen vacancies and detailing, in each tribunal, the respective section (Art. 38). In other instances, judicial movement is allowed exclusively in response to a disciplinary reason or the need to fulfil vacancies. The same norm also clarifies that judicial movement, as well as the graduation/placement of magistrates in the courts of first instance and superior courts depends exclusively on the CSM's deliberation.

The first appointment of judges occurs in accordance with the graduation obtained in the courses and the internship. Pursuant to Art. 42, the judges are appointed to the district tribunals and placed in courts of generic jurisdiction. The judges can be transferred at their request after two years, decurrent from the deliberation related to the previous position (Art. 43). In this respect, the same norm determines that it is impossible, after the exercise of functions in local courts with generic competence, for the judge to refuse the first placement in a different court. In addition, judges with more than three years of effective service cannot ask to be placed in generic competence courts (destined for first-appointment judges) if already placed in specialised or central courts (Art. 43·3). Art. 44 provides that the placement of judges should be carried out according to the prevalence of service needs and the principle of minimum damage for the personal and family life of the interested party. Regardless, other factors that may be considered in placement, in decreasing order of preference, are service classification and seniority. Finally, the third paragraph allows the CSM to allocate judges with less than five years of service in central or local specialised courts.

Art. 45, regulating the nomination in specialised courts, requires the judge to have more than 10 years of seniority (preferably with specific training in the respective area of competence) to be placed in a labour court, as well as have a 'good with honours' or better rating.

Section III of Chapter 5 of the law, Art. 46 provides for the nomination of judges in courts of second instance, which occurs through a specific curricular competition among judges, and the prevalent criterion is meritocracy.

Finally, Section IV of the same Chapter, provides for the nomination of TSJ judges, which is carried out through a curricular contest open to judges and Deputy Attorneys General, as well as other merit jurists.

Some of the competences attributed to the CSM by Art. 149 include the appointment, placement, transferral, promotion, dismissal, appreciation of professional merit and exercise of disciplinary actions. This provision therefore implements Art. 217 of the CP at the statutory level.

4.4 PERFORMANCE OF THE DISPUTE RESOLUTION SYSTEM (2015–2019)

This section is dedicated to the evaluation of the labour dispute resolution system's performance in Portugal. It compiles data on the number of labour disputes received (both administrative and judicial), processed (pending disputes from the last year plus the new ones received), resolved and pending (not resolved), preferably by economic sector and disaggregated by area if possible.

Data were also collected regarding type of order (what is being requested by the plaintiff), type (administrative or judicial, individual or collective), average time, success rate (share of plaintiffs—usually workers—who won their disputes), average sentencing (the amount of money involved in the sentencing) and compliance rate indicators (percentage of sentences that were actually paid).

TABLE 4.31 Amount of received, resolved and pending labour disputes in courts of first instance

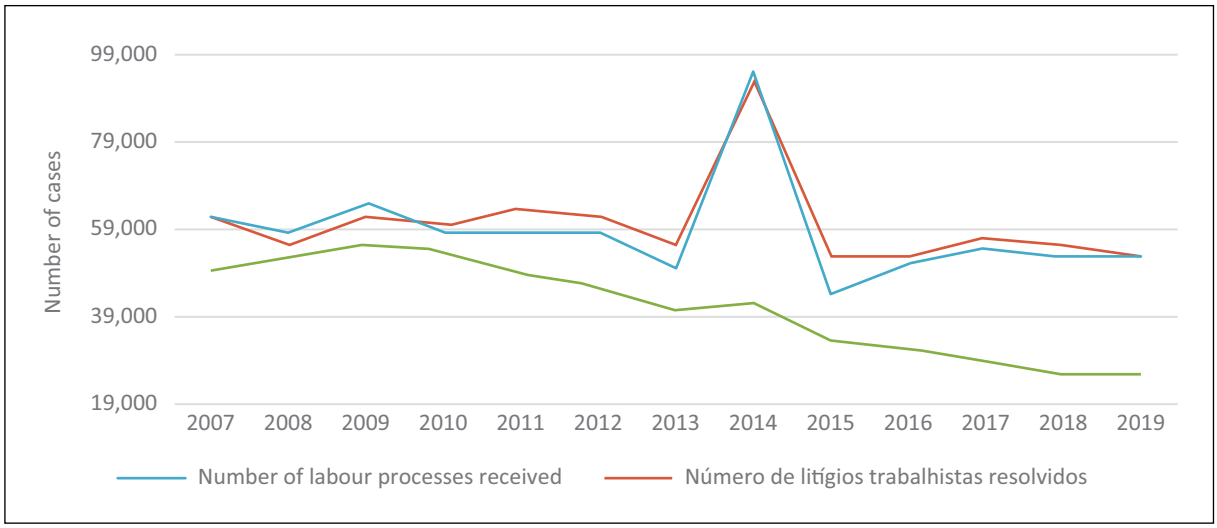
Year	Number of labour disputes received	Number of labour disputes resolved	Number of pending labour disputes
2007	60,761	61,211	49,517
2008	58,374	55,668	52,223
2009	64,689	61,602	55,310
2010	58,496	59,874	53,932
2011	58,441	63,804	48,569
2012	58,564	61,473	45,660
2013	49,855	55,196	40,319
2014	94,635	93,252	41,702
2015	44,174	52,351	33,525
2016	50,756	53,165	31,116
2017	54,389	57,151	28,354
2018	52,158	55,027	25,485
2019	52,298	52,081	25,702

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

This table and Figure 4.5 show the amount of labour disputes received, processed and resolved in these courts (2007–2019).

Regarding the number of labour disputes received, there was a decrease from 60,761 labour disputes received in 2007 to 52,298 in 2019, a 14 per cent reduction. The highest number of labour disputes received—94,635—was registered in 2014. In 2013, 49,855 disputes were filed—the second overall lowest figure. In 2015 the lowest figure was recorded: 44,174 cases. Remarkably, between 2013 and 2014 there was an increase of 90 per cent in the number of disputes. The average of number of cases received from 2007 to 2019 was 58,276 per year.

FIGURE 4.5 Received, resolved and pending labour disputes, 2007–2019



Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

There were 61,211 labour dispute cases resolved in courts of first instance in 2007, and this figure decreased to 52,081 cases in 2019—a 15 per cent decrease. A spike also occurred for this figure in 2014, with 93,252 cases. There was a 69 per cent increase in labour disputes from 2013 to 2014. Differently from the previous hypothesis, the lowest amount of labour disputes resolved (52,081 cases) was registered in 2019. Nevertheless, should be highlighted that the second lowest overall number of cases resolved (52,351) was registered in 2015. The average of number of labour disputes resolved between 2007 and 2019 was 60,142 cases per year.

A more marked decline can be observed in relation to the number of pending cases: it decreased from 49,517 labour disputes in 2007 to 25,702 in 2019, a 48 per cent drop. The peak of recorded pending labour disputes was recorded in 2009, with 55,310 cases, whereas the year with the lowest number of pending cases (25,485) was 2018. The average number of pending labour disputes between 2007 and 2019 was 40,878 cases per year.

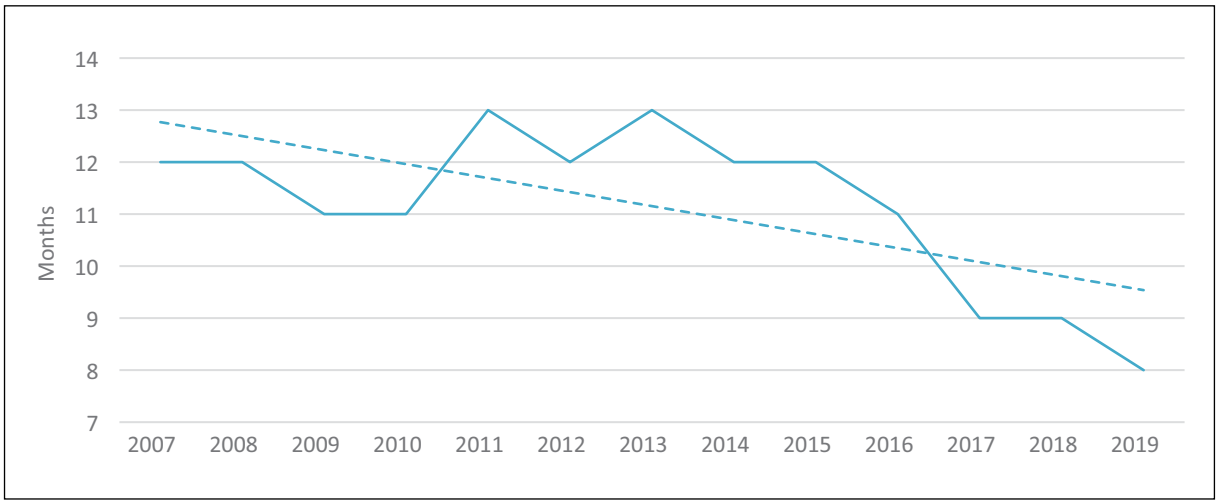
TABLE 4.32 Duration of labour disputes in courts of first instance

Year	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Average duration (months) of labour processes	12	12	11	11	13	12	13	12	12	11	9	9	8

Source: Authors' elaboration.

Table 4.32 and Figure 4.6 represent the duration of labour disputes, expressed in months, before courts of first instance, before 2007 and 2019.

FIGURE 4.6 Duration of labour disputes, 2007–2019 (in months)



Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

It is easily observable that the duration of labour disputes in courts of first instance shortened between 2007 and 2019. The two years in which the maximum average length of the dispute was reached during the period considered were 2011 and 2013. Between 2013 and 2019, the average duration of disputes shortened by 5 months (a 38 per cent reduction).

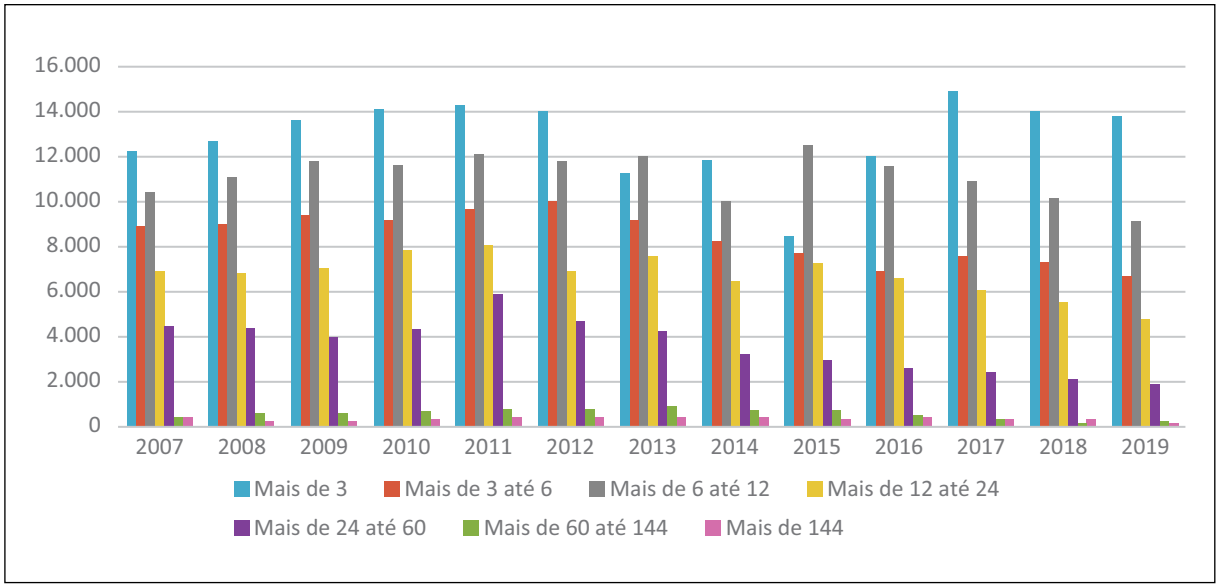
TABLE 4.33 Duration of labour disputes in courts of first instance, 2007–2019

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Up to 3	12209	12681	13611	14118	14285	14012	11232	11875	8435	11966	14914	14001	13796
More than 3 up to 6	8911	8948	9417	9226	9683	9983	9166	8233	7744	6917	7574	7317	6608
More than 6 up to 12	10412	11060	11821	11606	12123	11835	12031	9929	12514	11549	10917	10160	9121
More than 12 up tp 24	6936	6796	7013	7834	8089	6873	7596	6434	7249	6593	6039	5500	4728
More than 24 up to 60	4456	4400	3974	4320	5862	4641	4220	3158	2920	2584	2383	2101	1813
More than 60 up to a 144	412	560	584	708	740	682	848	734	675	481	287	189	224
More than 144	427	287	213	292	436	410	405	422	359	413	342	344	180

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

If the duration of labour disputes has been decreased over time, the same cannot be said for execution, which has been increasing.

FIGURE 4.7 Duration of labour disputes in courts of first instance, 2007–2019



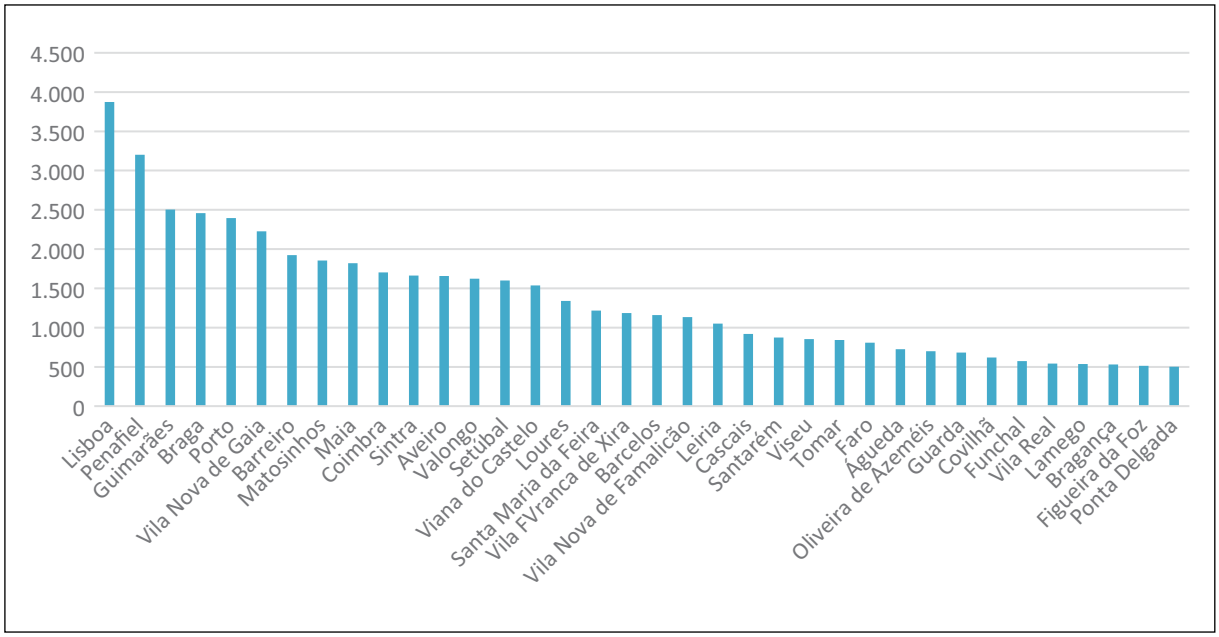
Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.34 Average length of execution, in months

2015	2016	2017	2018	2019
61	70	82	84	79

Source: Gonçalves da Silva (2021).

FIGURE 4.8 Municipalities which received more than 500 labour disputes during 2019



Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.35 Geographical distribution of labour disputes in courts of first instance, 2014–2019

	2019			2018			2017			2016			2015			2014		
Municipality	Receiv.	Resolv.	Pend.	Receiv.	Resolv.	Pend.	Receiv.	Resolv.	Pend.	Receiv.	Resolv.	Pend.	Receiv.	Resolv.	Pend.	Receiv.	Resolv.	Pend.
Águeda	724	707	268	717	710	251	694	891	244	661	534	441	488	496	314	167	190	322
Aveiro	1657	1589	787	1658	1736	719	1519	1541	797	1478	1416	819	1035	997	757	343	577	719
Santa Maria da Feira	1218	1308	652	1180	1228	742	1098	1088	790	1092	1312	780	976	1147	1000	227	205	1171
Oliveira de Azeméis	698	717	525	639	775	544	669	702	680	642	634	713	1145	1087	705	165	105	647
Beja	344	282	337	347	328	275	325	524	256	309	295	455	278	302	441	117	126	465
Cuba	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	11	0
Barcelos	1161	1112	499	1128	1220	450	1168	1182	542	1219	1448	556	1146	1444	785	416	546	1083
Braga	2457	2455	927	2527	2510	925	2538	2541	908	2699	2872	911	2079	2178	1084	565	537	1183
Guimarães	2505	2390	890	2354	2594	775	2221	2315	1015	1976	2032	1109	1711	2779	1165	423	466	2233
Vila Nova de Famalicão	1133	1170	518	1262	1175	555	1213	1184	468	884	950	439	717	1041	505	190	219	829
Bragança	530	501	338	528	467	309	513	517	248	507	515	252	568	596	260	146	165	288
Castelo Branco	228	226	106	248	247	104	274	302	103	291	308	131	242	233	148	70	84	139
Covilhã	618	614	120	604	610	116	561	651	122	535	433	212	247	280	110	129	231	143
Fundão	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Coimbra	1703	1787	436	1745	1777	520	1724	1833	552	1626	1871	661	972	1223	906	324	317	1157
Figueira da Foz	512	509	249	440	476	246	516	527	282	478	488	293	451	459	303	122	124	311
Évora	385	395	227	345	365	237	382	465	257	423	411	340	416	396	328	105	107	308
Faro	808	675	396	781	956	263	748	765	438	735	666	455	549	769	386	178	195	606
Portimão	455	416	446	493	472	407	464	513	386	498	509	435	649	597	446	126	127	394
Vila Real de Santo António	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gouveia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Guarda	681	696	276	677	708	291	592	623	322	730	716	353	446	511	339	115	137	404
Alcobaça	0	0	0	0	0	0	0	0	0	0	3	0	0	0	5	0	0	3
Caldas da Rainha	372	330	274	347	366	232	366	385	251	401	538	270	408	472	407	73	103	471
Leiria	1052	979	760	1129	1125	687	1161	1217	683	1088	1133	739	1011	1299	784	346	311	1072
Pombal	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cascais	919	890	587	847	959	558	934	944	670	890	1102	680	905	1316	892	276	298	1303
Lisboa	3875	4088	1460	3779	4028	1673	4443	5016	1922	3580	4288	2495	3319	4914	3203	944	1050	4798
Loures	1340	1385	707	1389	1508	752	1411	1599	871	1208	1160	1059	1072	1267	1011	258	282	1206
Lourinhã	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sintra	1662	1673	1045	1652	1844	1056	1782	1919	1248	1661	1801	1385	1769	2272	1525	502	609	2028
Torres Vedras	345	363	207	323	310	225	316	322	212	346	397	218	325	355	269	90	104	299
Vila Franca de Xira	1185	1177	523	1185	1201	515	1535	1691	531	815	855	687	766	1598	727	209	203	1559

→

	2019			2018			2017			2016			2015			2014		
Fronteira	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Ponte de Sor	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Portalegre	312	309	119	278	297	116	338	328	135	300	309	125	308	338	134	95	78	164
Amarante	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Maia	1820	1797	938	2140	2235	915	2061	1990	1010	2758	2726	939	1991	2130	907	454	331	1046
Matosinhos	1854	1821	842	1901	2095	809	1742	1886	1003	1921	1942	1147	1520	1968	1168	519	568	1616
Penafiel	3202	3032	1687	3536	3818	1517	3820	3950	1799	3662	3710	1929	3428	3265	1977	987	898	1814
Porto	2395	2379	829	2494	2712	813	2457	2618	1031	2566	2642	1192	1569	1871	1268	432	476	1570
Valongo	1624	1649	728	1681	1863	753	1537	1519	935	1590	1583	917	1538	1542	910	407	252	914
Vila Nova de Gaia	2227	2212	889	2307	2407	874	2098	2032	974	1826	1859	908	1422	1840	941	513	576	1359
Santarém	875	804	568	712	830	497	743	776	615	805	875	648	836	875	718	235	295	757
Tomar	842	832	532	890	882	522	869	857	514	895	947	502	798	1004	554	298	301	760
Barreiro	1923	2008	1443	1677	1658	1528	2405	2612	1509	1685	1728	1716	1626	1542	1759	398	301	1675
Setúbal	1599	1550	772	1270	1353	723	1626	1601	806	1086	1118	781	959	857	813	288	174	711
Sines	192	199	122	250	268	129	242	242	147	228	190	147	246	247	109	57	92	110
Arcos de Valdevez	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Monção	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Ponte de Lima	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Viana do Castelo	1538	1632	530	1405	1460	624	1587	1709	679	1359	1527	801	1060	1218	969	302	313	1127
Vila Real	542	612	451	596	647	521	889	859	572	593	589	542	632	785	538	154	159	691
Lamego	536	544	230	560	579	238	534	649	257	546	452	372	434	526	278	97	103	370
Viseu	853	852	493	842	803	492	836	919	453	925	929	536	895	992	540	238	369	637
Funchal	573	586	631	608	733	644	674	545	769	516	558	640	529	483	682	155	72	636
Angra do Heroísmo	28	72	0	53	55	44	63	73	46	43	52	56	37	55	65	15	9	83
Horta	66	71	18	58	57	23	48	46	22	27	65	20	39	76	58	15	10	95
Ponta Delgada	502	507	190	482	490	195	559	568	203	525	531	212	507	567	218	129	153	278
Ribeira Grande	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
São Roque do Pico	18	19	19	24	20	20	22	32	16	49	37	26	24	37	14	12	3	27
Santa Cruz Graciosa (R.A.A)	10	9	8	10	5	7	3	5	0	5	7	4	8	6	6	0	0	4
Santa Cruz das Flores	10	9	8	10	7	7	12	13	4	10	10	5	10	6	5	0	0	0
	20	16	7	9	9	3	7	8	3	25	27	4	14	18	6	5	6	10
Vila Praia da Vitória	152	112	49	28	32	9	36	36	13	28	50	13	41	51	35	7	24	45
Vila do Porto	16	13	10	13	14	7	11	12	8	8	4	9	8	12	5	0	0	9

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

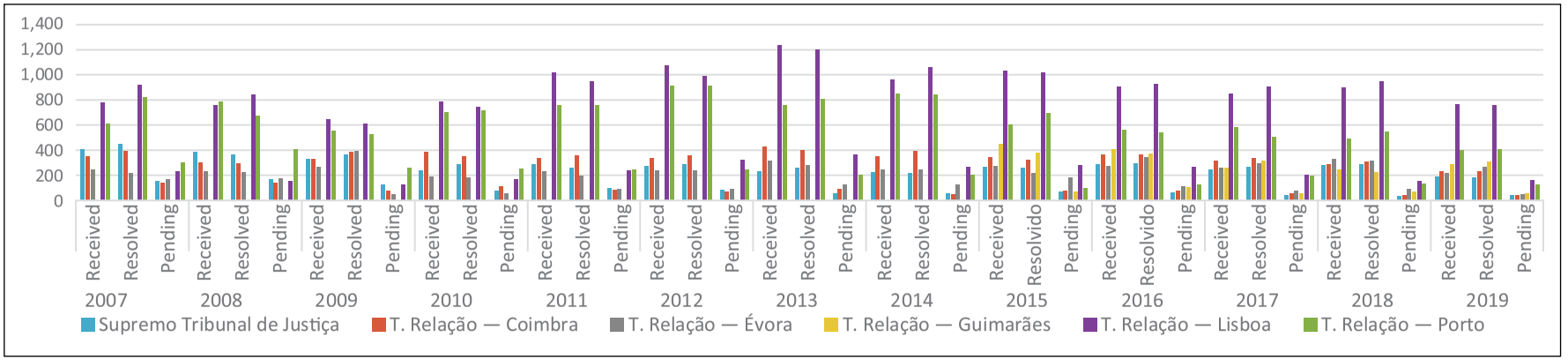
TABLE 4.36 Amount of received, resolved and pending labour disputes in higher courts, 2007–2019

	2007			2008			2009			2010			2011			2012			2013		
	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.	Receb.	Resol.	Pend.
A	406	446	150	380	364	166	329	365	120	238	289	69	284	258	95	276	290	81	229	257	53
B	348	390	135	296	296	135	324	384	75	383	349	109	333	361	81	337	354	64	423	398	89
C	242	218	163	227	220	170	267	388	45	185	176	54	228	192	90	233	235	88	313	278	123
D	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
E	776	923	230	761	839	152	645	606	124	786	743	167	1.020	950	237	1.072	990	319	1.236	1.196	359
F	611	817	298	782	672	408	556	524	263	698	713	248	757	762	243	909	912	240	762	805	197
T	**2.383**	**2.794**	**976**	**2.446**	**2.391**	**1.031**	**2.121**	**2.267**	**627**	**2.290**	**2.270**	**647**	**2.622**	**2.523**	**746**	**2.827**	**2.781**	**792**	**2.963**	**2.934**	**821**
(continued)																					
	2014			**2015**			**2016**			**2017**			**2018**			**2019**					
	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.	Recei.	Resol.	Pend.			
A	217	212	58	268	258	68	286	294	60	243	263	40	278	288	30	187	180	37			
B	348	388	49	340	317	72	365	365	72	314	331	55	285	303	37	231	232	36			
C	246	242	127	270	215	182	272	342	112	254	290	76	326	310	92	219	266	45			
D	0	0	0	444	375	69	403	371	101	255	308	48	243	223	68	288	307	49			
E	961	1.058	262	1.033	1.018	277	905	924	258	849	904	203	895	949	149	767	759	157			
F	847	845	199	594	696	97	562	540	119	583	506	196	484	546	134	399	408	125			
T	**2.619**	**2.745**	**695**	**2.949**	**2.879**	**765**	**2.793**	**2.836**	**722**	**2.498**	**2.602**	**618**	**2.511**	**2.619**	**510**	**2.091**	**2.152**	**449**			

Note: A= Supremo Tribunal de Justiça; B= T. Relação – Coimbra; C= T. Relação – Évora; D= T. Relação – Guimarães; E= T. Relação – Lisboa; F= T. Relação – Porto; T= Total.

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

FIGURE 4.9 Received, resolved and pending labour cases in the higher courts, 2007–2019



Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.37 Performance indicators of courts of first instance regarding labour disputes: resolution rate and disposition time, 2007–2019

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Res. R.	100.74%	95.36%	95.23%	102.36%	109.18%	104.97%	110.71%	98.54%	118.51%	104.75%	105.08%	105.50%	99.59%
Disp. T.	295	342	328	329	278	271	266	163	234	214	181	169	180

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

Performance indicators of higher courts (2007–2019): resolution rate and disposition time.

Table 4.38 reports resolution rates and disposition times for labour disputes in higher courts between 2007 and 2019.

TABLE 4.38 Resolution rate and disposition time for labour disputes in higher courts, 2007–2019

Ano	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Supremo Tribunal de Justiça													
Res. R.	109.85%	95.79%	110.94%	121.43%	90.85%	105.07%	112.23%	97.70%	96.27%	102.80%	108.23%	103.60%	96.26%
Disp. T.	123	166	120	87	134	102	75	100	96	74	55	38	75
T. Relação—Coimbra													
Res. R.	112.07%	100.00%	118.52%	91.12%	108.41%	105.04%	94.09%	111.49%	93.24%	100.00%	105.41%	106.32%	100.43%
Disp. T.	126	166	71	114	82	66	82	46	83	72	61	45	57
T. Relação—Évora													
Res. R.	90.08%	96.92%	145.32%	95.14%	84.21%	100.86%	88.82%	98.37%	79.63%	125.74%	114.17%	95.09%	121.46%
Disp. T.	273	282	42	112	171	137	161	191	309	119	96	108	62
T. Relação—Guimarães													
Res. R.	0	0	0	0	0	0	0	0	84.46%	92.06%	120.78%	91.77%	106.60%
Disp. T.	0	0	0	0	0	0	0	0	67	99	57	111	58
T. Relação—Lisboa													
Res. R.	118.94%	110.25%	93.95%	94.53%	93.14%	92.35%	96.76%	110.09%	98.55%	102.10%	106.48%	106.03%	98.96%
Disp. T.	91	66	75	82	91	118	110	90	99	102	82	57	75
T. Relação—Porto													
Res. R.	133.72%	85.93%	94.24%	102.15%	100.66%	100.33%	105.64%	99.76%	117.17%	96.09%	86.79%	112.81%	102.26%
Disp. T.	133	221	183	127	116	96	89	86	51	80	141	90	112

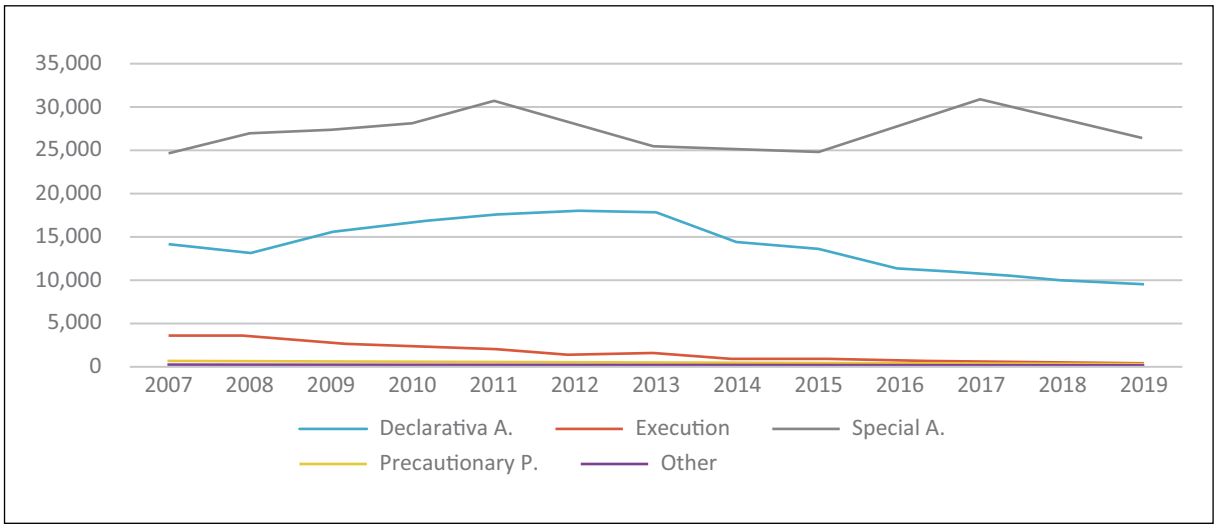
Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.39 Labour disputes by judicial action in courts of first instance, 2007–2018

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Declarative A.	14242	13262	15587	16703	17553	18033	17895	14443	13623	11407	10787	9967	9555
Execution	3625	3474	2742	2427	2075	1369	1510	899	982	814	507	497	264
Special A.	24819	27032	27283	28164	30693	28252	25377	24957	24866	27925	30909	28915	26471
Precautionary P.	775	682	785	583	641	606	533	406	353	276	207	190	188
Other	301	282	236	227	256	176	182	78	74	83	49	45	51
Total	43762	44732	46633	48104	51218	48436	45497	40783	39898	40505	42459	39614	36529

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

FIGURE 4.10 Labour disputes by type of judicial action, 2007–2019



Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2019).

4.4.1 Disaggregated judicial action types in labour disputes in first instance courts (2007–2018)

TABLE 4.40 Declarative actions

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Absence, declaration of nullity and annulment	0	0	0	0	0	0	0	0	0	0	0	0	0
Illicit facts	0	0	0	0	0	0	0	0	4	0	0	0	0
civil liability	0	0	0	0	0	0	0	0	0	0	0	0	0
Interpretation, validity or performance of contracts	0	0	0	0	0	0	0	0	0	0	0	0	0
Civil debt	0	0	0	0	0	0	0	0	0	0	3	0	0
Commercial debt	0	0	0	0	0	0	0	0	0	0	6	0	0
Insurance premiums debt	0	0	0	0	0	0	0	0	0	0	0	0	0
Hospital debt	4	0	6	5	3	3	5	0	0	0	0	0	0
Debt provision of services	0	0	0	0	3	0	4	11	0	0	0	0	0
Fulfilment of contracts/other obligations	4	170	435	495	478	523	648	473	441	320	247	219	209
Establishment of employment contract	480	326	169	114	100	130	158	95	57	61	54	37	39
Professional category	0	0	0	0	0	0	0	0	4	3	3	3	0
Remuneration, other salary payments and indemnities	9332	7990	7142	6142	6521	6838	6687	5173	5010	4384	4201	3777	3721
Disciplinary sanctions	67	48	82	107	174	135	168	150	181	214	186	133	126
Term of employment	197	163	159	253	341	446	486	429	516	468	527	577	517
Dismissal challenge	2455	2701	4379	5265	5207	4534	3842	2624	2247	1763	1476	1366	1181
Termination/initiative of the worker invoking just cause	227	281	964	1650	1955	2194	2305	2107	1936	1623	1350	1182	1257
After termination of employment contract	1276	1212	1961	2389	2532	3040	3447	3243	3056	2487	2698	2655	2491

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.41 Execution

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
De facto provision	160	78	50	47	29	15	10	5	13	6	4	0	3
Delivery of thing	191	200	121	77	63	18	26	10	12	5	0	5	0
Insurance premiums debt	0	10	25	7	4	0	0	3	3	3	0	0	0
Hospital debt	9	5	11	8	10	10	9	0	5	0	0	0	0
Debt provision of services	234	220	193	185	134	102	88	46	67	50	39	24	6
Failure to pay costs	0	0	0	0	0	0	0	0	0	0	0	0	0
Failure to pay fines or fines	0	0	0	0	0	0	0	0	0	0	0	0	0
Other or N.E.—fulfil contracts / other obligations	0	0	0	0	0	0	0	0	0	0	0	0	0
Remuneration, other salary payments and indemnities	2313	2338	1878	1668	1469	979	1142	677	691	587	378	395	209
Debts of contributions to social security institutions	41	23	20	15	10	9	11	8	8	10	0	0	0
Debts to union bodies	6	0	0	0	0	0	0	0	0	0	0	0	0
Debts to labour conciliation services	284	249	194	125	113	53	37	28	30	24	11	9	6
Rights resulting from accidents at work	331	309	238	260	209	161	160	106	133	111	65	54	36
Work accident N.E.	0	0	0	0	0	0	0	0	0	0	0	0	0
Accident at work/d.prof. HUH.	0	0	0	0	0	0	0	0	0	0	0	0	0

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.42 Special actions

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Hospital debt	367	319	442	753	972	689	678	419	288	288	333	317	302
Recognition of existence of work contract	0	0	0	0	0	0	0	282	210	186	353	258	321
Other or N.E.—term of employment	0	0	0	6	12	22	46	64	85	40	30	34	31
Dismissal challenge	0	0	4	2272	3252	4361	4368	3205	2949	2532	2116	1973	1823
Challenge of collective dismissal	27	33	58	71	89	113	110	129	127	95	114	69	40
Rights resulting from accidents at work	16547	17083	17732	17107	17864	16156	15538	14501	16692	17120	16963	17303	15184
Disability or pension review	4776	6064	5898	4813	5701	4168	2264	4515	1907	5224	8580	7188	7167
Redemption of pensions	2067	2267	1930	2168	1733	1629	1480	961	1471	1448	1308	802	582
Extinction of rights	906	1128	1045	801	797	858	619	605	897	717	899	813	791
Fixing disability	0	6	7	5	5	0	0	4	6	4	8	7	6
Professional diseases	82	78	88	64	78	46	39	46	45	51	48	29	47
Work accident N.E.	0	8	40	36	34	19	34	33	62	123	136	109	153
Car reform	0	0	0	0	0	0	0	0	0	0	0	0	0
Litigation of pension institutions	12	10	7	17	86	53	74	31	25	15	10	6	13
Union controversy	10	0	9	6	12	7	0	7	0	0	0	0	3
Other or N.E.—others	0	0	3	7	5	21	14	23	27	17	5	3	0
HUH.	19	29	20	38	52	109	109	130	74	64	5	4	6

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.43 Precautionary proceedings

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Suspension of corporate resolutions	0	0	0	0	0	0	0	0	0	0	0	0	0
Enrolment (arrolamento)	0	0	0	0	0	0	0	0	0	0	0	0	0
Provisional repair arbitration	0	0	0	0	0	0	0	0	0	0	0	0	0
Detention	7	4	32	39	44	38	36	50	79	71	50	46	44
Protection of safety, hygiene and health at work	0	0	0	0	0	0	0	0	0	0	0	0	0
Suspension of dismissal	372	323	345	218	237	202	152	123	119	89	65	61	69
Common precautionary procedure	393	348	402	320	350	350	336	220	145	106	91	81	74
Other or N.E.—precautionary procedures	0	0	0	0	0	0	0	0	0	0	0	0	0

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.44 Other

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Civil debt	0	0	0	0	0	0	0	0	0	0	0	0	0
Hospital debt	0	0	0	0	0	0	0	0	0	0	0	0	0
Debt provision of services	0	0	0	0	0	0	0	0	0	0	0	0	0
Other or N.E.—fulfill contracts / other obligations	0	0	0	0	0	0	0	0	0	0	0	0	0
Third party embargoes	0	0	0	0	0	0	0	0	0	0	0	0	0
Suspension of dismissal	0	0	0	0	0	0	0	0	0	0	0	0	0
Appeal against the request for legal aid	0	0	0	0	0	0	0	0	0	0	0	0	0
Suspicion	0	0	0	0	0	0	0	0	0	0	0	0	0
Opposition to enforcement / attachment	174	169	130	136	99	68	58	29	14	22	6	3	3
Cancellation of sale	0	0	0	0	0	0	0	0	0	0	0	0	0
Litigation of pension institutions	0	0	0	0	0	0	0	0	0	0	0	0	0
Deposits	0	3	0	0	0	0	0	0	0	0	0	0	0
Other or N.E.—others	127	105	99	84	144	97	117	43	49	55	37	40	42

Source: Authors' elaboration on the basis of (Direção-Geral da Política de Justiça 2020).

4.4.2 Labour mediation system (2015–2019)

TABLE 4.45 Number of received, resolved and pending labour mediation requests in the Labour Mediation System (SML) under the responsibility of the *Direção-Geral da Política de Justiça* (DGPJ)

	2015	2016	2017	2018	2019
Received	25	18	13	14	30
Resolved	23	18	9	17	28
Pending	0	0	6	3	5

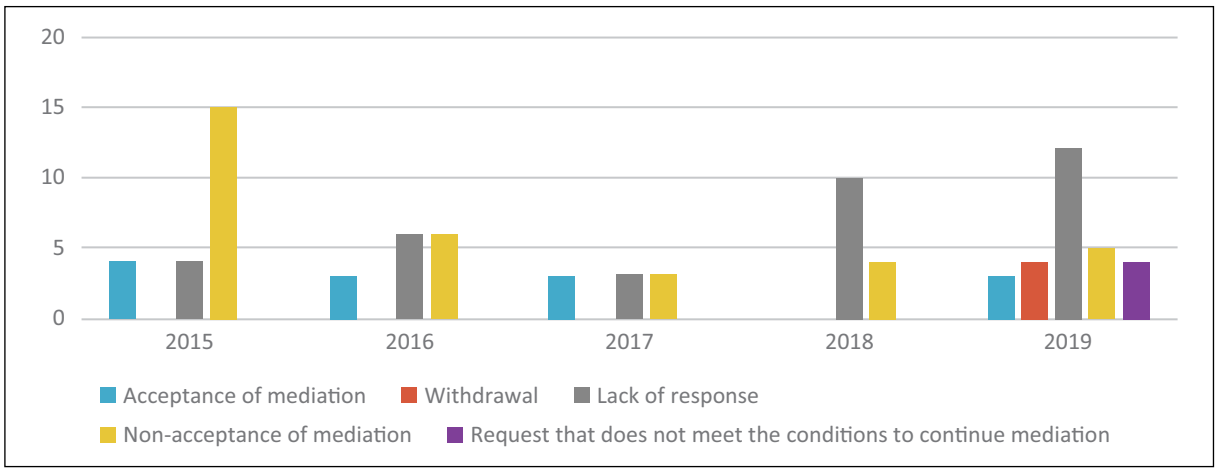
Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.46 SML mediation requests ended, by term modality

	2015	2016	2017	2018	2019
Acceptance of mediation	4	3	3	0	3
Withdrawal	0	0	0	0	4
Lack of response	4	6	3	10	12
Non-acceptance of mediation	15	6	3	4	5
Request that does not meet the conditions to continue mediation	0	0	0	0	4

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

FIGURE 4.11 Term modality of SLM requests, 2015–2019



Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

TABLE 4.47 Number of received, resolved and pending SLM lawsuits

	2015	2016	2017	2018	2019
Received	4	3	3	0	3
Resolved	6	3	0	4	0
Pending	0	0	0	0	0

Source: Authors' elaboration based on Direção-Geral da Política de Justiça (2020).

A. Conciliation and mediation cases (2005–2019)

TABLE 4.48 Number of received, resolved (with related outcome) and pending labour conciliation and mediation cases under the responsibility of the DGERT

	Conciliation				Mediation			
	Requests	Resolved (agreement)	Resolved (no agreement)	Resolved, total	Requests	Resolved (agreement)	Resolved (no agreement)	Resolved, total
2005	85	50	47	97	10	0	13	13
2006	84	61	31	92	21	0	21	21
2007	76	43	25	68	10	0	13	12
2008	75	27	25	52	17	1	14	15
2009	93	49	38	87	14	0	6	6
2010	85	35	38	73	14	1	1	2
2011	77	29	51	80	15	0	10	10
2012	35	15	20	35	8	1	7	8
2013	52	19	33	52	7	1	6	7
2014	61	33	28	61	11	1	10	11
2015	63	20	22	42	11	2	5	7
2016	38	17	21	38	10	1	9	10
2017	58	25	18	43	12	0	9	9
2018	51	30	23	53	17	2	12	14
2019	42	22	19	41	7	3	9	12

Source: Authors' elaboration based on DGERT (2020).

The most relevant figures concerning Portugal's labour conflict resolution system are concentrated in the major cities/regions (such as Lisbon, although some smaller cities such as Penafiel presented a very high number of labour disputes), and in the main economic sectors. Moreover, the data showed that in the period 2015-2019 there was relative stability, with higher figures for conciliation than for mediation, mainly because it is a faster and cheaper way to access the labour justice in the country.

Finally, most conflicts were resolved within 3 months, followed by the '6 to 12 month' category. The main cause were issues related to 'remuneration, other salary payments and indemnities'

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CHAPTER 5. CASE STUDY: REPUBLIC OF KOREA

5.1 EMPLOYMENT PROTECTION

5.1.1 Evolution of substantive labour law

As reported by Lee and Jung (2019), several legal systems of other countries have contributed to shape Korea's labour law. The Japanese system should be mentioned first, which was itself inspired by models adopted in advanced capitalist countries. Further, the regulation of collective agreements was significantly shaped by German legislation, while unfair labour practices were subject to the influence of the United States' Wagner Act.

The end of Japan's colonial rule led to significant changes in the country's legal system. The Constitution was adopted in 1948, and in 1953—during the Korean war—four major labour laws were enacted: the Labour Standard Act, the Labour Relations Commission Act, the Trade Union Act, and the Labour Dispute Adjustment Act. The former two acts, while repeatedly amended, are still in force today, while the latter two were merged in 1997 into the Trade Union and Labour Relations Adjustment Act.

Under the military government of the 1960s, economic growth became the main priority. In this context, a strong rural-urban migration took place as a result of industrialisation. Labour law was amended to ensure 'peaceful' labour relations and minimise the influence of trade unions (OECD 2000), which were required to be affiliated with industry federations under a single, government-sponsored national entity: the Federation of Korean Trade Unions (FKTU), maintained until the late 1980s. At the corporate level, the faculties and prerogatives of management/employers were strengthened, while collective bargaining remained underdeveloped. Further, the intervention of third parties in collective bargaining and labour disputes was strictly forbidden. As a counterpart to these restrictions, protective labour regulations concerning wages and working conditions were adopted or strengthened.

In 1987, the country shifted towards democracy. A slow process of labour law reform and democratic consensus-building was set in motion, gradually incorporating trade unions in national decision-making. However, between 1987 and 1997, the progress towards a comprehensive labour law reform was slow and social consensus-building was limited by the continuing prohibition of trade union pluralism—i.e., the refusal to legalise new trade union organisations that do not fall within the scope of FKTU's monopoly.

During the 1997 Asian financial crisis, the country sought the assistance of the International Monetary Fund (IMF). That same year, a Memorandum of Understanding was signed, through

which the country committed to implementing several structural reforms. In particular, the labour market reform strengthened the employment insurance system to facilitate the redeployment of labour, in parallel with further steps to improve labour market flexibility (Republic of Korea 1997). At the national level, a Tripartite Commission composed of representatives of labour, business, government, and the public interest, was created in 1997 to help overcome the crisis. Most of the Commission's agreements, made in the spirit of fair burden sharing, were subsequently adopted by the National Assembly.

In 1998, the National Assembly allowed companies to collectively dismiss workers without consent from their unions when facing urgent managerial needs, such as mergers and acquisitions aiming at preventing the aggravation of financial difficulties. Further, the 'Act relating to Protection, etc., for Dispatched workers' was also enacted in 1998, providing a legal basis to the already widespread practice of using dispatch labour.

A relevant critique was that the amendments related to collective dismissals would not alleviate the rigidity of the labour market. In particular, the ambiguous definition of the clauses whereby the employer/management must make all possible efforts to avoid collective dismissals and should carry out sincere discussions with workers' representatives would create uncertainty and consequently pave the way for large-scale industrial disputes (Kim 2007). As a result, firms, especially large companies where union power is generally strong, would prefer contract buyout measures to collective dismissals and rely more on outsourcing and atypical forms of employment, such as temporary agency workers. Therefore, non-standard forms of employment (including, in addition to dispatched workers, subcontracted workers, independent self-employed workers, domestic and daily workers, etc.) have gained prominence.

While the number of non-regular workers continued to rise due to the 1997 crisis, another important effect on Korea's labour market was a drastic reduction in the number of regular workers, which led to a historically high unemployment rate. Even after 1999, when the economy began to recover, the number of regular workers continued to drop (ILO 2012).

In 2006 the Act on the Protection, etc. of Fixed-term and Part-time Employees was enacted to protect these categories of non-regular workers. The Act Relating to Protection, etc., for Dispatched Workers was amended the same year.

Unlike the 1997 Asian crisis, the 2008/9 global crisis produced relatively moderate fluctuations in the employment growth rate (-0.6 per cent in the first two quarters of 2009 against -7 per cent in the third quarter of 1998) (ILO 2012). Further, the latter crisis mostly affected non-regular workers, impacting regular workers to a lesser extent, again unlike the Asian crisis: while the number of employed regular workers rose steadily—increasing total employment—the number of temporary and self-employed workers dropped.

As pointed out in Jung (2018), several factors served as an impulse to change labour relations. The existing labour regime was mainly criticised for:

- An excessive focus on flexibility and outsourcing aiming at corporate efficiency, creating job insecurity and increasing the abovementioned market dualism.
- Workplace industrial relations centred on bargaining at the corporate level, widening the gaps in working conditions between firms and creating labour market distortions.
- Non-representativeness of non-regular workers in trade unions mostly made up by regular workers (and the inability of the latter to address labour market dualism, main focus on employment and wage stability of regular workers).
- Discrimination by employment type, gender and age.

In addition, a further key external driver of change in the existing labour regime can be identified in the new government, as a result of the 'candlelight revolution'. The government committed to a new labour regime, which—in a radical shift from the past—aims to:

1. Create quality jobs in the public sector, including through the conversion of non-regular workers and the increase of youth employment quotas in public organisations.
2. Strengthen labour inspection administration to prevent unfair labour practices.
3. Expand basic labour rights (through the ratification of ILO's core conventions) and improve the system for the representation of workers' interests.

As a result, the performance-based pay system for public workers was abolished, the minimum wage per hour significantly increased (almost +16.5 per cent in 2018, compared to 2017), the process of converting non-regular workers to regular status in the public sector was started, and membership in trade union started to steadily increase. Further, industry-level bargaining has increased, although it has not spread across all industries.

While the government has received criticisms regarding the delayed and incomplete implementation of this new labour roadmap (see, for example, Lee (2019)), some amendments to the existing legal regime have been carried out. As reported by Suh (2019), since the beginning of 2019 there have been a series of major changes in Korean labour laws, including the enforcement of a 52-hour work week in government organisations, state-run entities and other companies with more than 300 employees, which became effective in

April. Smaller businesses were given an extended grace period, up to July 2021, before the law applied to them. Non-compliant employers are now subject to penalties of up to two years in prison or a fine of up to KRW20 million (USD18,000).

Other changes to Korean labour laws that came into effect in July 2019 include measures to prevent workplace harassment. The amended Labour Standards Act mandates employers to investigate workplace harassment and take disciplinary action against harassers. Employers are also required to take remedial measures and are prohibited from inflicting secondary harm. They must include measures to prevent workplace harassment as well as disciplinary measures in their employment rules. Failure to abide by these obligations may result in up to three years in prison or a fine of up to KRW30 million. This measure aims to contain/repress the widespread practice of *Gapjil*—the abusive treatment of subordinates by people in a higher hierarchic position (Lee 2019).

Finally, the Fair Hiring Procedure Act—which applies to workplaces with at least 30 employees—was amended in 2019 to strengthen the protection of personal information (e.g., physical characteristics, marital status, etc.) of job applicants: such information can only be requested when it is deemed crucial for the evaluation of the suitability of the applicant.

5.1.2 Constitutional protection of labour

The 1987 Constitution ensures, through Art. 32, the right to work to all citizens and remits to statutory legislation the determination of working conditions that must guarantee human dignity. In parallel, the same disposition attributes to citizens the duty to work, whose normative contents are to be defined once again through legislation. In connection with the above, Korea's fundamental law also enshrines freedom of occupation for its citizens (Art. 15). Further, the promotion of employment and the guarantee of optimum wages are established as a responsibility of the State, whereas the establishment of a minimum wage system is set as an obligation. Finally, Art. 32 affords special protection to working women and children. In turn, Art. 33, with a view to enhance working conditions, guarantees the workers' right to independent association, collective bargaining and collective action. The same norm establishes limits to these rights for public officials and important defence industry workers. While lockouts are not guaranteed by Korea's Constitution, the Supreme Court has repeatedly confirmed the ruling that recognises an employer's right to do so (*Marushima Suimon* case, Supreme Court (25 April 1975), 29 Minshu 481).

Finally, the Constitution allows for the restriction/limitation of freedoms and rights of citizens only through legislation, and only when absolutely necessary for national security, the maintenance of law and order or public welfare (Art. 37). Therefore, the question of balancing the protection of workers against public interests should be always considered when interpreting labour law.

5.1.3 Substantive labour law

A. Labour law contextualisation and features

Labour legislation aims to protect workers, considering the asymmetrical power relations between workers and employers, thus modifying the traditional principles of civil private law. In Korea's legal system, labour law can be categorised as special legislation (Kim 1994).

As reported by Lee and Jung (2019, 39) the scope of Korea's labour law is the regulation of the relationships between employers and subordinate workers who provide them labour. Thus, the subordinate labour relationship represents a key element for defining and applying labour law: in deciding whether to give the protection afforded by labour regulations, the reality of the situation takes precedence over the form of the contract (primacy of reality).

Further, labour law has an imperative nature both in individual and collective relations. As for individual labour relations, in accordance with Art. 15 of the Labour Standards Act (LSA), a labour contract which does not meet the standards provided for in the Act shall be null and void to that extent. Further, those conditions invalidated in accordance with these considerations shall be governed by the standards provided in the Act. Likewise, for collective labour relations the Trade Union and Labour Relations Adjustment Act (TULRAA) provides, in Art. 33, that any part of the rules of employment or contract of employment which violates the standards concerning working conditions and other treatment of workers as specified by collective agreement shall be null and void.

Finally, the country's labour law relies on the respect for labour-capital autonomy. Hence, negotiations between workers and management/employer should be the first and primary means of resolving disputes.

Korea's labour law can be subdivided into three major branches: individual labour relations law, collective labour relations law and labour market law.

- Individual labour relations law is characterised by an individual relationship between an employer and a worker and mainly relates to the initiation, development and termination of the employment contract, which is the basis of this relationship.

- Collective labour relations law refers to the organisation, establishment and management of workers' unions, and the nature of collective bargaining between these groups and their respective employers (or employers' associations).

- Two fundamental constitutional provisions stand at the basis of the mandate of labour market law: as mentioned, the constitution defines work as both a right and a duty.

This bears two main consequences: the State should enable citizens to obtain suitable employment opportunities; and it should guarantee the livelihoods of those who cannot obtain such opportunities.

Sources of labour law are reported in Table 5.1.

TABLE 5.1 Sources of labour law

Constitution		
Legislation		
Individual labour law	**Collective labour law**	**Labour market law**
• Labour Standards Act (1997) • Minimum Wage Act (1986) • Occupational Safety and Health Act (1990) • Industrial Accident Compensation Insurance Act (1994) • Act on the Prevention of Pneumoconiosis and Protection, etc., of Pneumoconiosis Workers (1984) • Wage Claim Guarantee Act (1998) • Worker Retirement Benefit Security Act (2005) • Act on the Protection, etc., of Fixed Term and Part-Time Employees (2006) • Act on the Protection, etc., for Dispatched Workers (1998)[1] • Act on the Employment Improvement, etc., for Construction Workers (1996)	• Trade Union and Labour Relations Adjustment Act (1997) • Labour Relations Commission Act (1997) • Act on the Promotion of Worker Participation and Cooperation (1997) • Act on the Establishment, Operation, etc., of Public Officials' Trade Unions (2006) • Act on the Tripartite Commission for Economic and Social Development (1999) • Act on the Establishment, Operation, etc., of Trade Unions for Teachers (1999)	• Basic Employment Policy Act (1993) • Employment Security Act (1994) • Workers' Vocational Skills Development Act (1997) • Act on Equal Employment and Support for Work-Family Reconciliation (1987) • Act on Employment Promotion and Vocational Rehabilitation for Disabled Persons (1990) • Act on Age Discrimination Prohibition in Employment and the Employment Promotion of the Elderly (1991) • Employment Insurance Act (1993) • Act on Foreign Workers' Employment, etc. (2003)
Customs and practice		
Although debated among scholars, customs and practice can be used as a source of law when labour legislation does not provide resolution to a dispute, as long as these do not contradict positive law or public order.		
Autonomous regulations (collective agreements, work rules and union bylaws)		
Administrative interpretation and case law		
Administrative interpretations occur when the Ministry of Employment and Labour or the Ministry of Justice provide their official opinions, or when the former Ministry provides instructions on an interpretative standard of labour. These interpretations, despite not having a binding force before the courts (and thus not being sources of law) have an authoritative value and are, in principle, observed. In parallel, case law—which fundamentally complements the abstract/general fundamental rules prescribed by legislation—is not a legal source, as can be inferred from Art. 103 of the Constitution. However, similarly to administrative interpretation, case law (particularly the rulings of the Supreme Court) has an important authoritative value.		
International Sources		
Pursuant to Art.6 of the Constitution, treaties (including, relevantly to our context, ILO's conventions) duly concluded and promulgated in accordance with the same fundamental law and with the generally recognised rules of international law shall have the same effect as the domestic laws of Korea.		

Source: Authors' elaboration based on Lee and Jung (2019).

1. Note that this part of the law regulates the conditions under which a dispatched worker may be employed but does encompass sub-contractors who are subject to other regulations.

As for the possible conflicts among the sources of labour law, it should first be noted that the Constitution takes precedence over all other laws. Further, pursuant to the principle of priority of higher laws, these are preferred to lower laws. Special laws are preferred to general laws (principle of priority of special laws). When two laws are applicable to the same situation, the law that has been most recently revised is preferred (principle of priority of most recent law). Finally, labour laws promoting better working conditions are preferred over the principle of priority of higher laws (principle of priority of better laws).

In terms of employment protection, individual labour relations law, as a form of individual contract law, contains numerous labour-protection statues which regulate in detail the labour relationship, as well as the mechanisms to enforce them. Conversely, collective labour relations law regulates the establishment of collective organisations and collective activities. These regulations aim to provide a legal framework for promoting the development of an autonomous relationship between unions and industry, thus serving as an arena in which management and the labour force can interact on an equal basis (Kazuo 2002, 494).

The LSA stands at the core of Korea's labour law, enunciating in its first Chapter the following basic principles:

- **Prohibition of lowering working conditions.** The LSA prescribes minimum standards for working conditions. Consequently: a) better working conditions cannot be reduced for matters of compliance with the LSA; and b) working conditions not meeting the minimum standards are null and void, substituted by the standards of the LSA. Ideally, working conditions should go beyond minimum standards, so as to enable the citizens' constitutional right to a decent human life (Art. 34, 1).

- **Equality in determining working conditions.** Art. 4 of the LSA provides that working conditions shall be determined based on mutual agreement between employers and workers on equal footing. Yet, considering that the employee has less bargaining power than the employer, the Constitution attributes to the former the right to independent association, collective bargaining and collective action (Art. 33).

- **Faithful fulfilment and observance of contractual norms.** Both employers and workers must comply with collective agreements, work rules and terms of labour contracts and abide by them in good faith (Art. 5).

- **Equal treatment.** In accordance with Art. 6 of the LSA, there must be no discrimination on the grounds of gender, or discriminatory treatment in working conditions based on nationality, creed, religion, or social status. The provision translates the constitutional principle of equal treatment (Art. 11 of the Constitution) into the field of labour law . The term 'working conditions' refers to the treatment of any worker in its entirety, within a labour contract relationship. Discriminatory treatment can be intended as placing a specified

or particular group of workers in a separate classification from that of other workers and subjecting them to differential treatment. Discriminatory actions/treatments are null and void, with a corresponding set of sanctions. It is worth noting that discriminatory treatment occurring before the formation of a contract is not covered by Art. 6.

- **Prohibition of forced labour.** Workers cannot be forced to work against their will through the use of violence, intimidation, confinement or any other means which unlawfully restrict their mental and physical freedom (Art. 7 of the LSA). Also, in this context, the provisions reflect the constitutional right of personal liberty (Art. 12).

- **Prohibition of violence.** No employer shall physically abuse a worker for the occurrence of accidents or for any other reason (Art. 8).

- **Elimination of intermediary exploitation**. Unless otherwise provided by law, no one shall intervene in the employment of another person, either to make a profit or to gain benefits as an intermediary (Art. 9).

- **Guarantee of the exercise of civil rights.** No employer shall reject a request from a worker to be granted time necessary to exercise their franchise or other civil rights, or to perform official duties during his working hours. However, the time requested may be changed, provided that such a change does not impede the exercise of those rights or the performance of those civil duties (Art. 10).

Finally, the LSA provides specific protection for minors and women, as specifically required by the Constitution. The LSA provides that neither a parent nor guardian shall enter a labour contract on behalf of a minor. Likewise, it allows the parent and/or guardian, or the Minister of Employment and Labour to terminate a labour contract, if the latter may be deemed disadvantageous to the minor. If an employer establishes a labour contract with a person under the age of 18, the employer must provide a statement of working conditions in writing, pursuant to Art. 17. A minor is entitled to claim the wage in his or her own right; therefore, parents or the guardian cannot receive the minor's wage. Further, the LSA affords specific protections pertaining to the kind of work a minor can carry out, as well as working hours, night work and other working conditions (for example, the prohibition of hazardous/ dangerous work).

Regarding women, it is worth recalling that non-discrimination in working conditions on the basis of gender is protected through Art. 6 of the LSA. Further, the Act provides protection to female workers regarding working conditions. Women are also protected against being employed in hazardous and dangerous conditions, excessive overtime work, there are restrictions on night work and holiday work, there is a guarantee for menstrual leave, legal protection for pregnant women, specified time off for prenatal examinations and nursing hours, among other provisions.

B. The employment contract

In Korea's legal system, the individual employment relationship originates from the employment contract. An individual working contract may be only concluded with the consent of both parties. The LSA does not require any specific form for the conclusion of a contract; this consent may be deemed to be given tacitly. In addition, both parties must agree only on important matters (such as the nature of the job, the extent of remuneration, etc.) and, thereafter, the details may be left to work rules established in writing by the employer.

In accordance with Art. 17 of the LSA, for an employment contract to be concluded, the employer must clearly state the wages to be paid, contractual working hours holiday entitlement (Art. 55), annual paid leave (Art. 60) and other working conditions as stipulated by the presidential decree. An employer shall issue a written statement to the worker specifying the components and methods of calculation and payment of wages and other matters described in Art. 17, paragraphs 2 to 4. If these are altered due to reasons prescribed by the presidential decree, such as changes in collective agreements or employment rules, the statement shall be issued to the worker at their request. The phrase "other working conditions" (Art. 17) is interpreted as meaning the location and condition of the workplace, the kind of work, matters which should be clarified by rules of employment, and matters concerning dormitory regulations (if there is dormitory provision).

C. The employment relationship

As Jung and Lee point out (2019, 111) any employment relationship comes into being following the establishment of a labour contract, in which the employee promises to provide labour to the employer while the employer ensures the payment of wages for that labour. Employment relationships have the following characteristics: they involve subordination, since the employee provides labour in accordance with the employer's instructions; are a kind of continuous legal relationship; and generally occur in the form of collective relations.

The LSA, in Art. 2, defines the employee—regardless of being engaged in whatever occupation—as a person who offers work to a business or workplace for the purpose of earning wages. The employer is a business owner or a person responsible for the management of a business, or a person who acts on behalf of a business owner with respect to matters relating to workers. Expanding on these definitions, the Supreme Court identified the following set of factors that point to an employer-employee relationship (Lee 2015):

- The employer determines the individual's duties, time and location of work.
- There are applicable work rules and the person the employer substantially supervises and orders the employee.

- The duties are not such that the individual is able to delegate them to a third party.
- The individual does not own work equipment and materials.
- Remuneration is in correlation to the amount of work the individual does, based on a fixed rate of pay, and income tax is withheld.
- The relationship is continuous and the individual works exclusively for the employer.
- Other regulations that define the individual as an employee. The economic and social circumstances of the parties also indicate an employment relationship.

The LSA applies to all businesses or workplaces that employ five or more workers, regardless of whether they are private enterprises, public enterprises, state-run enterprises, or any other kind. Likewise, the legislation is also applied to public bodies including the Seoul Metropolitan Government, other metropolitan cities, the provinces, Shi, Kun, Ku, Eup, Myon, Dong, or other municipal equivalents (Art. 12).

In parallel, the LSA does not apply to any business or workplace which employs only relatives living together or to workers hired for domestic work (Art. 11). Further, only part of the provisions of the LSA may be applicable, as prescribed by presidential decree, to those businesses/workplaces employing less than five workers. Art. 7 of the Enforcement Decree of the Labour Standards Act remits to Table 5.1 attached thereto for the identification of the provisions applicable to business/workplaces employing 4 workers or less. Incidentally, domestic workers are currently not recognised as legally holding a 'worker' status in South Korea (ILO 2014). Therefore, this category is excluded from the application of the LSA and from laws regulating working conditions, safeguards against employment-based discrimination and providing minimum social security and welfare benefits to workers (Gu 2013).

From a more general perspective, the LSA does not include a special contractual regime for certain kinds of employment (such as rural work) other than employment in the public sector. Rather, in regulating single matters the LSA introduces specific norms for certain employment types. For example, Art. 44-2 introduces an ad-hoc responsibility for the payment of wages in the construction business. Likewise, Art. 63 excludes the applicability of working hours, recesses and holidays for agricultural and forestry workers, among 14 other categories.

D. Non-standard forms of employment

Korea's labour market dualism between regular and non-regular workers started during the 1990s and deepened due to the 1997 and 2008 crises. While the 'typical' employment relationship can be identified as long-term employment, the country's legal system admits several atypical (or 'non-regular') employment relationships. As seen above, labour law poses some limits to the employer's ability to dismiss workers, arbitrarily rearranging the workforce: as a result, employers increasingly make use of non-regular forms of employment. The employment relations of non-regular workers can be legally subdivided as follows:

- Workers hired under fixed-term contracts. 'Fixed-term employee' refers to a worker who has signed a fixed-term labour contract (Art. 2,1 of the Act on the Protection, etc. of Fixed-term and Part-time Workers—FPWPA).

- Part-time (or temporary) workers: 'part-time worker' refers to a part-time employee whose contractual working hours per week are shorter than those of a full-time worker engaged in the same kind of job in the same workplace (Art. 2 of the LSA).

- Extra-company workers, comprising workers under contract work arrangements and dispatch workers. Enterprises receive and employ workers who are furnished by other enterprises and use those workers to perform work in their own enterprises. One of the methods of using non-company workers is to use 'dispatch workers'—a person who is employed by a sending employer and subject to worker dispatch.

The first two categories find their main regulatory source in the FPWPA, whose purpose is to promote the sound development of the labour market by redressing undue discrimination against fixed-term and part-time workers, and by strengthening the protection of their working conditions. The Act applies to all businesses or workplaces employing no fewer than five workers, as well as to state and local government agencies regardless of the number of workers they usually employ. Once again, exceptions are businesses or workplaces employing only relatives living together or workers hired for domestic work.

Fixed-term employment contracts terminate automatically upon the expiration of the term specified therein. Pursuant to Art. 4 of the FPPWPA, fixed-term contracts cannot exceed two years: in case of repeated fixed-term labour contracts, the sum of the periods cannot exceed the above-identified length of time. If an employer hires a fixed-term employee for more than two years, the employee shall be considered as a worker with no fixed-term labour contract (Art. 4, 2). However, the same norm provides for exceptions if:

- The period needed to complete a project or particular task is defined.
- The fixed-term employee is needed to fill a vacancy arising from a worker's temporary suspension from the duty or dispatch, until the worker returns to work.
- The period needed for a worker to complete schoolwork or vocational training is defined.
- The fixed-term labour contract is made according to Art. 2 of the Act on Age Discrimination Prohibition in Employment and the Employment Promotion of the Elderly.
- The job requires professional knowledge and skills, or the job is offered as part of the government's welfare or unemployment measures as prescribed by presidential decree.
- There is a rational reason equivalent to those described above, as prescribed by presidential decree.

Finally, if an employer wants to open an employment position without a fixed term, they must make an effort to preferentially hire fixed-term workers who are engaged in the same or similar kinds of jobs.

Part-time workers enjoy all labour laws except when special regulations are provided, namely employment insurance, health insurance, employee pension insurance and income tax. The abuse of the right to dismiss remains applicable for part-time, open-ended contracts. However, differences exist between part-time and regular workers (for example, the former are usually paid on an hourly basis, do not receive retirement allowances, etc.). The working conditions of part-time workers are determined based on their relative ratio of working hours compared to those of full-time workers engaged in the same kind of job in the same workplace and in accordance with the criteria established by presidential decree. If working hours are less than 15 hours per week over a four-week period, in accordance with Art. 18, holidays (Art. 55) and annual paid leave (Art. 60) do not apply. Part-time workers can exceed contractual working hours based on their consent, within a limit of 12 hours per week. If the employer wishes to hire a regular worker, they should preferentially be a part-time worker engaged in the same (or similar) kind of job.

Both categories, which are ubiquitous in Korea's labour market, are also especially vulnerable. During periods of economic growth, fixed-term employees have their contracts renewed; however, when the workforce must be reduced, employers often opt not to renew these contracts rather than dismissing regular workers. In other words, fixed-term contracts have thus functioned as shock absorbers to protect regular workers against fluctuating economic circumstances (Araki 2002). In turn, many part-time workers who as such are subject to a different treatment than regular workers often end up working almost as many hours as full-time

workers. These are the so-called 'quasi-part-time workers', hired under the part-time regime and treated differently from regular workers even though their working hours are almost as long. Further, part-time workers—mostly women—are hired through fixed-term contracts, offering minor employment security.

Art. 2, 3 of the FPWPA defines 'discriminatory treatment' as unfavourable treatment without any justifiable grounds, in terms of wages, incentive pay on a regular basis, performance-based bonuses and other matters concerning working conditions and welfare. As provided for in Art. 8 of the FPWPA, an employer must not treat fixed-term employees discriminatorily based on their employment status compared with other workers engaged in the same or similar jobs under a non-fixed term labour contract in the business or workplace concerned. Likewise, an employer must not discriminate against part-time workers on the grounds of their employment status compared with that of full-time workers.

As we shall see in more detail in Section 3, in case of discriminatory treatment, the fixed-term or part-time employee can apply for redress at the Labour Relations Commission, within six months decurrent from the day in which the discriminatory treatment occurred or ceased (if continuous).

Art. 16 of the FPWPA prohibits dismissal or other unfavourable treatment of fixed-term or part-time employees for performing the following acts:

- Refusing to undertake overtime work when ordered to do so by the employer.
- Applying for redress for discriminatory treatment, attending or making a statement at the Labour Relations Commission, applying for a review, or presenting an administrative lawsuit.
- Reporting a failure to comply with a redress order.
- Giving notification to the inspection agency.

Further, Art. 17 requires the employer, in correspondence of the establishment of a fixed-term or part-time contract, to clearly state in writing all the matters described in the following items (the last applies only to part-time workers):

1. Matters concerning the contract period.
2. Matters concerning working hours and rest hours.
3. Matters concerning the components, calculation and payment methods of wages.

4. Matters concerning holidays and leave.

5. Matters concerning the place of work and the job to be undertaken.

6. Workdays and the working hours of each workday.

State and local governments must undertake necessary measures, such as providing employment information, vocational guidance, job placement services, vocational skills development services, etc. to promote the employment of fixed-term and part-time employees (Art. 20 of the FPWPA).

Finally, Chapter 6 of the FPWPA includes several penalties and administrative fines for non-compliance with its provisions.

The third category of labour includes workers that are external to the company, which can be subdivided into contract workers and dispatch workers. Worker dispatching was prohibited until the enactment of the Act on the Protection, etc., of Dispatched Workers (DWPA) in 1998, whose actual version was promulgated in 2008. However, as pointed out by Brown and Cooke (2015, 26), the pre-existing practice of resorting to subcontracted employment increased significantly after the 1997 crisis, spilling into the public sector. In addition, within the private sector, large Korean firms (*chaebol*) bring in subcontracting firms to be based on the company premises: workers hired by the subcontracting companies managed by these—often working alongside regular employees but earning substantially less.

Pursuant to Art. 2 of the DWPA, 'worker dispatch' means a system whereby an employer, while maintaining employment relations with a worker it has hired, dispatches them to work for a second employer, under the direction and order of the latter in accordance with the dispatch contract.

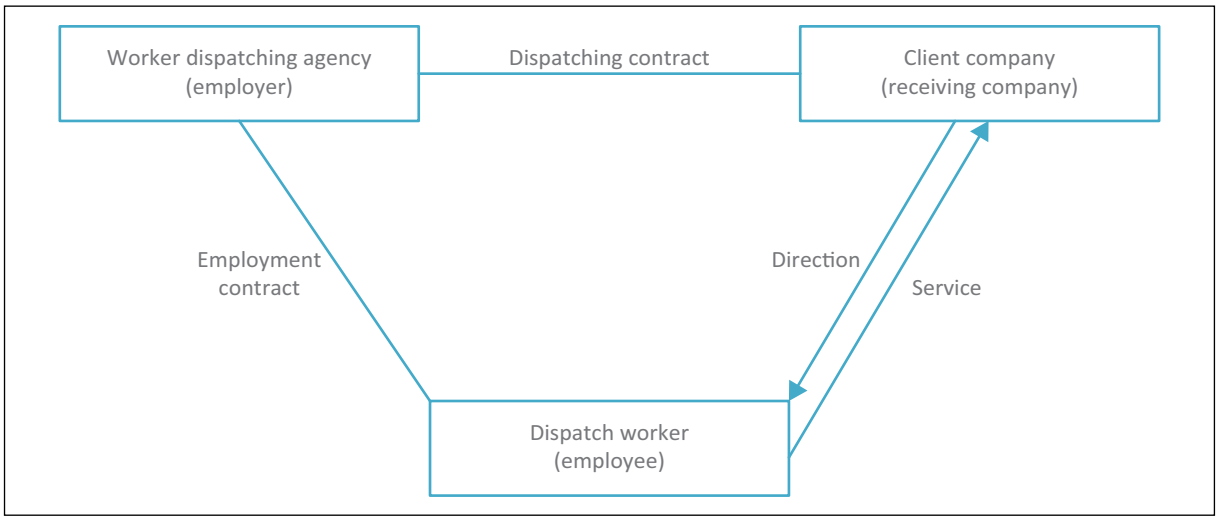
The purpose of the DWPA is to enhance the flexibility of supply and demand of manpower by managing worker dispatch undertakings properly and setting up criteria such as the standards of working conditions for dispatched workers, thereby contributing to the employment security and welfare promotion of dispatched workers (Art. 1).

The worker dispatching relationship is represented in Figure 5.1.

Dispatch workers maintain their employment relationship only with the dispatching agency: therefore, as a general rule, the dispatching agency is responsible for compliance with the relevant protective labour laws, including the LSA. Yet, considering that the client company directs and controls dispatched workers, the DWPA attributes to the former the responsibility for certain matters, such as the guarantee of the worker's freedom to exercise civil rights, regulations relating to working hours and regulations for women and minors concerning

hazardous work. The dispatching agency and the client company share responsibility for other matters, such as equal treatment, prohibition of forced labour, prohibition of apprenticeship abuse, and health and safety regulations.

FIGURE 5.1 Worker dispatching relationship



Source: Lee and Jung (2019, 158).

With a view to protect dispatched workers, the law requires the government to make efforts to ensure that workers can be directly employed by employers, by devising and implementing various measures (Art. 3):

- The gathering and provision of employment information.
- Research on jobs.
- Vocational guidance.
- The establishment and operation of employment security organisations.

Chapter 2 of the DWPA regulates the proper management of worker dispatch undertakings. First, jobs permissible for worker dispatch are "those considered suitable for that purpose, given their nature and the required professional knowledge, skill or experience, and prescribed by presidential decree but excluding those directly related to production in the manufacturing industry" (Art. 5,1). However, as provided by the same norm, if there is a vacancy due to childbirth, illness, injury, etc., or there is a need to temporarily or intermittently secure manpower, worker dispatch may be permitted. Further, if an employer intends to use a dispatched worker, they should consult in advance with the trade union of the business or workplace concerned (if there is a trade union with a majority of workers as members), or with a person representing the majority of workers.

Art. 5 also explicitly prohibits worker dispatch in the following circumstances:

- Work performed on a construction site.
- Job areas involving stevedoring work under other law, for which worker supply services are permitted pursuant to Article 33 of the Employment Security Act.
- Seamen work, as specified under Art. 3 of the Seamen Act.
- Harmful and hazardous work, as identified under Art. 28 of the Industrial Safety and Health Act.
- Other work considered not suitable for worker dispatch on the grounds of worker protection, etc., and prescribed by presidential decree.

Art. 6 limits the length of the dispatch period to one year, except when the case falls under Art. 5.2. However, the second paragraph of the same provision allows—if there is an agreement between the dispatching employer, the using employer and the dispatched worker—the period to be extended for another year, whereby the total dispatch period cannot exceed two years. A further exception to the rule can be found for elderly dispatched workers: pursuant to the Act on Age Discrimination Prohibition in Employment and the Employment Promotion of the Elderly, the dispatch period may be extended for more than two years.

The final and fourth paragraph of the same article requires the period of workers' dispatch to be:

- A period required to resolve clear and objective causes, such as childbirth, illness or injury.
- A period of less than three months in cases where there is a need to secure manpower on a temporary and intermittent basis, provided that if the cause is not resolved and if there is an agreement among the dispatching employer, the using employer and the dispatched worker, the period may be extended once, not to exceed three months.

Further, the DWPA obliges through Art. 6.2 the using employer to directly hire the dispatched worker in the following circumstances:

- When the using employer uses the dispatched worker for jobs which do not fall into the category of jobs permitted for worker dispatch under Article 5.1 (excluding cases where worker dispatch undertakings are carried out pursuant to Article 5 (2)).

- When the using employer uses the dispatched worker in violation of Article 5 (3) (jobs expressly prohibited).

- When the using employer continues to use the dispatched worker in excess of two years, in violation of Article 6 (2).

- When the using employer uses the dispatched worker in violation of Article 6 (4) (period of worker dispatch related to Art. 5.2).

- When the using employer receives worker dispatch services in violation of Article 7 (3)—a using employer accepting services by worker dispatch without the required permit.

However, the same norm allows the dispatched worker to express an objection in this respect and also provides that the above provisions do not apply when there is a justifiable reason prescribed by presidential decree.

The DWPA requires a permission for worker dispatch, to be obtained by the Minister of Employment and Labour (Art. 7), which has a validity of three years (Art. 10). It also determines the grounds for disqualification for obtaining permission (Art. 8) and the criteria for permission (Art. 9).

From a contractual perspective, the worker dispatch contract must be presented in written form and contain a number of issues listed in Art. 20 of the DWPA. Dispatched workers cannot be treated discriminatorily by the dispatching and using employers, and may seek redress before the Labour Relations Commission, whereupon shall be applied Art. 9 to 16 of the FPWPA (Art. 21). Further, in case of discriminatory treatment, the Ministry of Employment and Labour may demand corrective measures: in case of non-compliance, the Ministry can notify the Labour Relations Commission and give notice to the concerned subjects (sending or using employer and worker concerned, Art. 21-2). Finally, pursuant to Art. 22, a using employer cannot rescind a worker dispatch contract on the grounds of the worker's status, gender or religion, or legitimate involvement in activities of a trade union; conversely, a sending employer may suspend or rescind the contract if, with regard to services provided by dispatched workers, the using employer violates the DWPA (or orders thereof), the LSA and the Occupational Safety and Health Act (and orders thereof).

In conclusion, the DWPA requires dispatching and using employers to enact the measures listed in Table 5.2.

TABLE 5.2 Measures required of the using employer and the sending employer

Measures required of the using employer	Measures required of the sending employer
Welfare promotion for dispatched workers (Art. 23)	Necessary measures so as not to violate the terms and conditions of a worker dispatch contract (Art. 30)
Duty of notice for dispatched workers (when intending to employ a worker as dispatched worker) (Art.24)	Handling grievances (Art. 31)
Prohibition of employment restrictions for dispatched workers (in particular, prevention from hiring by the using employer after the termination of the employment relationship) (Art. 25)	Appointment of a person in charge of managing use of dispatched workers (Art. 32)
Notification of placement conditions (Art. 26)	Ledger for management use of dispatched workers (Art. 33)

Source: Authors' elaboration.

E. Termination of the employment contract

Na employment contract can be terminated:

- At the end of the a set period (fixed-term contracts).
- Due to consensual termination of the contract.
- Due to the resignation of the worker.
- When the worker reaches the mandatory retirement age.
- As a result of the extinction of one of the parties (either death of the individual or dissolution of the legal entity).
- Due to dismissal.

While employers have significant discretion when hiring, dismissal is subject to narrower limits. A dismissal can be defined as "a unilateral termination of labour contract relations by the employer, against the will of a worker, irrespective of its terms or procedures at the workplace" (Supreme Court, 03/24/2011, 2010Da92148).[2] The employer's freedom to dismiss is indeed restricted in several ways, as detailed in Table 5.3.

2. It is also worth noting that if an employer forces or induces a worker who has no intention of retiring to submit their resignation, this falls under the category of 'terminating the labour contract unilaterally by the employer' and can be understood as a dismissal (Supreme Court, 02/03/2017, 2016Da255910).

TABLE 5.3 Restrictions on dismissal

Restriction	Main elements
Legislative restrictions on dismissal and reasons for dismissal	• Art. 23 of the LSA: "no employer shall dismiss, lay off, suspend, or transfer a worker, or reduce their wages, or take other punitive measure (unfair dismissal, etc.) against a worker without justifiable reasons." In other words, the law requires the employer to demonstrate the existence of a just cause for dismissal. A dismissal without just cause is null and void. • Further, dismissal is explicitly prohibited in the instances foreseen in TULRAA's Art. 81 and when on the grounds of gender, marriage, nationality, religion or social status (Art. 6 LSA)
Restrictions of dismissal for managerial reasons (Art. 24 of the LSA)	Any dismissal for managerial reasons is an abuse of the right to dismiss (and thus null and void), unless it meets all following four requirements: • There must be urgent managerial necessity to resort to a reduction of the workforce • The employee is obliged to take various measures to avoid dismissal (such as reduction in overtime, transfers, non-renewal of fixed-term contracts, etc.) • The rational and fair criteria for dismissal must be established on an objective and reasonable basis • The management is required to explain the necessity for the dismissal, its timing, scale and method to the labour union, or worker group if no union exists, and consult with them concerning methods for avoiding dismissals and the criteria for dismissal(s) in good faith
Restrictions on dismissal timing	An employer cannot dismiss: any worker during a period of temporary interruption of work for medical treatment of a work-related injury/disease and within 30 days thereafter; any female worker during a period of temporary interruption of work before and after childbirth and within 30 days thereafter (Art. 23 of the LSA)

Source: Authors' elaboration based on Lee and Jung (2019, 259).

The LSA requires the employer to give written or verbal notice to the employee at least 30 days prior to the dismissal. If this provision is not observed, in principle the worker is entitled to the payment of 30 additional days of ordinary wages, with some exceptions. Employees are also obliged to notify the worker in writing about the reasons for dismissal and its related date. Conversely, dismissal without notice is only allowed under exceptional circumstances (for example, when it is impossible to continue the company's activities as a result of a natural disasters or other unavoidable causes). On the other hand, prior notice is not required (whereas the need for a just cause stands) for certain workers who are only temporary or short term (for example, those in a probationary period and those who have been employed for seasonal work for a fixed period not exceeding six months).

Finally, in case of unfair dismissal, the concerned worker can ask for either reinstatement or compensation, as we shall see in more detail in Section 3.

F. Collective labour relations

Collective labour relations are fundamentally regulated by TULRAA. Following the ratification of ILO's conventions, TULRAA was amended in 2019 to harmonise some dispositions (such as recognition of union membership status for the unemployed/terminated, eligibility of union officers, obligation to faithfully bargain with individual trade unions, etc.). While it provides

a basic framework for industrial relations in the private sector, there are other relevant legal sources such as the Act on the Promotion of Worker Participation and Cooperation, the Act on the Establishment, Operation, etc., of Public Official's Trade Unions, the Act on the Establishment, Operation, etc., of Trade Unions for Teachers and the Labour Relations Commission Act (for collective labour disputes resolution).

TULRAA's purpose is to maintain and improve the working conditions and to improve the economic and social status of workers by securing their rights of association, collective bargaining and collective action pursuant to the Constitution, and contribute to the maintenance of industrial peace and to the development of the national economy by preventing and resolving labour disputes through the fair adjustment of labour relations (Art. 1). Therefore, the TULRAA mainly deals with the right to organise, bargain and act collectively.

G. Trade unions

As seen in Section 2B, the Constitution enshrines the right of workers to organise, which resolves in the associated right to form or join trade unions and, consequently, the right of trade unions to continue their activities/existence. However, we must underscore that civil servants and teachers are subject to other regulations (such as Art. 5 of TULRAA). An interesting feature is the extent to which workers are forced to organise, closely related to union security clauses[3] inserted in collective agreements to protect the continued existence of trade unions. As reported by Lee and Jung (2019, 293) it is a widespread practice in Korea to include a union shop agreement. The Supreme Court held that these agreements are to be interpreted as requiring the employer to dismiss workers who refuse to join any union, while the same rule does not apply when the workers choose to join another union. Further, in accordance with case law, when the worker expulsion from a trade union is null and void, the dismissal from the company is also nullified.

Art. 2 of TULRAA defines a trade union as an organisation or associated organisation[4] of workers which is formed in a voluntary and collective manner upon the workers' initiative for the purpose of maintaining and improving working conditions or improving the economic and social status of workers. In turn, the same provision defines an employers' association as an organisation of employers which has an authority to adjust and control its constituent members with regard to labour relations.

The law lays down several requirements for establishing a qualified union under the TULRAA, which can be subdivided into positive, negative and formal requirements.

3. Including, for example, closed shop agreements (whereby only members of a given trade union are hired) and union shop clauses (non-union members may be hired but must join the union within a specified period).

4. As per Art. 10, an 'associated organisation' is an industrial-level organisation unit trade unions in the same industry and a federation comprised of industry-level organisations or nationwide industry-level unit trade unions.

Trade unions which are not established under TULRAA cannot make an application for adjustment of labour disputes or for remedy against unfair labour practices before the Labour Relations Commission, except for the cases provided for in sub-sections 1, 2 and 5 of Art. 81 (Art. 7). Table 5.4 reports the requirements set by TULRAA.

TABLE 5.4 Essential positive and negative requirements and formal requirements for establishing trade unions under TULRAA

Essential positive requirements	
Membership (Art. 2)	The organisation must be predominantly formed by workers and organised by workers on their own initiative
Independence (Art. 2)	The organisation must be independent (i.e., formed by workers, not allowing members who represent the employers' interest, as well as being financially independent from the employer—with some exceptions)
Purpose (Art. 2)	The organisation must maintain and improve working conditions and raise the economic status of workers (not merely political or limited to mutual aid)
Character as an organisation (Art. 2)	Form: organisation (with more than two members) or federation
Trade union constitution —requirements (Art. 11)	The trade union must include in its bylaws the items listed in Art. 11 (such as name, purpose and activities, location, matters concerning union members, etc.)
Essential negative requirements	
The organisation shall not be regarded as a trade union when (Art. 2)	A. An employer or other persons who always act in their employer's interests are allowed to join the organisation B. In cases where most of the expenditures are supported by the employer C. The activities of an organisation are only aimed at mutual benefits, moral culture and other welfare undertakings D. Non-workers are allowed to join the organisation, provided that a dismissed person shall not be regarded as a person who is not a worker, until a review decision is made by the National Labour Relations Commission when the person has made an application to the Labour Relations Commission for remedies against unfair labour practices E. The aims of the organisation are mainly directed at political movements
Formal requirements	
Report on establishment of the trade union (Art. 10)	The report must contain the elements listed by the norm (such as the trade union's name, location of HQ, number of members, union officials, etc.) and be submitted to several institutions/subjects, including the Ministry of Employment and Labour. Further, the trade union's by-laws must be attached
By-laws (Art. 11)	By-laws must include several elements, such as concerning meetings, representatives, accounting, modification of by-law, dissolution of the trade union, etc.
Issuance of certificate (Art. 12)	The administrative authorities to which the report and by-laws were submitted must issue the certificate within three days decurrent from their receipt. If the report/by-laws need to be supplemented, the authorities can order so within a submission period of 20 days
Notification of modifications (Art. 13)	Art. 13 demands the submission of a report of modification to the administrative authorities within a 30-day period from the changes. In addition, the trade union must inform the administrative authorities by 31 January of each year the eventual modifications of by-laws, the replacement of officials and the number of union members (relative to 31 December of the previous year)

Source: Authors' elaboration.

Several types of trade unions exist in Korea, such as craft unions (horizontal), industry-level unions and company unions. As mentioned in Section 2A, collective bargaining at the industry level is quite rare, whereas it usually occurs between company union and the employer, with the risk of being dominated by the latter.

The third section of TULRAA's second chapter includes various norms dedicated to trade union management. The provisions range from which documents should be kept (Art. 14, e.g., register of union members, union by-laws, etc.) to general meetings (Art. 15) and related matters to be decided (Art. 16), and to the activities of trade union's full-time officials (Art. 24).

Every member has equal rights and duties to participate in all affairs related to the trade union. However, a trade union may restrict, according to union by-laws, the rights of those members who do not pay their dues (Art. 22). Finally, as provided by Art. 9 of TULRAA, no member of a trade union shall be discriminated on the basis of race, religion, sex, age, physical condition, employment type, political party, or social status.

In conclusion, it is necessary to briefly analyse the Act on the Promotion of Workers' Participation and Cooperation, whose purpose is to seek industrial peace and to contribute to the development of the national economy by promoting the common interests of labour and management through the participation and cooperation of both workers and employers (Art. 1). To that end, the Act provides for the institution of the Labour-Management Councils, consultative bodies formed to promote the welfare of workers and seek the sound development of businesses through the participation and cooperation of workers and employers (Art. 3). Pursuant to Art. 4, these councils must be established in every business or workplace vested with the right to decide working conditions, provided that they ordinarily employ 30 or more workers. The council must be composed of an equal number of members representing employers and workers (at least 3 and not more than 10—Art. 6) and is meant to discuss subjects around which labour and management have common interests.

There are two basic principles governing the council system. The first is the requirement of good faith in consultation, incumbent on both employers and workers (Art. 3). In addition, the Act also provides that the Council shall promptly notify workers of matters resolved by it (Art. 23) and both workers and employers shall implement the resolutions made by the council in good faith (i.e., obligation of observance—Art. 24). The second principle is that of independence between Labour-Management Councils and collective bargaining (or any other union activity), established in Art. 5. However, it should be pointed out that if collective bargaining often happens at the industry level in dual systems, with work councils undertaking consultations at the company/plant level, in Korea the line between joint consultations and collective bargaining is blurred, as the latter usually happens at the company level, involving the same parties and subjects discussed (Lee 2019).

Finally, the Act requires businesses and workplaces employing 30 or more people on a regular basis to have a grievance handling committee, further analysed in Section 3B.

H. Collective bargaining

As pointed out by Lee and Jung (2019, 335) neither the Constitution nor TULRAA define collective bargaining, which entails negotiations about wages and other conditions of work between a trade union and an employer or an employers' organisation. Collective bargaining can be conceptually divided into the negotiation process and the conclusion of the collective agreement itself: the former one has no legal effect, whereas the latter is legally binding. In short, collective bargaining through an agreement based on mutual consent allows to formulate rules governing both individual and collective labour relations.

The right to bargain, as any other, must be exercised fairly within intrinsic legal limits. TULRAA provides that a trade union and an employer or an employers' association have to bargain with each other in good faith and sincerity and make a collective agreement, correspondingly not abusing their authority. The Act further provides that a trade union and an employer/employers' association must not refuse or delay, without just cause, negotiating or concluding collective agreements (Art. 30). The obligation to bargain in good faith is mutual (Art. 84).

Further, we must consider that the Constitutional Right to Bargain (Art. 33) is reinforced by the unfair labour practice system established in TULRAA. An employer's refusal—or delay—to conduct collective bargaining without justifiable reasons[5] with the representative of a trade union or a person who has been authorised by a trade union is, pursuant to Art. 81.3, considered an unfair labour practice. Correspondingly, the labour relations commission might issue a remedial order to the employer to bargain with the union in good faith.

In principle, all matters can be discussed in a collective bargaining process as long as the parties agree to do so. Mandatory subjects that fall under the purview of 'working conditions and other treatment' include wages, hours, holidays, health and safety, compensation for work-related accidents, vocational training and personnel matters (such as transfer, discipline and dismissal). Matters concerning management and production policies (such as restructuring of production processes, relocation of plants and subcontracting) are mandatory subjects only when they affect the working conditions or other treatment of union members. Further, matters concerning 'the management of collective labour relations' are to be negotiated: these include rules governing union activities, rules and procedures for collective bargaining, labour management consultations, rules and procedures for dispute acts, etc.

Concerning the collective bargaining parties, Art. 29 disposes that the representative of a trade union has the authority to bargain with the employer (or employers' association) and to establish collective agreement for the trade union and its members. In accordance with the same

5. Conversely, justifiable reasons can exempt the employer from the duty to start or continue bargaining. To decide whether justifiable reasons exist, the following elements must be considered: party involved in collective bargaining (workers' side); subjects being negotiated; as well as procedural and circumstantial details.

disposition, the right to bargain can also be delegated through authorisation. In case of multiple unions, Art. 29-2 sets the procedure for determining the bargaining representative union. In turn, Art. 29-4 provides that the bargaining representative union and the employer shall not discriminate against trade unions participating in the procedure for determining the bargaining representative union or their members without any reasonable grounds, and contextually foresees the possibility to resort to the Labour Relations Commission to redress discrimination.

Pursuant to Art. 31, a collective agreement needs to be established in writing, signed by the parties and submitted to the administrative authorities within fifteen days. In case any provision of the agreement is unlawful, the administrative authorities may order its correction, provided with a resolution from the Labour Relations Commission. Art. 32 provides that the term of validity of collective agreements cannot exceed 2 years. On the other hand, unless otherwise provided in a separate agreement, if no new collective agreement is concluded by the expiration date of the existing agreement, even though the parties have continuously engaged in collective bargaining before and after the expiration date, the existing collective agreement shall remain effective for up to three months after its expiration date. If a new agreement is reached, the existing agreement shall be applicable only if explicitly provided therein and notwithstanding the possibility of any party to terminate it with a notice six months in advance.

The provisions of a collective agreement in violation of the standards concerning working conditions and other treatments of workers specified therein shall be null and void (Art. 33). Further, TULRAA also contains a norm regulating the interpretation of collective agreements (Art. 34): if the parties do not reach an agreement, one or both of them can ask the Labour Relations Commission for its opinion, which should be issued within 30 days of the request. The opinion expressed has the same effect of an arbitrated judgement.

In terms of binding force, where a collective agreement applies to at least half of the ordinary number of workers performing the same kind of job and employed in a single business or a workplace, it shall also apply to other workers performing the same kind of job and employed in the same business or workplace (Art. 35). Further, pursuant to Art. 36, where more than two-thirds of the workers performing the same kind of job and employed in the same area are subject to the application of one collective agreement, the administrative authorities may, with the resolution of the Labour Relations Commission, and upon the request of one or both parties to the collective agreement, or by its own authority, make a decision that such collective agreement shall apply to other workers performing the same kind of job and employed in the same area, as well as to their employers.

Lee and Jung (2019, 113) shed some additional light on collective agreements, work rules and individual employment contracts.[6] Each of these must not conflict with laws or decrees (Art. 15

6. A collective agreement can be defined as an agreed set of rules established between a labour union and the employer concerning wages, working hours, or other issues. Work rules are a set of regulations set forth by an employer for the purpose of establishing uniform rules and conditions of employment within the workplace. Finally, employment contracts are celebrated in order for a worker to offer work and for an employer to pay wages for that work.

of the LSA; re: collective agreements, see Art. 31 of TULRAA). Further, work rules must also not conflict with the collective agreements applicable to the workplace concerned.

In individual labour relations, collective agreements and work rules have a normative effect on labour contracts. Further, collective agreements have a normative effect on both individual employment contracts and work rules: any provision of an individual employment contract or work rules which contradicts the working conditions standards of the collective agreement is void and governed by the latter (Art. 33 of TULRAA); the same applies to work rules. In turn, work rules have a normative effect on individual employment contracts. Any provision of the latter contradicting the working conditions provided in the work rules are void and governed instead by the provision of such rules (Art. 97 of the LSA).

I. Industrial action

Art. 33 of the Constitution recognises the right of workers (and not of the employer) to collective action to accomplish their claims concerning working conditions, when bargaining between workers and employers cannot bring about a collective agreement. Art. 2 of TULRAA defines "industrial dispute" as any controversy or difference arising from disagreements between a trade union and an employer or employers' association ("parties to labour relations") with respect to the determination of terms and conditions of employment such as wages, working hours, welfare, dismissal, and others. In such cases, disagreements refer to situations in which the parties to labour relations are no longer likely to reach an agreement by means of voluntary bargaining even if they continue to attempt it. Industrial actions (or dispute acts) are actions or counteractions which obstruct the normal operation of a business, such as strikes, sabotage, lockouts, and other activities through which the parties to the labour relation intend to accomplish their goals (Art. 2 of TULRAA). It can be clearly inferred from the wording of the norm that the "dispute acts" category is not limited to strikes and lockouts, but also encompasses other types of action, such as soldiering and sabotage as well as picketing and boycotts.

Further, dispute acts on the labour side, when justified, limit civil (Art. 3 of TULRAA), and criminal (Art. 4 of TULRAA) liability, in addition to prohibiting disadvantageous treatment (i.e., unfair labour practices) such as disciplinary action or dismissal (Art. 81 of TULRAA).[7] On the other hand, pursuant to Art. 44 of TULRAA, an employer shall have no obligation to pay wages during a period of industrial action to workers who did not provide labour because of their participation. Correspondingly, a trade union cannot conduct industrial actions to demand and secure payment of wages over a period of industrial action. Finally, the employer cannot hire or substitute any person not related to the relevant business during a period of industrial action to continue works interrupted by industrial actions (Art.43). Likewise, an employer

7. On the contrary, if the dispute act is deemed improper, the workers involved do not enjoy the protection afforded by the law.

cannot during industrial actions, contract or subcontract works which have been interrupted by industrial actions.

In accordance with TULRAA's Art. 37, the purpose, method and procedure of any industrial action must be consistent with the legislation and the social (public?) order. Further, no member of a trade union shall take part in any industrial action which is not led by the trade union. In addition, TULRAA prevents the trade union from undertaking industrial action, unless a decision is made through the concurrent votes of most union members by direct and secret ballot (Art. 41).[8] In addition, the industrial action must not interfere with the entry, work or other normal services of persons who are not related to it or those who intend to work, and it cannot resort to any form of violence or threat to persuade participation, whereas the trade union has the responsibility to guide, manage and supervise industrial action so it can be conducted within the limits of the law (Art. 38). Crucially, the law (Art. 45) determines that upon the occurrence of a labour dispute, one of the parties to the labour relations must notify to the other in writing. Industrial actions cannot be conducted without completing adjustment procedures (excluding mediation procedures after the decision to end such process, e.g., Art. 61-2) under the provision of Sections 2-4 of TULRAA's Chapter 5. This rule does not apply when the mediation procedure does not finish within the prescribed period (Art. 54) or when the ruling or arbitration does not occur within the period prescribed (Art. 63). A final important limit posed by TULRAA to dispute acts are restrictions in terms of minimum services to be maintained. Art. 42-2 provides that the acts of stopping, discontinuing or impeding the justifiable maintenance and operation of the essential business shall be prohibited industrial actions. 'Essential businesses' are businesses whose suspension or discontinuation may seriously endanger the lives, health or bodies of the public and the daily life of the public. These are defined by Presidential Decree from among the essential public-service businesses provided for in Art. 71,2.[9] The subsequent provision (Art. 42-3) requires the parties in labour relations to establish a written agreement (the Essential Minimum Services Agreement), stipulating several elements (such as the minimum service levels to be maintained, the work designated as essential services, the number of workers, etc.) that are necessary to maintain and operate essential businesses during a period of industrial action. In case on non-agreement, the parties must resort to the Labour Relations Commission, which will decide on the matter pursuant to Art. 42-4, 42-5 and 42-6.

Finally, since TULRAA does not address the criteria for determining the propriety of industrial disputes, case law usually relies on the following four elements (Lee 2019, 361).

- Parties to the dispute: the parties must be qualified to be parties to collective bargaining.

8. The same norm prohibits industrial action for certain categories of workers, such asthose engaged in the national defence industry, involved in the production of electricity, water, etc.

9. 1. Railway business, urban subway business and air transport business; 2. Tap-water business, electricity business, gas business, petroleum refinery business and petroleum supply business; 3. Hospital business and blood supply business; 4. Bank of Korea business; 5. Telecommunications businesses.

- Purpose of dispute acts: courts generally endorse the view that since dispute acts are guaranteed to facilitate industrial autonomy through collective bargaining, the dispute act must be employed for the purpose of promoting collective bargaining.

- Observance of procedural requirements (such as voting on the strike by a majority of union members, etc.).

- Properness of means of dispute acts (e.g., no violence or destruction employed, etc.).

A strike is the workers' collective and systematic refusal to offer their labour, with the employer therefore losing control of the workers. It is worth noting that the legality of 'political strikes' is debated: the main theory is the affirmative one, which approves the legality of political strikes within certain limits/conditions, the most important of which is perhaps that the strike must have the purpose of maintaining or improving working conditions, seeking to enhance the economic and social status of workers.

As mentioned above, TULRAA recognises lockout as a dispute act (Art. 2, 6). Further, the Supreme Court has repeatedly confirmed the ruling that recognises the employers' right to initiate a lockout. In accordance with the Court, when the workers' dispute acts result in a severe imbalance in the power relationship, dispute acts by the employer might be justified in light of the same principle. TULRAA provides that an employer may execute a lockout after the trade union concerned commences a dispute act (Art. 46). In the opinion of the Supreme Court, 'defensive' lockouts are legitimate, whereas 'offensive' ones, whereby the employer pressures workers to achieve their own objectives, are improper. The precedents suggest that the courts will recognise the appropriateness of lockouts only in exceptional cases, where the workers' dispute acts cause immense hindrance to business. TULRAA provides that employers must report lockouts in advance to administrative authorities and the Labour Relation Commission.

5.1.4 Employment, labour market, unions and collective bargaining indicators (2015–2019)

A. Employment and labour market indicators

Population and labour force. According to KOSTAT, the central government's office for statistics, the population of South Korea was 51 million in 2015, up 1.1 times compared to 2000. A slight increase is projected, reaching a peak of 52 million in 2030.[10] The total fertility

10. KOSTAT (2020). Population Projections for Korea. <https://bit.ly/3oJCucM> .

rate of South Korea stood at 1.23 children per woman in the period between 2010 and 2014, ranking the 4th lowest globally. Life expectancy at birth in South Korea was 81.3 years in the period 2010-2013, ranking the 14th highest in the world. The working-age population was approximately 72.19 per cent (aged between 15 and 64 years old) in 2019, while those above the age of 64 comprised around 15 per cent of the population.

The population of South Korea has seen a slow but steady increase during the period considered, from 50,823 thousand in 2015 to 51,225 thousand in 2019—a relative growth of 0.8% over the two years.

TABLE 5.5 South Korean population by age and sex—UN annual projections, July 2019 (in thousands)

Year	2015	2016	2017	2018	2019
Total	50,823	50,983	51,096	51,172	51,225
Male	25,466	25,544	25,596	25,628	25,649
Female	25,357	25,440	25,500	25,543	25,576

Source: UNDESA, Population Division (2019). Custom data acquired via website.

Against this background, some observations are required. In the first place, according to census data, in 2020 the declining number of new-borns was exceeded by a rising number of deaths. According to UNDESA's Population (2019), Korea has one of the highest life expectancies on earth (82 years vs 72 years—global average). The country also has the world's lowest fertility rate (UNFPA 2020). Due to the combination of these factors, the population is rapidly aging.

The country has seen a higher rate of growth in its working-age population compared to its total population—0.72 per cent, on average, between 2015 and 2019.

TABLE 5.6 Working-age population by sex and age, 2015–2019(thousands)[11]

Year	2015	2016	2017	2018	2019
Total	43,239	43,606	43,931	44,182	44,504
Male	21,222	21,401	21,573	21,699	21,886
Female	22,018	22,205	22,357	22,484	22,618

Source: ILOSTAT (2021).

Between 2015 and 2019, the labour force participation rate increased 0.16 per cent on average, driven by an increase in female labour force participation rate of 0,71 per cent on average. Meanwhile, the male labour force participation rate decreased by 0.24 per cent.

11.'Working-age population' is commonly defined as persons aged 15 years and older, but this varies with each country. In addition to using a minimum age threshold, certain countries also apply a maximum age limit.

TABLE 5.7 Annual labour force participation rates by sex (as a percentage)[12]

Year	2015	2016	2017	2018	2019
Men	74.30%	74.10%	74.20%	73.80%	73.60%
Women	52.40%	52.70%	53.20%	53.30%	53.90%
Total	63.20%	63.20%	63.50%	63.40%	63.60%

Source: ILOSTAT.

Labour market. Economic growth driven by exports, manufacturing and conglomerates has given rise to a labour market dualism in Korea. The traditional growth model has led to dualism between large firms and small and medium-sized enterprises (SMEs), as well as between the manufacturing and service sectors. Indeed, the labour productivity of SMEs in the manufacturing sector is less than a third of large firms. SMEs are concentrated in the services sector, where productivity is less than half than in the manufacturing sector. This dualism resulted in a labour market mismatch, and SMEs struggle with labour shortages despite high unemployment rates among young people. Moreover, the trickle-down effects from a traditional growth model to domestic employment have weakened as large firms have been actively adopting offshoring through the global value chain.

The South Korean unemployment rate was at 3.8 per cent in 2019 and has increased over the last few years. However, it is still low compared to the Organization for Economic Co-operation and Development (OECD) average of 5.4 per cent.[13] South Korea has a much higher incidence of youth unemployment (9 per cent in 2019). The unemployment rate of women is 0.3 per cent lower than that of men.

TABLE 5.8 Unemployment indicators (as a percentage)

	2015	2016	2017	2018	2019
Unemployment rate	3.5	3.6	3.6	3.8	3.8
Unemployment rate, Male	3.6	3.7	3.8	3.9	3.9
Unemployment rate, Female	3.5	3.5	3.5	3.7	3.6
Share of unemployed persons with advanced education	56.9	57.9	60.2	55.9	54.7
Share of unemployed persons with basic education	9.9	9.2	9.6	10.3	11.9
Share of unemployed persons with intermediate education	32.4	32	29.5	33	32.2
Youth (15 -29) unemployment rate	9.2	10	9.8	9.6	9
Youth (15 -29) unemployment rate, men	10.6	11.2	11.5	10.6	9.8
Youth (15 -29) unemployment rate, women	7.9	8.9	8.3	8.6	8.3

Source: International Labour Organization.

12. 'Labour force participation rate' is the labour force as a percent of the working-age population.

13. See: <https://stats.oecd.org/Index.aspx?QueryId=36499>.

Note the high incidence of unemployed persons with advanced education—i.e., at least an undergraduate degree—indicating that anchoring employability solely in formal education it is not enough to keep people employed.

We can also observe dualism in regards to gender in the Korean labour market. The female employment rate remains below the OECD average, as women tend to withdraw from the labour force once they have children, in part due to a shortage of support in early childhood care. Women are also concentrated in low-paying and non-regular jobs despite their relatively high level of education. Almost half of female workers are non-regular employees, whereas male non-regular workers account for 26.4 per cent. For this reason, the gender gap in South Korea is the highest in OECD countries, with a 32 per cent wage gap.[14] In accordance with the World Economic Forum's 2020 report on the global gender gap—measuring economic participation and opportunity, education, health and survival and political empowerment—[15] South Korea ranked 108th out of 156 countries.

Against this backdrop, the Korean government has taken actions to reform the country's labour market dualism, which has contributed to exacerbating relative poverty and income inequality. The government is currently promoting the fourth industrial revolution and start-ups, aiming to make SMEs a driver of innovation. President Moon Jae-in came up with the concept of income-led growth driven by job creation. In 2018, the subsidy to firms that convert non-regular workers to regular status was increased to KRW800,000 (USD741).[16] In order to boost household income, the government is expanding public employment and sharply increased the minimum wage (by 10.9 per cent) in 2019.[17] Technological and demographic changes are also affecting Korea's labour market. Around 43 per cent of all jobs are at risk of being completely automated or substantially changed by new technologies, along with the most rapidly-aging population in the OECD.[18]

Employment. The employment-to-population ratio increased an average of 0.12 per cent between 2015 and 2019, driven by an average increase of 0,64 per cent in the female employment-population ratio, while the male employment-to-population ratio decreased by 0,28 per cent.

In regards to employment distribution by economic activity, as presented in Table 5.10, the manufacturing industry is the main employer in the country, accounting for 16,3 per cent of the workforce, followed by the wholesale, retail trade; repair of motor vehicles and motorcycles sector at 13,4 per cent, and accommodation and food service activities at 8,57 per cent.

14. Gender wage gap. OCDE data.

15. See: <https://www.weforum.org/reports/gender-gap-2020-report-100-years-pay-equality>.

16. OECD Economic Survey: Korea. 2018.

17. See: <http://www.koreaherald.com/view.php?ud=20180714000027>.

18. Employment Outlook—Korea (OECD).

TABLE 5.9 Annual employment-to-population ratio, by sex (as a percentage)[19]

Year	2015	2016	2017	2018	2019
Male	71.60%	71.40%	71.40%	70.90%	70.80%
Female	50.60%	50.80%	51.30%	51.30%	51.90%
Total	60.90%	60.90%	61.20%	60.90%	61.20%

Source: ILOSTAT (2021).

TABLE 5.10 Annual employment distribution by economic activity, 2019 (thousands)[20]

A. Agriculture; forestry and fishing	1,394.9
B. Mining and quarrying	14.5
C. Manufacturing	4,429.1
D. Electricity; gas, steam and air conditioning supply	67.9
E. Water supply; sewerage, waste management and remediation activities	135.1
F. Construction	2,019.5
G. Wholesale and retail trade; repair of motor vehicles and motorcycles	3,662.6
H. Transportation and storage	1,431.3
I. Accommodation and food service activities	2,303.4
J. Information and communication	860.5
K. Financial and insurance activities	800
L. Real estate activities	555.7
M. Professional, scientific and technical activities	1,156.7
N. Administrative and support service activities	1,311.6
O. Public administration and defence; compulsory social security	1,076.4
P. Education	1,883.3
Q. Human health and social work activities	2,206
R. Arts, entertainment and recreation	494,8
S. Other service activities	1,232.7
T. Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use	74,7
U. Activities of extraterritorial organizations and bodies	11.8
X. Not elsewhere classified	108.7
Total	2,7231.4

Source: ILOSTAT.

While the manufacturing sector is the main economic activity to employ workers in the country, concerns have been raised regarding deindustrialisation. About this topic, Lim (2004, 133) states that "whereas the Korean economy already entered the stage of de-industrialisation in terms

19. The 'employment-to-population ratio' is the number of persons who are employed as a percentage of the total of working-age population.

20. Data are disaggregated by economic activity according to the latest version of the International Standard Industrial Classification of All Economic Activities (ISIC).

of employment and nominal output from the late 1980s, de-industrialisation has not begun yet in terms of real output". Furthermore, the author claims that the chances are, however, that as the increasing demand for manufactured goods caused by the fall of their relative price is overwhelmed by the increase in demand for the service sector that accompanies rising income standards, the Korean economy will gradually enter onto the stage of deindustrialization even in terms of real output. It is estimated that deindustrialization in the case of the Korean economy is not attributable to a failure in competitiveness in domestic manufacturing or the dramatic growth of North-South trade, but is predominantly the consequence of successful economic growth largely caused by the relatively faster growth of productivity in the manufacturing sector and the shift of consumption patterns according to rising income standards."

TABLE 5.11 Annual employment distribution by economic activity, 2015–2019 (as a percentage)

International Standard Industrial Classification of All Economic Activities—Revision 4	2015	2016	2017	2018	2019
A. Agriculture; forestry and fishing	5.2	4.9	4.9	5	5.1
B. Mining and quarrying	0	0.1	0.1	0.1	0
C. Manufacturing	17.5	17.3	17	16.8	16.3
D. Electricity; gas, steam and air conditioning supply	0.3	0.3	0.3	0.3	0.2
E. Water supply; sewerage, waste management and remediation activities	0.4	0.4	0.4	0.5	0.5
F. Construction	7	7	7.4	7.6	7.4
G. Wholesale and retail trade; repair of motor vehicles and motorcycles	14.5	14.2	14.1	13.8	13.4
H. Transportation and storage	5.4	5.4	5.2	5.2	5.3
I. Accommodation and food service activities	8.4	8.6	8.5	8.3	8.5
J. Information and communication	2.9	3	2.9	3.1	3.2
K. Financial and insurance activities	3	3	3	3.1	2.9
L. Real estate activities	1.8	1.8	2	2	2
M. Professional, scientific and technical activities	4	4.2	4.1	4.1	4.2
N. Administrative and support service activities	5	5.2	5.1	4.9	4.8
O. Public administration and defence; compulsory social security	3.6	3.8	3.9	4.1	4
P. Education	7	7	7.1	6.9	6.9
Q. Human health and social work activities	6.8	7	7.2	7.6	8.1
R. Arts, entertainment and recreation	1.6	1.5	1.6	1.6	1.8
S. Other service activities	4.7	4.6	4.6	4.6	4.5
T. Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use	0.3	0.3	0.2	0.2	0.3
U. Activities of extraterritorial organizations and bodies	0.1	0.1	0	0	0
X. Not elsewhere classified	0.4	0.3	0.3	0.4	0.4
Total	100%	100%	100%	100%	100%

Source: ILOSTAT (2021).

In the long-term, this might affect the labour market, as "it is likely that this deindustrialization is accompanied by sluggish growth and, if it proceeds at an uncontrollably rapid speed, may

result in a variety of problems, such as increasing structural unemployment or a deepening of income inequality, etc" (ibid.).

Continuing to the next indicators, the share of employees increased from 73.6 per cent in 2015 to 75.10 per cent in 2019, while the percentage of employers decreased from 6.10 per cent to 5.60 per cent, as well as the percentage of own-account workers, from 15.20 per cent to 14.90 per cent in the same period.

TABLE 5.12 Annual employment distribution by employment status (as a percentage)[21]

Year	2015	2016	2017	2018	2019
Employees	73.60%	74.10%	74.20%	74.60%	75.10%
Employers	6.10%	6%	6%	6.10%	5.60%
Own-account workers	15.20%	15.20%	15.20%	14.80%	14.90%
Contributing family workers	4.40%	4.20%	4.10%	4.10%	4.00%
Workers not classifiable by status	0.7%	0.5%	0.5%	0.4%	0.4%

Source: ILOSTAT (2021).

After practically no annual change in the share of temporary employees between 2015 and 2018, this indicator saw an increase of 3 per cent between 2018 and 2019.

TABLE 5.13 Annual share of temporary employees (as a percentage)[22]

Year	2015	2016	2017	2018	2019
Share	13.80%	14.20%	13.70%	13.80%	16.80%

Source: ILOSTAT.

The incidence of part-time employment increased by 4.20 per cent from 2015 to 2019.

Informal employment. Following the descriptive analysis of employment and labour market indicators, it can be observed that Korea is shifting towards a more flexible employment market dynamic, considering the substantial increase of the incidence of part-time employment and share of temporary employees, while women labour force participation rate has been growing at a steady pace.

21. The 'employed' comprise all persons of working age who, during a specified brief period, were in one of the following categories: a) paid employment (whether at work or with a job but not at work); or b) self-employment (whether at work or with an enterprise but not at work). Data are disaggregated by status in employment according to the latest version of the International Standard Classification of Status in Employment (ICSE-93). 'Status in employment' refers to the type of explicit or implicit contract of employment the person has with other persons or organizations. The basic criteria used to define the groups of the classification are the type of economic risk and the type of authority over establishments and other workers which the job incumbents have or will have.

22. This indicator represents temporary employment as a percentage of employees. Temporary employment, whereby workers are engaged only for a specific period of time, includes fixed-term, project- or task-based contracts, as well as seasonal or casual work, including day labour. There are wide differences in definitions used across countries, which should be kept in mind when making cross-country comparisons.

Labour productivity. After a steady increase in labour productivity between 2015 and 2017 and a sharp increase from 2017 to 2018, the annual growth rate of output per worker slowed down by 0.50 per cent from 2018 to 2019.

TABLE 5.14 Annual growth rate of output per worker (GDP constant 2011 international USD in PPP, as a percentage)

Year	2015	2016	2017	2018	2019
Share	1.4%	2.2%	2.1%	2.6%	1.2%

Source: ILOSTAT (2021).

Earnings and labour income. A similar pattern to labour productivity can be observed for mean nominal monthly earnings, which increased steadily between 2015 and 2017, followed by a sharp increase of 4,14 per cent between 2017 and 2018, but a decrease of 6,18 per cent between 2018 and 2019.

TABLE 5.15 Annual mean nominal monthly earnings of employees—harmonised series (2017 PPP USD)[23]

Year	2015	2016	2017	2018
Mean nominal earnings	3406.3	3464.4	3486.1	3630.5

Source: ILOSTAT (2021).

TABLE 5.16 Average annual wages, measured in 2019 constant prices

Country	Series	2015	2016	2017	2018	2019
South Korea	In constant prices in 2019 USD PPPs	37,513	38,617	39,552	40,820	42,285
OECD		46,562	46,897	47,277	47,748	48,587

Source: OECDStat.[24]

South Korea is below the total OECD average wage for the entire period, although the country has been reducing the gap over the years.

23. The earnings of employees relate to the gross remuneration in cash and in kind paid to employees, as a rule at regular intervals, for time worked or work done, together with remuneration for time not worked, such as annual vacation, other types of paid leave or holidays. Earnings exclude employers' contributions in respect of their employees paid to social security and pension schemes and also the benefits received by employees under these schemes. Earnings also exclude severance and termination pay. Statistics of earnings relate to the gross remuneration of employees—i.e., the total before any deductions are made by the employer. This is a harmonised series: (1) data reported as weekly and yearly are converted to monthly in the local currency series, using data on average weekly hours if available; and (2) data are converted to USD as the common currency, using exchange rates or using 2017 purchasing power parity (PPP) rates for private consumption expenditures. The latter series allows for international comparisons by accounting for the differences in relative prices between countries.

24. OECD (2021), Average wages (indicator). doi: 10.1787/cc3e1387-en (Accessed on 21 February 2021).

TABLE 5.17 Annual unemployment rate (as a percentage)[25]

Year	2015	2016	2017	2018	2019
Total	3.50%	3.60%	3.60%	3.80%	3.80%
Male	3.60%	3.70%	3.80%	3.90%	3.90%
Female	3.50%	3.50%	3.50%	3.70%	3.60%

Note: for this table, all persons aged 15 or over were considered.
Source: ILOSTAT (2021).

Unemployment. The unemployment rate remained steady between 2015 and 2019, on average increasing 0.05 per cent over the period.

The same pattern is observed for the inactivity rate, with a slight average decrease of 0.10 per cent over the period.

TABLE 5.18 Annual inactivity rate (as a percentage)[26]

Year	2015	2016	2017	2018	2019
Share	36.80%	36.80%	36.50%	36.60%	36.40%

Source: ILOSTAT (2021).

As stated by Lee (2020), the South Korean labour market looks healthy overall. Unemployment has remained below 4 per cent since 2002 and average real monthly earnings have increased considerably, with only a small dip during the 2008 global financial crisis. However, the South Korean labour market is facing difficulties related to youth unemployment, weak female labour force participation, rising earnings inequality, and a rapidly aging labour force. Policymakers should consider steps to strengthen the social safety net, develop labour market programmes to promote fertility and female labour force participation, and encourage long-term investment in education.

Although the country has recovered rapidly form the Asian economic crisis of 1998 and showed to be resilient in face of the 2008 global financial crisis, its labour market is facing some challenges, especially regarding the relationship between workers and employers, as discussed in the next topic.

25. The unemployment rate conveys the number of persons who are unemployed as a percentage of the labour force (i.e., the employed plus the unemployed). The 'unemployed' comprise all persons of working age who were: a) without work during the reference period (i.e., were not in paid employment or self-employment); b) currently available for work, i.e., were available for paid employment or self-employment during the reference period; and c) seeking work, i.e., had taken specific steps in a specified recent period to seek paid employment or self-employment. (NB The NEET Rate, another important unemployment indicator can be found below).

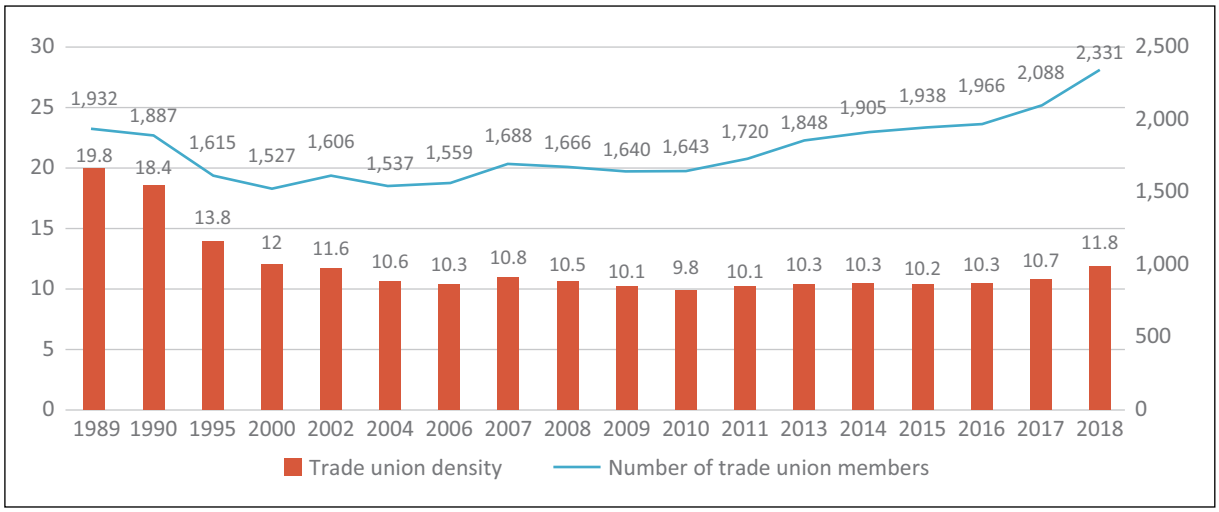
26. This indicator conveys the number of persons of working age outside the labour force (that is, not employed or unemployed) expressed as a percentage of the working-age population. The working-age population is commonly defined as persons aged 15 years and older, but this varies from country to country. In addition to using a minimum age threshold, certain countries also apply a maximum age limit.

B. Trade union density and collective bargaining coverage rate

From 2010 to 2018, the number of union members increased by 688,000 workers, with 2.33 million members in 2018. This steady growth from 2010 was possibly influenced by the 2008-2009 crisis, during which the unemployment and dismissal rates increased considerably.

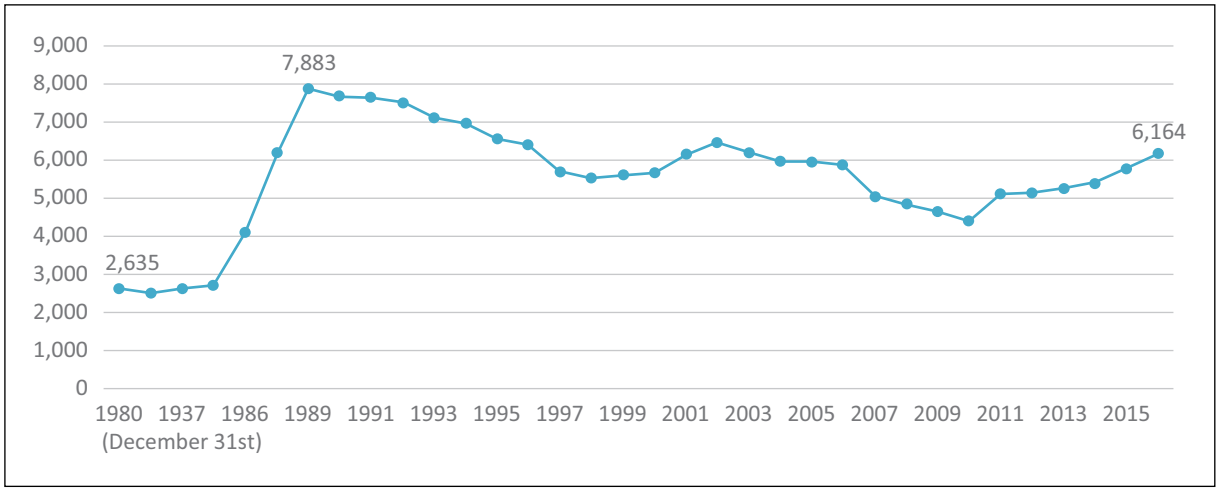
As defined by the OECD, trade union density "corresponds to the ratio of wage and salary earners that are trade union members, divided by the total number of wage and salary earners" (OECD 2016). This indicator also increased from 2010 to 2018 by 2 percentage points. Even though the density is low compared to 1989, it was in the democratisation period during which the popular pressure for improvements of labour rights was at its peak.

FIGURE 5.2 Trade union density and number of trade union members (as a percentage)



Source: Review of Industrial Relations and Outlook for 2020. Korea Labour Institute.

FIGURE 5.3 Number of labour unions in South Korea, 1980–2016



Source: Korea Labour Institute.

Figure 5.3 represents the number of labour unions in South Korea from 1980 to 2016.

Table 5.19 shows South Korea's collective bargaining coverage rate for the period 2011-2016, the most recent year with available data. It used ILO and OECD data, and presents a comparison against the total OECD estimate.

TABLE 5.19 Annual collective bargaining coverage rate (as a percentage)

	2011	2012	2013	2014	2015	2016	2017
South Korea—ILOSTAT	11.5	11.7	11.8	11.9	11.8	NA	NA
South Korea—OECD.Stat	13.0	13.2	13.3	13.3	13.2	13.1	NA
OECD—Total (estimated value)	34.8	33.9	33.6	33.1	32.7	32.4	32.4

Source: OECD and ILO.

South Korean workers have less collective bargaining coverage compared to the OECD estimate. Although the figures from the ILO and OECD differ for this parameter, we can notice some stability throughout the years, twice as low as the OECD average.

Some analysts point out that the low collective bargaining coverage rate might be a cause for wage inequality (Suk-yee 2019). Both trade union density and collective bargaining coverage rates in South Korea have been relatively stable since the mid-1970s and well below the OECD averages. Therefore, quality of labour relations in the country is classified as 'low' by the OECD,[27] which also asserts that Korea's "economic achievements have not fully translated into well-being" (OECD 2020) and recommends revisions of some labour-related laws, including the ratification of the ILO Convention on the right to organise and collective bargaining:

Korea ranks particularly low on social connections, perceived health status, environmental quality, and work-life balance, highlighting the need to foster a more inclusive society. Meanwhile, the government submitted again the revision package of labour-related laws based on the recommendations of public interest members of the Economic, Social and Labour Council, together with the ratification proposal of the three International Labour Organization Fundamental Conventions (No. 87 on freedom of association, No. 98 on the right to organise and collective bargaining, and No. 29 on the prohibition of forced labour) to the National Assembly. The approval by the National Assembly of the revision package and the ratification proposal would significantly improve Korea's worker fundamental rights (OECD 2020, 30).

The predominant level of the collective bargaining system of the country is at the company level and is decentralised, but this is changing. As highlighted by Lee and Kim (2017, p. 2), the "percentage of unionized workers joining the unions beyond enterprise-level (including unions

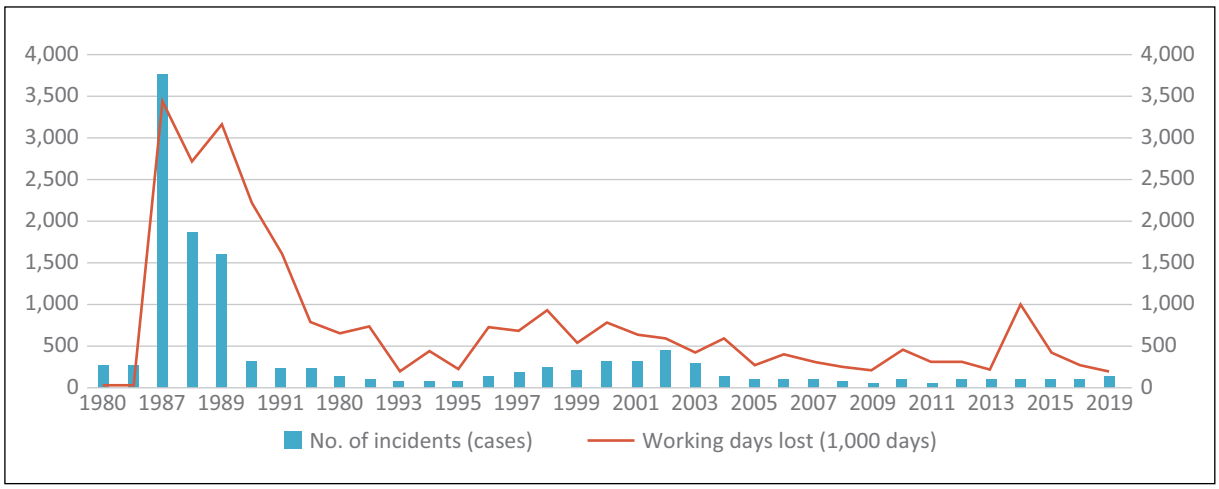
27. See more at: <https://www.oecd.org/employment/emp/collective-bargaining-Korea.pdf>.

established by industry, occupation, region, or other nature of the group of workers) stood at 39.7 per cent in 2006, but this percentage increased over 50 per cent in 2007 (at 51.3 per cent) and continued to grow to reach 56.7 per cent as of the end of 2015. The authors continue, arguing that aside from the shift in unionization towards unions beyond enterprise boundaries, the scope implicated by industry-level collective bargaining is limited. Bargaining concerning the terms of actual wages and working conditions is mostly conducted at the enterprise-level. This points out the mismatch between the form of unionization and the type of bargaining. The labour (trade unions) continues to emphasize the need for the industry-level bargaining, but the response of the employer side is passive. Complaints from the employer side are related to redundancies in bargaining and the agenda for bargaining. To name a few, they are discontent with the issue of the three-tier bargaining structure including bargaining on the central (national), regional, and branch (enterprise) level, repeated occurrences of strikes including political strikes and collective strikes, and bargaining agendas difficult to handle uniformly at the central level with possible breaches of rights to personnel and business management (Lee e Kim 2017, 2–3). In conclusion, "under the condition that existing clauses in the labour law that have failed to reflect the variety of trade unions are to be amended", Lee & Kim (2017, p. 7) suggests "industry-level bargaining and workplace-level consultation based on coordinated decentralization, the introduction of a wage notification system, and measures to enhance the efficiency and stability of enterprise-level bargaining".

C. Industrial action

This section aims to provide an overview of industrial action in South Korea. Prior to proceeding to the analysis, we must establish three premises. First, data concerning the number of workers involved is available only up to 2016. Further, it should also be pointed out that there is data available for workers involved in industrial action only up to 2016.

FIGURE 5.4 Number of strikes and working days lost, 1985–2019



Source: Korea Labour Institute and Ministry of Employment and Labour.

While in the late 1980s and early 1990s strikes were frequently employed in South Korea, since the mid-2000s the number of strikes remained at around 100 cases per year. The number of union strikes organised at large establishments grew steadily, as well as their duration. In 2014 there were 111 strikes (7 of those classified as illegal), which involved around 133,000 workers and resulted in a loss of 650,924 working days. Most affected was the manufacturing industry with 45 strikes—most concentrated in the machinery/metal industry (28 cases)—followed by 'social and private service' with 39 strikes (particularly related to cleaning and other services subcontractors—32 cases). In the manufacturing sector, the main causes of dispute were related to wages and retirement extension, whereas for social and personal service activities disputes were driven by indirect employment, unionisation strategy and working conditions. In terms of labour management disputes by size, most cases occurred in establishments with over 1,000 employees (39) followed by establishments with 100-299 employees (24).

TABLE 5.20 Number of strikes, working days lost and workers involved, 2014–2018

Year	2014	2015	2016	2017	2018
Strikes	111	105	120	101	134
Working days lost	650,924	446,852	2,034,751	861,783	551,773
Workers involved	133,000	77,000	226,000	NA	NA

Source: Authors' elaboration.

In 2015, strikes remained relatively stable, with 105 cases (4 of which were deemed illegal). Conversely, a more marked decrease can be observed in relation to working days lost, decreasing by 31 per cent (446,852) and number of workers involved, decreasing by 42 per cent (77,000). The manufacturing industry registered the most cases (47), particularly in machinery and metal industries (27 cases), and was followed by social and private services (36 cases). In 45 cases the disputes were due to wage negotiation, whereas in 47 cases the cause was related to both wage negotiation and collective agreements. Finally, in terms of disputes by size, 34 cases happened in establishments with 100-299 employees, followed by 26 cases in establishments with over 1,000 employees.

In 2016 there were 15 additional strikes compared to the previous year, resulting in a total of 120 cases (5 of those were deemed illegal). The two other indicators experienced significant growth: 226,000 workers were involved, increasing by 65 per cent over 2015; likewise, 2,034,751 working days were lost, a 78 per cent increase. These were the highest figures in the time series considered, keeping in mind that publicly available data concerning workers involved only goes up to 2016, which was a year marked by strong social tension due to the Candlelight Revolution,[28] undoubtedly contributing to the growth of those three indicators. Particularly relevant within this context were the labour reforms proposed by the Park administration. They provided for the right

28. A series of protests against president Park Geun-hye which occurred throughout all of South Korea, from November 2016 to March 2017.

of the management to change employment terms (without the workers' consent) with a view to adopt a performance-based salary system; encouraged the use of non-standard workers and dispatched labour in manufacturing; and relaxed the conditions for dismissing regular workers. The most affected business categories were again the manufacturing sector, at 40 cases (more specifically the machinery/metal industries, accounting for 33 strikes), and social and private services with 39 cases. In addition, there was a growth of 83 per cent in disputes regarding finance, insurance, real estate and business services, which went from 2 cases in 2015 to 12 in 2016. Sixty three per cent of disputes were due to collective agreements and wage negotiation, whereas a further 30 per cent were exclusively linked to wage negotiation. Finally, there was a marked growth in disputes in establishments with more than 1,000 employees, from 26 in 2015 to 47 in 2016 (a 44 per cent increase), and a decrease in cases in establishments with 100-299 employees (from 34 in 2015 to 19 in 2016).

The following year, 2017, was marked by a decrease in strikes with 101 cases (3 illegal) and working days lost: a total of 861,783 days. Despite a significant reduction of 1,172,968 working days lost over the previous year, it is noteworthy that the 2017 figure was almost double the one recorded in 2015. The manufacturing industry remained the most affected (45 cases), mostly concentrated in the machinery/metal industries (with 26 disputes). Further, despite a decrease of 51 per cent, social and private services remained the second most affected business category, totalling 20 cases. The number of disputes due to wage negotiation remained stable at 36, while those due to collective agreements and wage negotiation decreased more substantially, from 76 disputes in 2016 to 55 in 2017. Finally, disputes occurring in establishments with over 1,000 employees remained the most frequent, with 29 cases (an 18 case decrease compared to the previous year), followed by those in establishments with 100–299 employees (22 cases) and those in establishments with less than 50 employees (18 cases—the highest figure recorded in the time series for this segment).

In 2018, 134 labour-management disputes were registered (4 illegal), and the year was characterised by a further decrease in working days lost (551,773). Of the 55 cases registered in manufacturing, 43 occurred in the machinery/metal industries, which recorded the highest number of the time series. The second most affected business category remained social and private services, which also registered the highest figure in the period considered (44 cases). The same applies to transportation (other than taxis), with 24 disputes. A more equal distribution of disputes can be seen when the size of establishment is considered: establishments under 50 employees (15), 50–99 employees (23—highest figure in the time series), 100-299 employees (31—highest figure of 2018), 300-499 employees (18), 500-999 employees (21—highest figure in the time series), and over 1,000 employees (26 cases). Finally, 117 labour-management disputes (87 per cent) of 134 were due collective agreements and wage negotiation, with a quite significant decrease of those exclusively due to wage negotiation (14 cases).

5.2 LABOUR DISPUTE RESOLUTION SYSTEM

5.2.1 Organisation of the labour dispute resolution system

Contextualisation of the dispute resolution system. In Korea's legal system, there are two main channels for labour dispute resolution— through the LRC or through regular justice channels.

The main institution responsible for handling labour disputes in Korea is the LRC, an independent, quasi-judicial, public administrative body that aims at settling labour conflicts by alternative dispute resolution means. The labour cases that undergo the LRC and National Labour Relations Commissions (NLRC) are administrative actions conducted by an administrative agency. If the parties are not satisfied with the Commission's decision, an administrative litigation can be filed before the Administrative Court against to seek their revocation.[29] The efficiency and efficacy of the NLRC on settling disputes through alternative dispute resolution (ADR) translates into a higher number of success cases through ADR in Korea, and therefore less dependency of citizens on the nation's justice system (civil courts) in matters of labour conflicts.

Considering that the country's legal system does not include courts specifically dedicated to labour litigation, labour disputes are brought before civil courts. In order to strengthen the professionalism of civil magistrates over labour cases, courts at each district operate a department dedicated to labour cases and a labour coordination committee. As Lee (2012, 14) points out, civil litigation is available for unfair treatment cases (such as unfair suspension, transfer, disciplinary actions, unfair dismissal, etc), in the form of a 'legal action to confirm status of employee' or 'legal action to claim wage payment'. The court can correspondingly order reinstatement and damage compensation. A civil action can be launched before, during, or after the LRC process and administrative court procedures, and should be proposed before the competent district court.

On the other hand, it should be pointed out that very few cases—mostly involving large-scale dismissals or wage payments—are brought before courts without going through the LRC, as these can be costly (due to attorney's fees, except for small claims trials) and time-consuming.

In addition to these channels, disputes can also be solved at the company level through the grievance handling committee. As briefly mentioned in Section 2, the Act on the Promotion of Employees' Participation and Cooperation requires businesses and workplaces employing 30 or more individuals on a regular basis to have such committees

29. As per Article 27 of the Labour Relations Commission Act, Article 31 of the LSA stipulates that "with respect to a decision made by the National Labour Relations Commission's review, the employer or worker may institute a lawsuit pursuant to the Administrative Litigation Act within fifteen days from the date when he/she is served with the written decision made by review".

(Art. 26). The committee, composed of not more than three members representing labour and management (Art. 27), upon hearing from a worker about their grievances, shall notify them of the measures taken and other results within ten days (Art. 28). The matter can also be referred to the labour-management council for settlement through consultation. The use of this mechanism varies among companies, depending on their size and if unions are present or not (Lee 2012).

A. Dispute resolution system organisation and composition

The Labour Relations Commission system currently comprises the NLRC) the Regional Labour Relations Commissions (RLRCs: 13 regions), and the Special Labour Relations Commission (Seamen's Labour Relations Commission). The NLRC and each RLRCs is presided by a chairperson. The NLRC's chairperson has general control over several matters, as analysed in the next subsection, whereas the chairpersons of the RLRCs serve as public interest members (Art. 9 of the LRCA).

The jurisdiction of various commissions is set in Art. 3 of the LRCA, and depicted in Table 5.21.

TABLE 5.21 The jurisdiction of various commissions

Body	Jurisdiction
National LRC	• Reviewing measures already taken by the Regional and Special Labour Relations Commissions • Making adjustments in terms of industrial disputes which fall under the jurisdiction of two or more Regional Labour Commissions • Such cases as may fall under its jurisdiction as prescribed by other enactments
Regional LRC	Regional LRCs have jurisdiction over cases which occur in their respective region. Cases (other than adjustments) which span two or more Regional LRCs shall be governed by the Regional LRC which has jurisdiction over the location of the main workplace
Special LRC	Special LRCs have jurisdiction over the cases concerning specific matters which are prescribed by relevant enactments as an objective of its establishment. Yet, the Chairman of the National LRC may designate a particular Regional LRC to deal with the case concerned, when it is deemed necessary to settle industrial disputes effectively

Source: Authors' elaboration based on Lee (2019).

Further, pursuant to Art. 15, the LRC is composed of a Plenary Session and seven Committees in each category, including the Mediation Committee, the Adjudication Committee, the Discrimination Correction Committee, etc. The sectoral committees of the RLRC are almost the same as those of the NLRC. However, the Teacher's Labour Relations Mediation Committee and Public Official's Labour Relations Mediation Committee were established only under the NLRC. And the Negotiating Representative Determination Division was established only under the Seoul RLRC. Table 5.22 depicts the committees, their composition and roles.

As provided by Art. 6 of the LRCA, the LRC is to be composed of members representing workers ("workers' members"), employers ("employers' members") and public interests ("public interest members"). In addition, the LRCA requires each LRC to have standing members serving as public interest members (Art. 11). As reported by the Labour Relations Commission (2018, 12) there are two standing members in the NLRC, three in Seoul's RLRC, two in Gyeonggi and one in Busan.

The composition of the committees (as established in Art. 15 of the LRCA) varies according to committee type: in principle, committees are always collegial, with the exception of single adjudication cases (LRCA, Art. 15-2) which occur when both parties request or agree with a single-member adjudication, or when the requirements of a request for remedy are not clearly met (i.e., missing deadline).

TABLE 5.22 Composition of the Labour Relations Commission

	Committees	Composition	Roles
Committees by section	Plenary	Full tripartite commissioners	Determination of general administrative matters for the LRC/establishment of recommendations, orders and rules for improving working conditions
	Adjudication Committee	Three public interest commissioners in charge of adjudication	Judgments and remedies on unfair labour practices and unfair dismissals, etc., corrections related to the single bargaining channel and the duty to provide fair representation
	Discrimination Correction Committee	Three public interest commissioners in charge of discrimination correction	Ordering the correction of discrimination against non-regular workers, such as fixed-term, part-time, and temporary agency workers
	Mediation Committee	1 employee commissioner, 1 employee commissioner, and 1 public interest commissioner (in charge of mediation)	Mediation of labour disputes in general businesses
	Special Mediation Committee	Three public interest mediation commissioners	Mediation of labour disputes and the determination of the maintenance and operation levels of essential minimum services in public utilities
	Arbitration Committee	Three public interest mediation commissioners	Arbitration upon request from both parties concerned or a party to the collective bargaining agreement
	Teachers' Labour Relations Mediation	Three public interest mediation commissioners	Mediation and arbitration of the labour relations of teachers
	Public Officials' Labour Relations Mediation Committee	Seven or fewer public interest commissioners dedicated to the mediation of public officials' labour relations	Mediation and arbitration of the labour relations of public officials

Source: National Labour Relations Commission (2019, 6).

Finally, the NLRC has a Secretariat Department (one of the NLRC's standing members concurrently holds the position of Secretary General) and the RLRCs Administrative Bureaus to support administrative affairs. Overall, there are 364 Public Officials in service (92 at the NLRC

and 272 at the RLRCs) (National Labour Relations Commission 2019). One such official is the investigation officer, who is responsible (under the direction of the LRC chairperson or sectoral committee) for conducting investigations regarding several procedures before the LRC and can also attend the Committee to present their opinion (LRCA, Art. 14-3).

Regarding judicial civil courts, Art. 102 of the Constitution remits the determination of the organisation of the Supreme Court and lower courts to statutory legislation. The main legal framework at the statutory level for the organisation of justice is the Court Organisation Act, which regulates the organisation of courts exercising the judicial power under the Constitution (Art. 1). While a comprehensive analysis of the legislation is not possible given the scope of this work, it is nonetheless worth noting that, according to Art. 2, courts shall judge all legal disputes and litigations. However, the norm also specifies that this provision cannot prohibit any judgement as a previous trial by an administrative agency—as in the case of the LRC.

Pursuant to what was detailed in Section 1B, the Act provides for the following categories of courts (Art. 3):

- Supreme Court
- High Court
- Patent Court
- District Court
- Family Court
- Administrarive Court

To handle part of the affairs of district courts and family courts, the same norm also allows for the establishment of a branch court, a family branch court, a Si court or Gun court (hereafter referred to as 'Si/Gun court'), and a registry under the jurisdiction of the district courts and family courts. Two branches of the district courts and family courts may be united into one branch court. Art. 34—establishing the jurisdiction of Si/Gun Courts—includes civil cases which are subject to the trial of small claims act.

The Act attributes to the Chief Justice the possibility of asking a specified panel to judge certain cases exclusively, including labour cases (Art. 7). Likewise, Art. 27 provides for the establishment of divisions in the high court, while Art. 30 and Art. 31 do the same for district and branch courts, respectively.

Finally, the Court Organisation Act provides that the number of judges assigned to high, patent, district, family, and administrative courts is determined by the Supreme Court Regulation (Art. 5). Art. 4 of the Act further provides that, in principle, the judgement authority of high, patent and administrative courts is exercised by a collegiate panel composed of three judges. In turn, the judgement authority of district courts, family courts branch courts, or Si/Gun courts of districts is to be exercised by a single judge. However, if a collegiate judgement is required, a collegiate panel will resolve the case.

B. Administration of the labour dispute resolution system

The National and Regional LRCs fall under the purview of the Ministry of Employment and Labour, while the Special LRC falls under the purview of the central administrative agency, which has jurisdiction over specific issues. Although the LRC is affiliated to administrative bodies in terms of organisational structure, it has independence to carry out its mission without being controlled or guided by other institutions (Art. 4 of the LRCA). The Act determines that the chairperson of the NLRC has overall control over budgets, personnel affairs, education and training, and other administrative matters of the NLRC Commission and the Regional LRCs, and shall direct and supervise the public officials falling under his jurisdiction. The Chairman can delegate part of the authority to direct and supervise administrative matters to chairpersons of the Regional LRCs (Art. 4. 3 of the LRCA).

In terms of judicial administration, the Chief Justice[30] exercises general control over judicial administrative affairs, including the supervision of personnel. The Chief Justice may delegate part of his directory and supervisory authority to the Minister of National Court Administration, the chief judge of each court, the President of Judicial Research and Training Institute, the President of Training Institute for Court Officials, or the President of the Supreme Court Library. Important judicial administrative affairs require a resolution of the Council of Supreme Court Justices. The Judges Personnel Committee was established as an advisory group to the Chief Justice to plan and coordinate personnel issues. The Chief Justice can evaluate service of judges and the outcomes may be reflected in personnel management.

The Council of Supreme Court Justices is the highest deliberative body in the country's judicial administration. It is composed of all the Justices and presided by the Chief Justice. A resolution of the Council requires a quorum of no less than two-thirds of all Justices and the consent of a majority of Justices present. The Council decides on the following matters: consent to the appointment and reappointment of judges; enactment, revision, etc. of the Supreme Court Regulations; collection and publication of judicial precedents; request for the budget,

30. The Chief Justice and justices of the Supreme Court are appointed by the President of South Korea, with the consent of the National Assembly. The Chief Justice must submit his recommendations for appointment of other justices to the President. Judges are appointed by the Chief Justice with the consent of the Council of Supreme Court Justices, and are assigned to their posts by the Chief Justice.

expenditure of reserve fund and settlement of accounts; and other matters deemed to be particularly important , which are submitted to the Council by the Chief Justice.

The Minister of the National Court Administration (NCA) is also affiliated to the Supreme Court, under the direction and supervision of the Chief Justice. It is responsible for all the tasks of the institution, as well as the administrative affairs of the Court. Within this context, the Planning and Coordination Office administers court activity, including planning and coordination for judicial operations, international affairs, the management and development of the judicial information system, request, allocation and execution of the judicial budget, organisation reform, and management of court facilities. The Judicial Proceedings Support Office oversees the operation and improvement of trial systems, including revision of trial procedure regulations and procedures for civil, criminal, family and bankruptcy cases. The Administrative Management Office is responsible for executing general administrative affairs, including the management of Supreme Court facilities, as well as of finance and human resources. The Judicial IT Bureau establishes judicial information technology (IT) policies, budget and contracts, in addition to managing and developing the judicial information network. The Supreme Court Litigation Bureau is in charge of receiving cases, managing case records and supervising court officials in courts across all levels. The Inspector General for Judicial Ethics conducts activities and measures to enhance overall judicial ethics. The Director General of Personnel Affairs handles the personnel matters of judges, and the Director of Personnel Management handles the personnel matters of court employees.

C. Territorial distribution of LRCs and courts

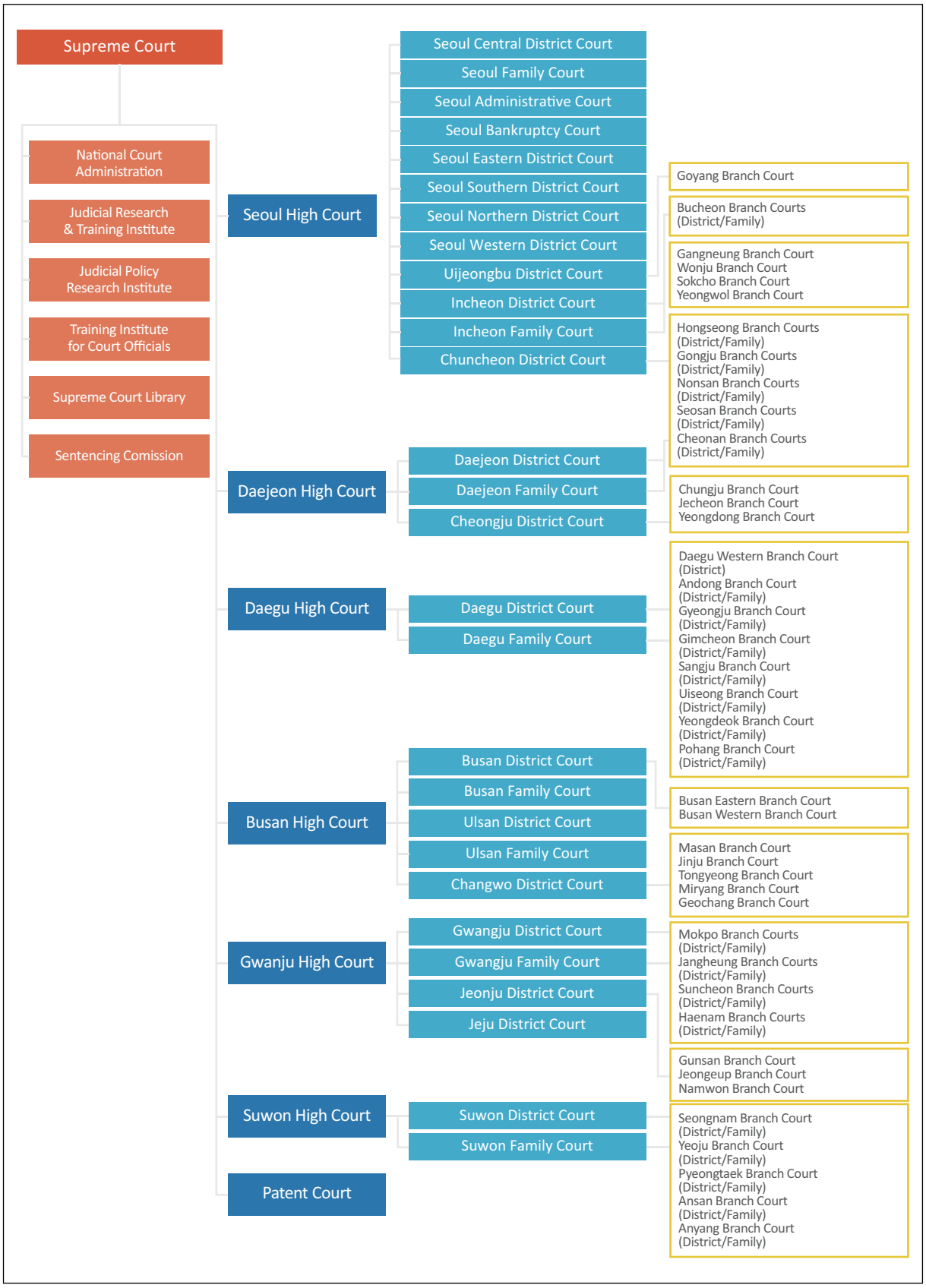
TABLE 5.23 Names, locations, and jurisdictions of the RLRCs

Classification	Location	Jurisdiction
Seoul RLRC	Seoul	Seoul
Busan RLRC	Busan	Busan
Gyeonggi RLRC	Gyeonggi-do	Gyeonggi-do
Chungnam RLRC	Daejeon	Daejeon·Chungcheongnam-do·Sejong
Jeonnam RLRC	Gwangju	Gwangju·Jeollanam-do
Gyeongbuk RLRC	Daegu	Daegu·Gyeongsangbuk-do
Gyeongnam RLRC	Gyeongsangnam-do	Gyeongsangnam-do
Incheon RLRC	Incheon	Incheon
Ulsan RLRC	Ulsan	Ulsan
Gangwon RLRC	Gangwon-do	Gangwon-do
Chungbuk RLRC	Chungcheogbuk-do	Chungcheogbuk-do
Jeonbuk RLRC	Jeollabuk-do	Jeollabuk-do
Jeju RLRC	Jeju-do	Jeju-do

Source: "Names, locations and jurisdictions of the RLRCs," 2018.[31]

31. Labour Relations Commission in Korea by National Labour Relations Commission. p.6 <https://bit.ly/3HVitYj>.

FIGURE 5.5 Distribution of the various courts in South Korea



Source: Supreme Court of Korea (2019, p. 8).

In addition to the NLRC and the Special Labour Relations Commission (non-permanent Seamen's Labour Relations Commission, affiliated to the Ministry Oceans and Fisheries), there are 13 RLRCs, as illustrated in Figure 5.5.

The Korean justice system is composed of a Supreme Court, five high courts located in five major cities, 18 district and 40 branch courts nationwide, and 11 specialised courts, of which the Administrative and Bankruptcy Courts are located in Seoul, the Patent Court in Daejon, and 8 Family courts are distributed across different regions. Table 5.23 illustrates the distribution of the various courts.

The role of the administration. Notwithstanding the role of the LRCs, which once again are independent administrative bodies, the public administration undertakes several functions which are instrumental to preventing and resolving labour disputes. While we cannot address them in a comprehensive manner due to the scope of this work, nonetheless it is worth pointing out that the Ministry of Employment and Labour is responsible for the protection of working conditions. One of the ways it does so is through regular inspections of workplaces and eventual corrections of registered violations through administrative remedy in the form of a corrective order. If such an order is not complied with, the case will be referred to a prosecutor, who can eventually initiate a criminal lawsuit. Chapter 11 of the LSA is dedicated to the regulation of labour inspectors. Art. 101 requires the Ministry of Employment and Labour and its subordinate offices to carry out labour inspectors to ensure the standards of the terms and conditions of employment. Pursuant to the following Art. (102), labour inspectors can scrutinise workplaces, dormitories and other annexed buildings, request the submission of books and documents, and interrogate employers and workers. Further, a labour inspector who is a also medical doctor (or a medical doctor entrusted by the inspector) can conduct a medical examination of workers who seem vulnerable to diseases which should preclude their continued employment. Both cases require a letter of order of inspection or medical examination issued by the Ministry. The inspector has a duty of confidentiality which remains even after their retirement (Art. 103). Finally, Art. 104 explicitly allows workers to report any violation of the LSA and implementing regulations to supervisory authorities, and prohibits employers from dismissing or unfairly treating workers who carry out such a report.

The Ministry of Employment and Labour has been increasing the number of labour inspectors—from 1,450 to 2,290 in 2020. Further, it is preparing a labour inspection innovation plan to increase the effectiveness of inspections. Finally, for newly-established workplaces and those with less than 30 employees, voluntary improvement programmes have been implemented to prevent violations (Ministry of Employment and Labour 2021).

5.2.2 Procedures of the labour dispute resolution system

A. Evolution of labour justice

Table 5.24 represents a timeline of key events associated to the LRC. Several changes modified the LRC over time in terms of structure, organisation and responsibilities.

TABLE 5.24 Timeline of key events associated with the LRC

1953	1954	1963	1980	1989	1997
LRCA enactment	NLRC	Remedy system for unfair labour practices	Office integration	Remedy system for unfair dismissal	New LRCA
Seoul LRC			NRLC and RLRCs under Ministry of Labour		NLRC promoted to ministry level
					Teachers' labour relations mediation and arbitration
2006	**2007**	**2008**	**2011**	**2017**	
System for public officials' labour relations mediation and arbitration	System for penalties for non-compliance and discrimination correction of non-regular workers	System for the determination of essential minimum services	System for the recognition of the bargaining representative and correction of violations of duty of fair representation	Ulsan RLRC (13 total)	

Source: Authors' elaboration based on National Labour Relations Commission (2019, 5).

B. Labour disputes

According to Lee (2012, 1) labour disputes in South Korea's legal system can be classified as follows:

- Individual vs. collective labour disputes: depending on whether the parties to the dispute are individuals or a group. Individual labour disputes are all disputes that arise between an individual worker and an individual employer, from the start to the termination of the employment relationship. A collective labour dispute includes disputes between a union (or similar) and an employer (or an employers' association).

- Rights disputes vs. interest disputes: according to the nature of rights. Disputes over rights are already established by existing rules, such as labour-related rules, and collective bargaining agreements. Employment contracts are defined as rights

disputes. Rights disputes include individual disputes over unfair treatment (such as dismissal), whose legal basis is Art. 23 of the LSA; or disputes over violations of legal provisions protecting working conditions (such as wages). Interest disputes are those that arise while defining the relationship of rights between labour and management for individual wage bargaining or collective bargaining.

The LRC's labour committees—tripartite bodies composed of workers, employers and public interest members—oversee solving labour disputes adjudicating (as a quasi-judicial body) rights disputes and adjusting (as an administrative body) interests disputes, as can be inferred from Art. 2.2 of the LRCA. The purpose of the LRC remedial procedures is to support workers who have been dismissed to receive a remedy in an easier, faster and less expensive way (Supreme Court, 11/13/1992, 92Nu11114). According to Lee and Jung (2019, 388), the LRC has an adjudication function in the following instances:[32]

- Adjudication under the LSA

- Application for remedy for unfair dismissal and related acts (violation of Art. 23 of the LSA): when a worker is subjected by the employer to any unfair dismissal, etc., they may request a remedy to the LRC within three months from the date of dismissal (Art. 28 of the LSA)

- Adjudications under TULRAA

    1) Legality of trade union formation, operation and administration

    2) Administrative authorities may, with a resolution of the LRC, order |the correction of union by-laws in conflict with labour-related laws; (Art. 20 of TULRAA), and union resolutions and measures in conflict with labour-related laws and union by-laws (Art. 20, paragraph 2 of TULRAA).[33] Further, if the trade union has no officials and has not carried out any activity for more than one year, the administrative authority may, with a resolution of the LRC, order its dissolution (Art. 28, No. 4). Finally, if a representative of a trade union neglects or avoids convening a general meeting, upon request of a third or more of the union members to appoint a convener of the meeting, the administrative authorities shall ask the LRC to adopt a resolution to that end within 15 days (Art. 18, paragraph 3).

32. In addition, the LRC adjudicates on the maintenance and operation of minimum essential services. As mentioned in the last part of Section 2, Art. 42-3 of TULRAA requires the stipulation of the 'agreement on the essential businesses'. If such an agreement is not stipulated, pursuant to the subsequent Art. 42.4, one or both parties should file a request to the LRC to determine the necessary minimum level of maintenance/operation of essential services, targeted jobs, and the necessary number of workers. Upon receiving the request, the LRC will contextually adjudicate on these aspects.

33. The application of the interested party is required in this case.

3) Extension of the geographical binding force of the collective agreement (Art. 36, paragraph 1). When two-thirds or more of the workers of the same kind of job employed in an area are subject to one collective agreement, the administrative agencies may, with resolution of the LRC, at the request of either party to the collective agreement or ex officio, decide that the respective collective agreement shall apply to other workers of the same kind of job and their employers engaged in the same field.

4) Disagreement on the interpretation or implementation of the collective agreement, upon the request of one or both parties: the interpretation of the LRC must be given within 30 days (Art. 34).

5) Application for remedy for unfair labour practices identified by Art. 81: a worker or trade union may make an application for remedy to the LRC within three months from the date of occurrence of the practice concerned (or termination if such a practice is still ongoing) (Art. 82).

- Redress of discriminatory treatment under the FPWPA and DWPA

1) Any fixed-term or part-time worker who has been subjected to discriminatory treatment may file a request for its correction with the LRC under the LRCA. This does not apply if six months have passed since the discriminatory treatment occurred (or, in case of continuous discriminatory treatment, since the end of the treatment) (Art. 9 of the FPWPA).

2) If a dispatched worker is discriminated against, they may request redress to the LRC; Art. 9 to 15 of the FPWPA shall apply mutatis mutandis (Art. 21 of the DWPA)

Further, the LRC has an adjustment (mediation and arbitration) function in the following cases:

- Adjustments under the TULRAA: RLCs and SLC undertake ordinary mediation and arbitration, whereas the NLC undertakes emergency mediation and arbitration according to a decision for emergency adjustment by the Ministry of Employment and Labour.

- Adjustment under the LSA related to employment injuries/diseases (see next subsection).

- Mediation and arbitration under the FPWPA: the LRC can commence mediation procedures upon the request of either or both parties, or even ex officio, during the course of an inquiry. It may conduct arbitration following the agreement and request of the parties (Art. 11). Requests for mediation and arbitration must be filed within 14 days

from the date of the request of correction for discrimination, regardless of the LRC's prerogative to approve these requests after the fact.

- Voluntary arbitration under the Act on the Promotion of Worker Participation and Cooperation. A dispute may be settled by an arbitration organisation within the Labour-Management Council through an agreement between workers and employers, or may be referred to arbitration by the LRC or other third parties in the following cases: if the Council fails to issue a resolution on matters subject to resolution; or if there is any disagreement regarding the interpretation, implementation, etc., of resolutions made by the Council (Art. 25).

- Mediation and arbitration under the Act on the Establishment, Operation, etc., of Trade Unions for Teachers and the Act on the Establishment, Operation, etc., of Public Officials' Trade Unions. If collective bargaining fails, either or both parties can apply to the NLRC for mediation. The NLRC will commence mediation procedures without delay and the parties concerned shall participate in good faith. The process is to be concluded within 30 days (Art. 9 of the Teachers' Act and 12 Public Officials' Act). The NLRC conducts arbitration in the following circumstances: when both parties request so after collective bargaining breaks down; if the mediation proposal is rejected by either or both parties; or when the LRCA refers the case to arbitration during a plenary meeting (Art. 10 of the Teachers' Act and 13 Public Officials' Act).

C. Rules inherent to investigation, evidence, etc.

If the parties are the main players in the field of civil litigation—initiating the lawsuit, determining the claim, making allegations and presenting the evidence.[34] The situation is different for the LRC. Art. 23 of the LRCA provides that, when deemed necessary for performing its functions (thus explicitly including adjustment), the LRC may require workers, labour unions, employers, employers' associations, and other relevant individuals/entities to attend and report to the LRC, issue statements or submit necessary documents. In addition, the LRC may require the LRC member or investigation officer designated by the LRC chairperson or the chairperson of a sectoral committee to investigate business conditions, documents and other articles of the business or workplace. The LRC can also request the assistance of administrative agencies (Art. 22).

In cases of unfair dismissal and related acts, the LRC, upon receiving the application for remedy, shall immediately conduct the necessary investigations and examine the parties (Art. 29 LSA). In accordance with the same provision, it may, upon request of the party or *ex officio*, summon a witness and make the necessary inquiries. In undertaking examinations,

34. The Korean Civil Procedure Act (Art. 136) provides that the presiding judge may ask the parties questions in order to clarify the legal relations regarding factual or legal matters.

the LRC must ensure that the parties have ample opportunity to produce evidence and cross-examine the witnesses. Finally, the procedures for investigation and examination are prescribed by the NLRC under the LRCA. The same applies, pursuant to Art. 83 of TULRAA, to unfair labour practice cases and, pursuant to Art. 10 of the FPWPA/Art. 21-2 of the DWPA, to discrimination redress cases. For the latter, the burden of proof is placed on the employer, while the worker must clearly state the details of the discriminatory treatment (Art. 9 of the FPWPA and 21-2 of the DWPA).

D. The decision stage (faculty to decide ultra/extra petitum, etc.)

In civil law, after the trial the court deliberates on the case. It is evidently up to the court to apply the law to the facts which come before it. Therefore, the question of whether the court is bound by the cause of action presented by the party has been fiercely debated among civil procedure law scholars. What is certain is that once the legal grounds are fixed and submitted by the party, the court is bound to keep to those grounds. Yet, parties (particularly when not supported by a legal expert) are often not capable of the legal classification or categorisation of facts, allowing other lawsuits on the same dispute but with different causes of action, which can be perceived as inefficient and time-consuming (Kwon 2007).

In terms of the LRC, 'adjudication' means making a legal judgement on a remedy request based on the results of the investigation and the hearing. The Adjudication Committee can either decide in favour of the complainant (worker/trade union) or the respondent (employer), as well as determine the validity of the case. The Committee can adjudicate within the parameters according to which the remedy is requested. When the Committee acknowledges that the whole or part of a remedy (redress) request is appropriate, it mandates a remedy order. It is important to note that the Supreme Court has recognised the discretionary authority in determining the remedial order's contents, with a view to eliminate the harm caused: the decisions/remedial orders of the LRC have to be 'treated with deference' when under judicial review (Lee 2019, 400). If the employer does not comply within the specified deadline, the LRC imposes an enforcement fine (Art. 33 of the LSA). If the application is considered groundless, the LRC mandates a dismissal order. In addition, the remedy request may be rejected in following cases: if the application period is over; if the concerned party fails to meet the committee's request to provide supplementary information for the remedy request more than twice; the concerned party fails to satisfy certain conditions, such as not having the eligibility requirements or no expectation of merit of remedy (redress) in the case.

Similarly, in discrimination redress, the Discrimination Redress Committee will, pursuant to Art. 12 of the FPWPA (applicable also to the DWPA through Art. 21-2), issue a corrective order to the employer when the treatment in question is deemed discriminatory, or dismiss the request

if it is not. Art. 13 of the FPWPA allows the LRC to order monetary compensation not exceeding three times the amount of the damages in cases where clear wilfulness is recognised in the discriminatory treatment, or the discriminatory treatment occurred repeatedly.

Regarding dispute adjustment, the institutes of conciliation, mediation and arbitration must be analysed. However, prior to the analysis, two preliminary observations are necessary. First, the basic element underlying adjustment of labour disputes is **voluntary settlement**: in mediation and conciliation, the parties are free to reject the proposal of the LRC; in arbitration, although the decision is binding, the parties can still refuse to participate in the procedure. Further, Art. 52 of TULRAA explicitly allows private mediation and arbitration as valid channels to resolve industrial disputes. However, from a practical perspective, private mediation and arbitration rarely occurs in South Korea, further increasing the relevance the Commission (ibid.).

In addition to adjustment (e.g., under TULRAA—mediation and arbitration in ordinary situations, plus emergency adjustment—, LSA, FPWPA and DWPA, among others), pursuant to Art. 16-3 of the RLCA, the LRC can advise or offer reconciliation upon request by one of the parties or *ex officio* up until an adjudication, order, or decision is rendered under Art. 84 of TULRAA and 28 of the LSA—i.e., 'in adjudication cases'. The LRC must hear the opinion of both parties when drafting the reconciliation proposal. The Adjudication Committee or a single adjudication member should make a conciliation proposal after sufficiently reviewing conciliation conditions of the concerned parties and should explain the purpose and content sufficiently to both. When deemed necessary, the Adjudication Committee or a single adjudication member can hold a separate meeting for conciliation. Pursuant to Art. 16-3, when the parties accept the conciliation proposal, a protocol of reconciliation is made, signed and sealed by the parties and members engaged in the conciliation process. This protocol, in accordance with Art. 220 of the Civil Procedure Act, has the same effect as a final and conclusive judgement: its non-implementation results in compulsory execution without a civil suit.

As reported by Lee and Jung (2019, 408), conciliation is the simplest procedure, with the least binding power regarding the parties concerned. It is carried out by a public officer appointed by the relevant administrative authority, who besides confirming/clarifying the claim, simply assists them in reaching an agreement. Pursuant to the LRC Rules, conciliation can be requested, within the context of adjudication, by the parties before and during the hearing (Art. 68) and is recommended/arranged by the Adjudication Committee.

Mediation allows for a more positive intervention by the mediators than conciliation: they hear the opinion of the parties, prepare a draft mediation, and recommend its acceptance.

After having received a mediation request, the chairman of the committee or the single mediator must designate a specific date for the parties concerned to appear and verify the main points of their respective claims (Art. 58 of TULRAA). The mediation committee or the single mediator

prepare a mediation proposal, present it to the parties, recommending its acceptance, and simultaneously publicly announce it (with the support of press/broadcasting companies to inform the public if necessary) (Art. 60 of TULRAA). If there is no reason to continue the process (the parties concerned refuse the proposal), the committee/mediator terminates mediation and contextually notifies the parties. If the draft mediation is accepted by the parties it has, pursuant to Art. 61 of TULRAA, the same legal effect as a collective agreement. Similarly, mediation under the FPWPA (and DWPA) has the same validity of a settlement in litigation under the Civil Procedure Act (Art. 11of FPWPA). In the event that the proposal is accepted but there is disagreement regarding its interpretation or implementation, the parties can request the committee/mediator to clarify these aspects. The views of the committee/mediator, to be issued within seven days from the request, have the same effect of an arbitration award. In parallel, the parties concerned cannot conduct industrial action until the committee/mediator has expressed its views. Finally, the LRC can conduct mediation to settle a labour dispute even after the decision to end mediation is made (Art. 61-2 of TULRAA).

Arbitration allows the active intervention of arbitrators to an even greater extent.
The arbitration award has a binding force on the parties, regardless of their acceptance.
Similarly to mediation, the arbitration committee orders one or both parties to appear before it to confirm the main points of their respective claims. The arbitration ruling must be made in writing, clearly stating the date upon which it will come into effect (Art. 68 of TULRAA).
In case of discrepancy regarding the interpretation/implementation of the arbitration award, the interpretation of the concerned committee shall prevail. Arbitration under TULRAA has the same effect of a collective agreement (Art. 70) and of a settlement in litigation under the Civil Procedure Act under the FPWPA and the DWPA (respectively Art. 11 and 21-2).

E. Appeals/reparations

The parties can apply to the NLRC for review within 10 days of receiving an arbitration in case it violates the law or is ultra vires (i.e., goes beyond the authority of LRC) (Art. 69 of TULRAA). An arbitration ruling rendered by the NLRC or a decision on review can be contested on the same grounds, through an administrative suit within 15 days from the date of receipt.

Regarding adjudication (unfair dismissal and related acts and unfair labour practices cases) Art. 31 of the LSA and Art. 85 of TULRAA provide that when one of the parties is aggrieved/ disagrees with any remedial order or dismissal decision by the RLRC or SLC, they may apply to the NLRC for review within 10 days of the date of receiving the notice of the order or decision.

Within the context of unfair labour practice cases, Art. 31 of the LSA provides that given a decision taken by re-examining the NLRC, the employer or worker may institute a lawsuit pursuant to the Administrative Litigation Act within 15 days from the date when they

are served with the written decision. If neither the application for re-examination nor administrative litigation is filed within this period, the order for remedy, the decision for rejection or the decision made by re-examination shall become final and conclusive.

In parallel, Art. 85 of TULRAA establishes that any of the parties may institute an administrative suit in accordance with the Administrative Litigation Act, against a decision on review made by the NLRC within 15 days from the date of receiving the notice of the decision on review. Unless an application for review or an administrative suit has been filed within the period specified, the remedial order, dismissal decision, or review decision shall be final and decisive.

Finally, pursuant to Art. 32 of the LSA and 86 of TULRAA, the effect of the order for remedy, decision of rejection or decision made by re-examination of the LRC shall not be suspended even if an application for re-examination or administrative litigation is filed with or against the NLRC.

F. Occupational health and safety

Workers' health and safety are protected through the Industrial Safety and Health Act, as provided by Art. 76 of the LSA. Nevertheless, as anywhere else, workplace accidents and occupational diseases are inevitable. A South Korean worker can choose to claim damages through two different means: the Civil Code and the Industrial Accident Compensation Insurance Act.

It is worth shedding some light on the employer's liability under civil and labour law. Korea's Civil Act generally provides that any person (including the employer) who causes losses to or inflicts injuries on another person by an unlawful act, intentionally or negligently, shall be bound to make compensation for damages arising therefrom. As a consequence, in civil law the employer would be bound to compensate the worker for work-related accidents/diseases only when they have directly caused the damage on purpose or as a result of gross negligence. Conversely, under the LSA, the employer is liable to compensate the worker for a work accident or occupational disease regardless of intention or negligence (Lee 2019).[35]

To offer protection to the employee when the concerned employer cannot pay, a mandatory insurance system was created—the Industrial Accident Compensation Insurance Act (IACIA). After several amendments, the protective measures and coverage afforded by this law have been substantially expanded, making the IACIA the main law governing compensation for workplace accidents. The LSA currently plays a role limited to medical care and wage replacement benefits (ibid.).

35. There are additional differences between labour and civil law. The LSA fixes the amount of compensation based on a calculation of the worker's average wage. The payment of this compensation is sanctioned by criminal provisions and subject to administrative supervision.

In the event of injury, illness or death of workers, the LSA requires the employer to provide several forms of compensation, such as medical treatment compensation (Art. 78), compensation for the suspension of work (Art. 79), compensation for disability (Art. 80), compensation for survivors (Art. 82), funeral expenses (Art. 83) and lump-sum compensation (Art. 84). It is also important to point out that, pursuant to Art. 81, if a worker suffers from an occupational injury or disease due to their own gross negligence and the employer obtains an admission of said negligence from the LRC, the employer shall not be required to provide compensation for suspension of work or disability.

In terms of dispute resolution, when a person has an objection regarding the admission of occupational injury, disease or death, methods of medical treatment, compensation amount, or any other matter pertaining to the implementation of compensation, they may request the Minister of Employment and Labour to review or arbitrate the case in question (Art. 88 of the LSA). The Minister shall review or arbitrate within one month decurrent from the request filing. The same norm also allows the Minister's to review or arbitrate the case *ex officio* and dispose medical diagnoses/exams of the worker.

In turn, pursuant to Art. 89 (corresponding to the LRC's adjustment function under the LSA), if the review or arbitration is not carried out by the Minister within the specified period (1 month) or if the plaintiff is not satisfied with the result of the review or arbitration, they may file a request for review or arbitration with the LRC, which will also have 1 month to review or arbitrate the case (Art. 89).

The IACIA is a compulsory, public insurance system, carried out through the Korean Workers' Compensation and Welfare Service (Art. 10), under which the government collects insurance premiums from employers and provides, among other functions, benefits directly to injured workers or survivors: if a beneficiary has received insurance benefits pursuant to the IACIA, the insurance policy holder is exempt from liability for accident compensation under the LSA (Art. 80 of IACIA). In accordance with Art. 4 of IACIA, the premiums and other charges to be collected are subject to the conditions prescribed by the Act on the Collection, etc., of Premiums for Employment Insurance and Industrial Accident Compensation Insurance. In turn, pursuant to paragraph 5 of Art. 13 of the Act, the amount of industrial accident compensation insurance premiums to be borne by an employer corresponds to the total wages paid multiplied by the industrial accident compensation insurance premium rate applicable to businesses of the same kind.

Art. 103 of IACIA disposes that a person dissatisfied with a decision of the Workers Compensation & Welfare Service ('Service' hereafter) may request an examination to the same body regarding:

- A decision on insurance benefits
- A decision on medical expenses (under Art. 45 and 91-6; and under Art. 46)

- A measure to change a medical treatment plan
- A decision regarding the lump-sum payment of insurance benefits
- A decision regarding the collection of undue gains

The request for examination must be made within 90 days of the decision regarding the insurance benefits and must be directed at the organisation under the control of the Service which made the decision regarding the insurance benefit. The organisation, in turn, sends the request to the Service together with its written opinion. Through the same Art. 105, IACIA awards various prerogatives to the Service regarding the review of the request for examination, including the possibility to question individuals, order the production of documents, consult appraisals of technical experts, carry out inspections, etc. The Service must make a decision within 60 days, extensible for up to 20 days, after the Deliberation of the Industrial Accident Compensation Insurance Examination Committee (Art. 105).

Whoever is not satisfied with the decision regarding the examination can request a re-examination to the Industrial Accident Compensation Insurance Re-examination Committee (Art. 106). This request must be made within 90 days of the decision. The provisions of Art. 105 apply through Art. 109 with regard to review and decisions on a request for examination.

Claims for accident compensation under the LSA prescribe after 3 years (Art. 92). Likewise, the right to receive insurance benefits under IACIA also prescribes after 3 years if not used (Art. 112).

G. Labour claims

The LSA establishes various standards for wages and other kinds of labour claims, such as the compensation for occupational injuries and diseases previously analysed. The Minimum Wage act is an important guarantee, whose purpose is to stabilise workers' lives, improve the quality of the labour force and thus contribute to the sound development of the national economy (Art. 1). Regarding management crises or bankruptcy, pursuant to Art. 38 of the LSA wages, accident compensations, and other claims arising from labour relations shall be paid in preference to taxes, public charges or other claims, except for claims secured by pledges, mortgages or the security rights under the Act on Security over Movable Property, Claims, Etc. on the whole property of the employer concerned. However, this does not apply to taxes and public charges which take precedence over the said pledges, mortgages or security rights under the Act on Security over Movable Property, Claims, Etc. The second paragraph of the same norm states that the wages of the last three months in additional to accident compensation are to be paid in preference over all the abovementioned claims. Finally, claims for wages under the LSA are prescribed unless exercised within 3 years (Art. 49, same prescription as for labour credits resulting from occupational injuries and diseases).

The Wage Claim Guarantee Act is another crucial piece of legislation, enacted in response to the 1997 Asian economic crisis, which led to a number of corporate bankruptcies. Pursuant to Art. 1, the purpose of the Act is to contribute to the stabilisation of the livelihoods of workers by introducing measures to guarantee the payment of overdue wages, etc. to those who retired without receiving their wages due to companies not being able to continue their business or their management being unstable due to economic volatility, changes in industrial structure, etc. As reported by Lee and Jung (2019, 192) the government is responsible for paying unpaid wages to workers in the employer's stead according to reasons prescribed by presidential decree, such as bankruptcy. Pursuant to Art. 7, the scope of wages or other payments (subrogated payment or the substitution of payment of wages) paid by the Minister of Employment and Labour on behalf of employers includes:

- Wages covered under the LSA and retirement pay for the last three years in accordance with the Worker Retirement Benefit Security Act.

- Allowances for the suspension of business (limited to the final three months) in accordance with the LSA.

The same norm requires the definition, through Presidential Decree, of eligibility criteria for workers and employers to be entitled to a subrogate payment. In the case of a subrogated payment, the right of the worker to claim unpaid wages is transferred, to the extent of the amount of the payment to the Minster (Art. 8).

Article 7-2 allows the employer, in arrears of wages due to temporary financial difficulties or other grounds (prescribed by ordinance), to apply to the Minister of Employment and Labour for a loan.

Executive procedures. The Korean civil procedure includes a procedure of compulsory execution as well as a procedure of foreclosure, regulated in the Civil Execution Act. Further, provisional attachment and disposal procedures are initiated to prevent a debtor from selling their property before the judgement becomes final and conclusive in order to perform compulsory execution.

Conversely, an adjudication of the LRC—a quasi-judicial administrative disposition with a legally binding force—is enforceable, as the effect of the remedial order is not suspended even in case of review before the NLRC (Labour Relations Commission 2018).

Ad hoc' procedures for specific categories of workers. In accordance with Art. 11, the LSA (and its remedies) apply to all companies or workplaces (public or private) that employ five or more regular workers. However, it does not apply to any company or workplace in which only the employer's relatives living in the same household are employed, and neither to domestic workers hired for housework.

The Seafarers' Act sets through its Art. 4, as a Special Labour Relations Commission, the Seafarers' Labour Relations Commission, under the Minister of Oceans and Fisheries. Pursuant to Art. 28 of this Act, wherein labour conditions specified for a seafarer labour contract are different from the actual labour conditions, the seafarer can cancel such a contract and claim damages caused by violations against the shipowner. The seafarer who intends to claim damages can request the Commission to ascertain whether the shipowner has violated the employment conditions.

Further, two of the committees that compose the NLRC are specifically dedicated to certain categories of workers. The Teachers' Labour Relations Adjustment Committee, in addition to mediating and arbitrating teachers' labour disputes, also provides interpretations regarding mediation and arbitration statements and proposes opinions on their implementation. Likewise, the Public Officials' Labour Relations Adjustment Committee carries out the same functions in relation to public officials.

Finally, the discrimination redress committee—present both in the NLRC and RLRCs—adjudicates on discrimination against fixed-term, part-time and agency workers. Besides adjudicating on discrimination against the abovementioned workers upon request by the Ministry of Employment and Labour, the committee also mediates and arbitrates such cases.

Small claims are regulated by the Small Claims Trial Act and are applicable to labour lawsuits (Lee 2012). Small claims are cases in which the amount does not exceed KRW20 million and the intended claim is payment of money, other replacement of goods or certain quantities of securities. As reported by Kwon (2007, 114), in small claims trials the plaintiff can institute an action by making an oral statement to the court clerk instead of filing a written petition to the court. Once filed, the court may first render a decision recommending the defendant to perform their obligation based on the complaint, without waiting for the defendant's response. If the defendant does not want to accept the recommendation as it is, they may raise an objection. In practical terms, a great portion of the small claim cases are resolved during the recommendation stage. Restrictions on the legal representative are eased, allowing persons in certain family relations with the party to represent them without explicit permission by the court. The production of evidence is less stringent. Although the judge must produce a written judgment at the end of a hearing, they are not required to state the reasons in writing. The grounds for final appeal are strictly limited.

H. The role of the Public Prosecutor's Office

The only role played by the Public Prosecutor's Office in labour disputes is in case of non compliance with the corrective order issued by the Labour Supervisor. As previously

mentioned, the case will be referred to the prosecution, which will then determine whether to launch a criminal process.

I. Oral vs written procedures

A complaint in accordance with Korea's civil procedure must be filed in writings, except for small claims. While pre-trial procedures, which are instrumental to the preparation of the oral hearing, are also carried out in writing (for example, the preparation and submission of each party's briefs and documentation), the trial is instead governed by the principle of orality. Once oral arguments are concluded, the judgement is pronounced and transposed into text (Lee, n.d.).

Similarly, adjudication processes before the LRC start with the filing of a remedy request, through a dedicated (written) remedy request form addressed to the competent RLRC. The employer must then submit a written answer, together with supporting evidence. After the examination of the facts by the adjudication committee, a hearing is held, during which witnesses can be questioned and both parties produce evidence. In a further step, an adjudication meeting is convened, where the committee listens to the opinions of the workers and employers prior to making a final decision. The remedy order or dismissal of the remedy request is served to the parties and workers in writing (Art. 30 of the LSA) (Labour Relations Commission 2018).

Mediation and arbitration before the respective LRC committees begin upon a written request by the parties. In both instances, several documents must be attached to the application. Likewise, several oral meetings are held after the end of the preliminary investigation phase. Conversely, the mediation proposal and the arbitration award are presented in writing.

5.2.3 Access to labour justice

Justice: conditions of access. As mentioned, a judicial action before civil courts begins with the plaintiff's written complaint—establishing the claim and attaching relevant documents—directed to the (district, branch or municipal) court. This complaint must satisfy some requirements, mainly established in Art. 249 of the Civil Procedure Act. If the complaint does not comply with these requirements, pursuant to Art. 254, the court can order the complainant to carry out corrections within a reasonable period. If the plaintiff fails to correct the complaint within this predetermined period, the court will dismiss the case. In addition, the following conditions can be identified for accessing civil justice, which are enshrined in the Civil Procedure Act:

- Jurisdiction of the court: international and internal (e.g., matter, hierarchy, value and territorial) (Section 1 of Chapter 1 of the Civil Procedure Act)

- Capacity for being a party and litigation capacity (Section 1 of Chapter 2)
- Co-litigation (*litis consortium* Section 2 of Chapter 2)
- Assistance from attorney (Section 4 of Chapter 2); and eventually
- Litigation aid (Section 3 of Chapter 3)

As reported by the Korean Legal Information Institute (2021) the statute of limitations on civil claims varies according to the nature of the claim. For most civil claims (such as breaches of contract) the statute of limitations is 10 years, but can be shorter for certain contractual relationships. Tort claims must be brought forward within 10 years from the date the tort was committed, or three years from the date when the plaintiff became aware of the damage and the identity of the tortfeasor, whichever is shorter.

Labour legislation establishes various requirements for access regarding procedures before the LRC. Within the context of adjudication, we should recall the jurisdiction of the LRC as a premise: an RLRC has jurisdiction over cases which occur within its jurisdictional area, but cases which are under concurrent jurisdiction of at least two RLRCs are handled by the RLRC which has jurisdiction over the location of the main workplace (Art. 3 of the LRCA). The first procedure to be considered is the remedy request for unfair dismissal and related acts (e.g., forced leave, removal from the position, transferral to another position or region, wage reduction without just cause, etc.), as provided for in Art. 28 of the LSA. For the remedy to be applicable, the case must first fall within the LSA's scope of application. For example, the remedy would be applicable to a private workplace employing five or more regular workers, but it would not be available for a domestic worker. The wording of Art. 28 of the LSA also includes two additional requirements. First, a remedy can only be requested by a worker who was subject to a disciplinary measure (and not by a trade union, as confirmed in Supreme Court, 05/25/1993, 92Nu12452), as defined in Art. 2, paragraph 1 of the LSA. Therefore, the respondent is necessarily the employer. There must be a subordinate employment relationship between the two parties, as defined in Section 2. The second requirement posed by Art. 28 is that the remedy must be requested within three months.

The adjudication process for unfair labour practices under TULRAA has some traits that are common to unfair dismissal and its own specificities. In addition to the case falling within TULRAA's scope of application, there is a three-month period to request the remedy (from the occurrence of the unfair practice or its termination if continuous). Likewise, the employer remains the respondent. Only the employer (as defined by Art. 2, paragraph 2 of TULRAA) can commit an unfair labour practice, as can be inferred from Art. 81 of TULRAA. The main difference between it and the other adjudication process regards which subject is legitimate to request remedy. Art. 82 of TULRAA states that a worker or trade union may make an

application for remedy to the LRC concerned on the ground that their rights have been infringed on by an unfair labour practice.

Clarifications are required for both cases. Despite some differences in the definition of 'worker'[36] for TULRAA and the LSA, the term some common meaning—i.e., an individual providing "his/her labour in a subordinate relationship to the employer" (Supreme Court, 05/25/1993, 90Nu1731). Further, 'trade union' should be understood as a trade union established and registered pursuant to Art. 10 and 12 of TULRAA. The first paragraph of Art. 7 explicitly precludes unregistered trade unions from requesting remedies for unfair labour practices and applying for industrial dispute adjustments. However, the subsequent paragraph of the same norm explicitly provides for the protection of workers in case of disadvantageous treatment, unfair employment contract and unfair dismissal[37] (respectively, Art. 81, para. 1, 2 and 5 TULRAA). Consequently, members of unregistered unions can still file a remedy for disadvantageous treatment by the employer or unfair employment contract in the name of an individual worker (Labour Relations Commission 2018, 227).

In both instances, and similarly to what was previously discussed regarding the civil procedure, there are additional formal requirements related to the request. In particular, the written request, directed to the competent RLRC, should include the following elements: (1) overview of the workplace; (2) dispute background; (3) disagreements between the parties concerned and arguments against each other; and (4) documentation specifying other references, etc. (TULRAA Enforcement Ordinance, Article 24, TULRAA Enforcement Regulations, Article 14).

Regarding discrimination redress for non-regular workers before the LRC, the jurisdiction is as follows (Art. 3 of the LRCA): the RLRC in charge of the location of the company where discriminatory treatment was identified has original jurisdiction, and for cases involving two or more jurisdictional territories, the RLRC that has jurisdiction over the primary location of the company will handle the case. The procedure for discrimination redress, despite being similar to the adjudication procedure, has its own distinguishing features in terms of conditions of access. First, pursuant to Art. 21-2 of the DWPA and Art. 15-2 of the FPWPA, the Minister of Employment and Labour, through notification of regional employment and labour offices, can give impulse to the redress discrimination procedure before the LRC. In addition, fixed-term, part-time or dispatched workers[38] who were subject to discriminatory treatment can file a correction request before the LRC (Art. 9 of FPWPA and 21 of the DWPA). This is not available for regular workers, as claimants must fall within one of the three aforementioned

36. TULRAA's definition of worker (Art. 2, paragraph 1) differs from the LSA's, as it includes those who are seeking jobs and those who are temporarily unemployed.

37. Provided that the case falls within the scope of Art. 81, 5 of TULRAA, an employee may request a remedy for unfair dismissal, etc. as well as a remedy for unfair labour practices to the LRC. In this case, the LRC handles two cases together by combining them (Labour Relations Commission 2018, 230).

38. The claimant can be either the temporary work agency or the user company.

categories according to the respective definitions provided by the two Acts. An additional difference is that the worker's application for correction must be filed within six months of the discriminatory treatment (or its end, if continuous). Additional important differences between the worker's request and the notification of the Minister is that there is no mandatory time limit and it can potentially cover a large number of workers (Labour Relations Commission 2018).

In adjudications under the LSA and TULRAA, conciliation can be requested by the parties or recommended by the committee. Conversely, in discrimination redress both mediation and arbitration procedures are available.

A case is to be dismissed if, among other hypotheses (Art. 60 of the LRC): the case is filed after the expiration of the applicable term; the complainant does not follow the LRC's request to supplement the filed documents twice; a party concerned does not satisfy the eligibility requirements; and the request for remedy is not within the scope of the LRC remedial order.

The analysis now focuses on the adjustment of industrial disputes[39] under TULRAA by the LRC. The jurisdiction of the LRC for adjustment of industrial disputes is also established in Art. 3 of the LRCA, in the following terms: the NLRC administers cases spanning the jurisdiction of two or more RLRCs, and the RLRCs oversee cases arising in their own jurisdiction. Parties to the industrial dispute—as can be inferred from Art. 2 of TULRAA—are exclusively the trade union (or the bargaining representative union in case of multiple unions) and the employer (or employers' organisation). Pursuant to Art. 53 of TULRAA, mediation commences when one of the parties concerned files an application to that end. In turn, arbitration begins upon request of both parties or when either party applies for it based on a collective bargaining agreement (Art. 62 of TULRAA). In particular, a request for mediation/arbitration should be filed and accompanied by the following: (1) overview of the workplace, (2) dispute background, (3) disagreements between the parties concerned and their arguments, and (4) documentation specifying other references, etc. (TULRAA Enforcement Ordinance, Article 24, TULRAA Enforcement Regulations, Article 14). Finally, the Minister of Employment and Labour decide to conduct an emergency adjustment of any industrial action when it is related to a public service, is likely to impair the national economy, or endanger citizens' daily lives because of its large scale and specific nature (Art. 76 of TULRAA).

Legal representation. Korea's legal system has certain particular features concerning legal representation, both regarding the civil process and procedures before the LRC. Art. 87 of the Civil Procedure Act states that except for representatives entitled to conduct the judiciary acts pursuant to legislation, no person may become an attorney, other than attorneys-at-law. An exception to this rule is provided for in the subsequent norm, applicable in those instances for which the value of the lawsuit falls short of a specific amount, among the cases

39. An industrial dispute is "any controversy or disagreement between a labour union and an employer or employers with respect to the determination of terms and conditions of employment (. . .)" (Art. 2, paragraph 5 of TULRAA).

to be examined and tried by a single judge: in these cases, the court may allow other subjects (such as those in a close living relationship or those who are in a specific relationship under an employment contract) to handle or assist in such cases. In other words, the representation of an attorney is not always required in civil procedure. It is also noteworthy that small claim trials do not require authorisation from the court.

Regarding the procedures before the LRC, the main observation is that the legal system allows for the assistance certified labour affairs consultants (i.e., not attorneys): the main source of regulation in this respect is the Certified Labour Affairs Consultants Act. Pursuant to Art. 2, the duties of certified labour affairs consultants include:

- Representation or agency of notification, application, report, statement, claim (including filing an objection, inspection claim and adjudication claim) and remedy of rights, etc. made to the authorities under the labour statutes.

- Writing and confirming all the documents under the provisions of labour-related Acts and subordinate statutes.

- Consultation and guidance regarding the labour-related Acts and subordinate statutes and labour management.

- Labour management diagnosis[40] on the business or workplace to which the LSA is applicable.

- Private mediation or arbitration under Article 52 of TULRAA.

Legal costs, fees and aid. In Korea's civil process, as in many other legal systems, the costs of the lawsuit—including stamp duties (based on the claim amount), service fees, costs incurred in examination of the evidence (i.e., witness expenses, expert appraisal fees, etc.) and attorneys' fees—are in principle to be borne by the losing party (Art. 98 of the Civil Procedure Act). On the other hand, the court can charge the prevailing party in certain cases, such as unnecessary acts, delay, etc. provided for in Art. 99 and Art. 100. In case of partial defeat, the costs to be borne by each party are determined by the court, which, depending on the circumstances, may charge either one with the full costs (Art. 101). Lawyers and clients are free to enter into contingent or conditional fee arrangements, including 'no win, no fee' agreements, or any other fee arrangements that are not expressly prohibited under Korean law. Korean law does not prohibit the use of third-party funding, or sharing the risks or proceeds of litigation (Korean Legal Information Institute 2021).

40. A series of actions to analyse and diagnose matters concerning personnel affairs, labour management or labour-management relations, etc. of a business or workplace, providing reasonable reform proposals to the business or workplace, at the request of one or both parties (labour or management).

Finally, litigation aid can be granted by the court either *ex officio* or upon request of a person who is insolvent to pay the costs of lawsuit (Art. 128).

Regarding the procedures before the LRC, the LRCA does not mention any procedural fees. Still, legal assistance and representation (of the lawyer or the certified labour consultant) expenses are due. LRCA's Art. 6-2, added in 2007, provides that the LRC might have certified labour consultants conduct business for the relief of rights of socially vulnerable groups. A similar provision can be found in Art. 26-2 of the Certified Labour Consultant Act.

5.3 ADMINISTRATIVE ORGANISATION OF THE LABOUR DISPUTE RESOLUTION SYSTEM

5.3.1 Organisation of the justice system

As provided by Art. 17 of the Court Organisation Act, budget request, expenditure of reserve funds and settlement of accounts of the Judiciary fall within the competence of the Supreme Court Justices' Council. On the other hand, The Minister of the National Court Administration (NCA), under the direction and supervision of the Chief Justice, is responsible for all tasks of the institution, as well as the administrative affairs of the court. In particular, the Planning and Coordination Office is responsible, among other functions, for the request, allocation and execution of judicial budget (Supreme Court of Korea 2019).

Art. 4 of the LRCA includes the budget among the administrative matters ascribed to the chairperson of the NLRC. The second paragraph of the same Article allows the chairperson to delegate part of the authority to direct and supervise administrative matters to RLRCs chairpersons. In general, the LRC has budgetary autonomy (although under the approved Executive budget) considering that it is an independent administrative body.

5.3.2 Human resources

LRC. The number of members to be allocated in each LRC is determined by Presidential Decree, taking account of the workload of each Commission. Depending on the workload of each LRC, representatives of workers and employers are between 10 and 50, respectively, whereas public interest members are between 10 and 70. The number of workers' and employers' representatives must be equal (Article 6 of the LRCA, Paragraph 2). Implementing this provision, Art. 3 of the Enforcement Decree of the Labour Relations Commission Act remits to Table 2 attached therein the determination of the number of LRC's members.

Table 5.25 depicts the number of employee, employer and public interest commissioners as of 31 December 2018.

TABLE 5.25 Number of employee, employer and public interest commissioners as of 31 December 2018

Category	Total	Employee Comission	Employer Comission	Public Interest Comission			
				Tot.	Adj.	Med.	Discr.
Total	**1,805**	**535**	**535**	**735**	**347**	**209**	**179**
NLRC	170	50	50	70	33	20	17
RLRC	1,635	485	485	665	314	189	162

Source: National Labour Relations Commission, (2019, 8).

TABLE 5.26 Personnel serving in Korea's court system (up to 1 March 2019)

Classification	Total	Employee Commission	Employer Commission	Public Interest Commission				Pub. I. C. for Public Officials
				Tot.	Adj.	Med.	Discr.	
3 members from labour, management and public interest (Mar. 8 1953)	108 (9)	36 (3)	36 (3)	36 (3)	-	-	-	-
3 members from labour and management, 3~5 public interest members (Apr. 7 1963)	131 (11)	36 (3)	36 (3)	59 (5)	-	-	-	-
10 members from labour, management and public interest respectively (Dec. 31 1980)	360 (30)	120 (10)	120 (10)	120 (10)	-	-	-	-
7 to 20 members from labour, management and public interest respectively (Act: March 13 1997; Enforcement Decree: March 27 1997)	720 (60)	240 (20)	240 (20)	240 (20)	99 (8)	141 (12)	-	-
10 to 30 members from labour, management and public interest respectively (Act: 15 April 1999, Enforcement Decree: 30 June 1999)	891 (90)	297 (30)	297 (30)	297 (30)	114 (12)	183 (18)	-	-
10 to 30 members from labour and management respectively, 10 to 50 public interest members (Act: 21 December 2006, Enforcement Decree: 27 March 2007)	898 (97)	297 (30)	297 (30)	297 (30)	114 (12)	183 (18)	-	7 (7)
10 to 50 members from labour and management respectively, 10 to 70 public interest members (Act: 26 January 2007, Enforcement Decree: 27 March 2007	1.747 (177)	515 (50)	515 (50)	710 (70)	202 (20)	335 (33)	173 (7)	7 (7)
10 to 50 members from labour and management respectively, 10 to 70 public interest members (Act: 27 Jan January 2016, Enforcement Decree: 28 February 2017)	1.812 (177)	535 (50)	535 (50)	735 (70)	205 (20)	347 (33)	183 (17)	7 (7)

Note: The numbers NLRC numbers are reported in parentheses.

Source: Labour Relations Commission (2018, 72).

The figures for 2017 are the same (see Labour Relations Commission (2018, 8). Art. 15 of the LRCA requires the presence of the LRC chairperson or one standing member to set up an Adjudication or Discrimination Redress Committee. It is worth pointing out the insufficient number of standing members compared to the number of cases to be handled (Labour Relations Commission 2018, 374). On the other hand, the same report clearly indicates an increase in the number of commissioners since the constitution of the LSA, which is coherent with the expansion of its responsibilities and structural changes (see Section 3B).

Table 5.27 provides information regarding personnel serving in Korea's court system as of 1 March 2019.

TABLE 5.27 Personnel serving in Korea's court system (up to 1 March 2019)

Court	Position	Number*
Supreme Court	Chief Justice	1
	Justice	13
	Senior Research Judge	2
	Research Judge	96
High Court	Chief Judge	7
	Presiding Judge	107
	High Court Judge	173
	Judge	56
District Court	District Court Chief Judge	28
	High Court Presiding Judge	1
	Deputy Chief Judge	915
	Judge	1,491
National Court Administration	Deputy Chief of Court Administration	1
JRTI	The President of JRTI	1
JRTI	Professor (Judge)	26
Total		**2,918**

Source: Supreme Court of Korea (2019).

Remuneration. Art. 46 of the Court Organisation Act exclusively determines that the remuneration of judicial officers is to be set through legislation commensurate with their duties and dignity. Implementing these provisions, the Remuneration of Judges Act regulates the matter by establishing various norms concerning payment methods, calculation of remuneration, etc. In particular, a judge is entitled to a salary (and other remuneration) according to a table attached to the Act (Art. 2): unfortunately, this table was not transposed in the English translation of the legislation and thus we were unable to analyse it.

Regarding the remuneration of LRC members, the LRCA remits (Art. 7, paragraph 4) to further legislation the determination of matters concerning 'treatment of members'—which should include retribution. However, the LRCA's Enforcement Decree Art. 8, which implements this

provision, exclusively deals with allowances and travel expenses, and says nothing of wages. The remuneration of public officials serving at the LRC is determined in accordance with the State Public Officials Act and the Public Officials Remuneration Regulations.

5.3.3 Recruitment, selection and training

Recruitment and selection. As previously mentioned, in Korea's legal system the LRC is the forum in which members representing employees, employers and the public interest can settle labour disputes autonomously through dialogue and cooperation.

The LRCA establishes several requirements to serve as a public interest member of the LRC. The qualifications required—set in Art. 8 of the LRCA—vary depending on the position (NLRC or RLRC) and the area (adjudication/discrimination redress and mediation), as reported in Table 5.27.

Despite the various requirements established by the LRCA for the position of member of public interest , these are recruited among individuals who already have working experience and knowledge in labour issues, as stated by the same Art. 8. The norm allows for the recruitment of people from different labour-related 'areas', ranging from academia to various legal professions (judges, public prosecutors, attorneys and also certified labour consultants) up to public officials. In addition, Art. 9-2 of the LRCA's Enforcement Decree establishes the requirements for LRC investigators: these must e public officials, however the grade/experience required varies depending on whether the position to be filled is at the NLRC or RLRC.

The LRCA encompasses two different procedures for the recruitment of workers' and employers' members on one hand, and public interest commissioners on the other.

Considering that workers' and employers' members participate in dispute resolution as concerned parties, the LRCA provides that these are respectively recommended by trade unions and employers' associations. The appointment is made by the President, upon recommendation by the Minister of Employment and Labour for NLRC nominations. For RLRCs, workers' and employers' members are appointed by the NLRC's chairperson upon recommendation of the relevant RLRC chairperson (Art. 6, paragraph 3 of the LRCA). The LRCA's Enforcement Decree establishes additional rules. Pursuant to Art. 5, workers' members of the NLRC are to be recommended by the federation of all trade unions; workers' members of the RLRC are recommended by the regional representative organisation of the federation of all trade unions in the jurisdiction of the LRC. If a trade union does not belong to the federation of all trade unions, a recommendation may be made directly from that trade union. In this instance (i.e., various trade unions making recommendations) the RLRC chairperson may adjust the respective number of members to be recommended by each trade union based on the number of trade union affiliates. The same applies (except in the case of a plurality of employers' associations, which is not expressly provided for) to the recommendation of employers' members. From a more general perspective, the

LRCA's Enforcement Decree requires taking into account the number of workers, trade unions, etc. by industry, and the size of the enterprises within the jurisdiction of the LRC (Art. 4) when recommending appointments. Finally, the number of members recommended by trade unions and employers' associations must be at least 100/150 (i.e., two-thirds) of the number of workers' and employers' members to be commissioned, respectively.

TABLE 5.28 Qualifications required of LRC members, depending on the position and area

Classification		Qualifications
National RLC	Adjudication and discrimination redress	(a) A person who majored in labour-related studies and has been or used to be in office as an associate professor or higher at a school (b) A person who has been or used to be in office as a judge, public prosecutor, military judicial officer, attorney-at-law, or certified labour affairs consultant for at least seven years (c) A person who has at least seven years of work experience in labour relations affairs and was or has been in office as a public official of Grade 2 or higher, or the equivalent thereof or higher, or a member of the Senior Civil Service (d) Any other person who has at least 15 years of experience in labour relations affairs and is deemed suitable for a position as a public interest member in charge of adjudication or redress of discrimination
	Mediation	(a) A person who was or has been in office as an associate professor or higher at a school (b) A person who has been or used to be in office as a judge, public prosecutor, military judicial officer, attorney-at-law, or certified labour affairs consultant for at least seven years (c) A person who has at least seven years' work experience in labour relations affairs and has been or used to be in office as a public official of Grade 2, or the equivalent thereof or higher, or a public official belonging to the Senior Civil Service (d) Any other person who is deemed suitable as a public interest member in charge of mediation among those who have at least 15 years' work experience in labour relations affairs or those who are deemed to have excellent morals
Regional LRCs	Adjudication and discrimination redress	(a) A person who majored in labour-related studies and was or is in office as an assistant professor or higher at a school (b) A person who has been or used to be in office as a judge, public prosecutor, military judicial officer, attorney-at-law, or certified labour affairs consultant for at least three years (c) A person who has at least three years' work experience in labour relations affairs and has been or used to be in office as a public official of Grade 3 or of a grade equivalent thereof or higher, or a public official belonging to the Senior Civil Service (d) A person who has at least ten years' work experience in labour relations affairs and has been or used to be in office as a public official of Grade 4 or of a grade equivalent thereto or higher (e) Any other person who has at least ten years' work experience in labour relations affairs and is deemed suitable as a public interest member in charge of adjudication or redress of discrimination
	Mediation	(a) A person who has been or used to be in office as an assistant professor or higher at a school (b) A person who has been or used to be in office as a judge, public prosecutor, military judicial officer, attorney-at-law, or certified labour affairs consultant for at least three years (c) A person who has at least three years' work experience in labour relations affairs and has been or used to be in office as a public official of Grade 3 or of a grade equivalent thereto or higher, or a public official belonging to the Senior Civil Service (d) A person who has at least ten years' work experience in labour relations affairs and was or has been in office as a public official of Grade 4 or of a grade equivalent thereto or higher (e) Any other person who is deemed suitable for a public interest member in charge of mediation among those who have at least ten years' work experience in labour relations affairs or those who are deemed to have excellent morals

Source: Labour Relations Commission (2018, 9-10).

Pursuant to paragraph 4 of Art. 6 of the LRCA, public interest members are recommended by trade unions, employers' associations and the chairperson of the respective RLC. As specified in the LRCA's Enforcement Decree, this recommendation should distinguish between members in charge of adjudication, discrimination correction and mediation (Art. 6, para. 1). The Enforcement Decree provides that the recommendation should in principle come from the federation of all trade unions and employers' associations on a national scale for the NLRC, and from the respective regional representative organisations for the RLRC. However, if there are trade unions that do not belong to the confederation, a recommendation may also be made from those trade unions, and the chairperson of the concerned LRC may adjust the number of persons who might be recommended by each trade union (Art. 6, paragraphs 2 and 3). In case the trade union or the employers' association refuses to recommend public interest members, the chairperson of the LRC concerned can select those individuals eligible for appointment (Art. 6, paragraph 5 of the LRCA).

Once recommendations are made, a list of candidates is elaborated and notified by the LRC chair to labour unions and employers' associations. Subsequently, labour unions and employers' associations take turns in excluding candidates, by submitting to the LRC a list of those to be excluded in order of priority: exclusions continue until the number of positions to be filled is reached. The remaining candidates are those eligible for the positions of public interest members. Pursuant to Art. 6, paragraph 4 of the LRCA, public interest members of the NLRC are appointed by the President following a proposal from the Minister of Labour, whereas those of the RLRC are appointed by the NRLC's chairperson following a proposal from the RLRC's chairperson. In the former case, the NLRC Chairperson notifies the list of eligible candidates to the Minister. Once appointed, public interest members are classified into three groups: those in charge of adjudication, discrimination redress, and mediation (Art. 6, paragraph 6 of the LRCA).

As prescribed in Art. 9 of the LRCA, the Chairperson of the NLRC is appointed by the President upon proposal of the Ministry of Labour from among those qualified as public interest members of the NLRC; the NLRC chairperson must be a public official in political service. Similarly, the chairperson of the RLRC is appointed by the President upon recommendation of the NLRC's chairperson from among those eligible as public interest members before the RLRC. As already mentioned, the RLRCs' chairpersons serve as public interest members.

Finally, the standing members of the LRCs are appointed by the President upon recommendation of NLRC's chairperson and according to the proposal of the Minister of Employment and Labour from among those qualified as public interest members of the concerned LRC (Art. 11 of the LRCA).

Some important changes in the judicial system must be briefly analysed regarding judges. The Judiciary Reform Committee—which completed deliberations on a systematic legal reform in 2005—decided to establish an American-style graduate-level law school system in South

Korea (Chisholm 2014). The National Bar Examination Act, in addition to setting the first bar examination for 2012, allowed the National Judicial Examination up to 2017 (Addenda 4) —which previously qualified judges, prosecutors and lawyers. In September 2016, the Constitutional Court recognised this Addenda as constitutional after having received a petition alleging an infringement of the constitutional freedom to choose a profession. Since then, the Court Organisation Act has been amended several times. Previously the second paragraph of Art. 42 allowed for the appointment of judges among those who passed the National Judicial Examination and completed the two years training course at the Judicial Research and Training Institute (JRTI), as well as those qualified as lawyers. Judges are appointed from those who have served for at least ten years in any of the following occupations:

- Judge, prosecutor or attorney-at-law. ·
- Those admitted to the bar and who have been engaged in legal affairs at a government agency, local government, national or public corporation, government-funded organisation or other corporations.
- Those who are qualified as an attorney-at-law and have been in the office at a higher position than assistant professor in jurisprudence at a credentialed college or university.

However, this ten-year period envisioned in the norm will only start being implemented in 2026. Until then, Art. 4 of the 2011 Addenda of the same Act determines the application of the following transitional regime:

- From 1 January 2013 to December 31 2017: at least 3 years in office.[41]
- From 1 January 2018 to December 31 2021: at least 5 years in office.
- From 1 January 2022 to December 31 2025: at least 7 years in office.

This change in the system has been the object of abundant discussion among legal practitioners (see Chisholm 2014) and has also been vigorously debated in society in general. The debate is divided among those who expect an improvement in the quality of candidates as a result of the law schools (substituting the JRTI), and those convinced that the National Judicial Examination was more socially fair in terms of accessibility, considering the costs of law schools.

Term of office. The term of office for LRC Commissioners is three years, with the option of renewal. In case of vacancy of an LRC member, the term for a member elected to fill the

41. Before 2017, judges were also recruited from among those who had passed the National Judicial Examination and the two-year training programme prior to the JRTI.

vacancy is equal to the remainder of the term of their predecessor. However, if a successor has been appointed due to the vacancy of the chairperson or a standing member of an LRC, the term of office of the successor starts anew. An LRC member whose term of office has expired should continue to perform their duties until their successor is designated (LRCA, Article 7, paragraphs 1, 2 and 3). The Labour Relations Commission (2018, 374) signals that the renewable three-year period of office might not be sufficient to accumulate sufficient expertise, considering that the member might not be subsequently reappointed.

A further peculiarity of Korea's judicial system is that Art. 45 of the Court Organisation Act limits the term of office of judges to 10 years. On the other hand, the same Act explicitly allows for reappointment, after deliberation of the Personnel Committee, and with a contextual order from the Chief Justice and the consent of the Supreme Court Justices' Council (Art. 45-2). Criticisms have been raised regarding the renewal of tenure, which could have been improperly used in some cases to fire certain judges. An example is the denial of tenure to a judge in 2012 on the grounds of alleged 'poor performance'—some connected this denial to the judge's use of social media to express opinions on politically controversial themes. This led to a debate on the broader process of personnel (Chisholm 2014).

Initial and continuous training. As mentioned previously, the LRC Commissioners are selected among those who already have significant expertise in labour. This, however, does not imply the absence of training of LRC members. Even so, the LRCA dedicates very few provisions to this matter. Art. 2-2 of the LRCA includes among the functions of the LRC an educational component related to the typical duties of the LRC (adjudication, discrimination redress and adjustment of labour disputes). Further, the second paragraph of Art. 4 also attributes to the NLRC's Chairperson 'education and training' of both NLRC and RLRCs. However, the LRCA's Enforcement Decree remains silent on the subject and does not specify the kind and contents of such a training. It is also important to note that the NLRC's Chairperson, being in control of public officials under their jurisdiction (Art. 4 of the LRCA), is also responsible for determining, for example, the education required of a candidate to be appointed as an LRC Investigator for public officials of grade VI or VII with less than one year of working experience (Art. 9-2 of the LRCA's Enforcement Decree).

Regarding the training of judges, the previous system relied on a two-year training programme at the JRTI—established in 1971—after the completion of the National Judicial Examination. As a result of the reform of the recruitment system, the role of the JRTI had to be redesigned. While one could expect that the functions of the JRTI would be completely absorbed by the law schools, this was not the case. As reported by the Supreme Court (2019, 21) the judicial training component for those who passed the National Examination was to be phased out in 2020. On the other hand, the JRTI improved the training programme for newly appointed judges with legal experience and opened a further programme for experienced judges.

In addition, the JRTI provides training for judicial researchers[42] (non-judges) and assistant officials, as disposed in Art. 72 and the following articles of the Court Organisation Act.

The main legal framework for law schools is the Act on the Establishment and Management of Professional Law Schools (as amended), enacted in 2007 as a result of the conclusion of the Judiciary Reform Committee. The Act requires law schools to receive an authorisation from the Minister of Education through deliberation of the Law School Education Committee (Art. 5), established under the same Ministry and regulated by Art. 10. A series of requirements (e.g., concerning faculties, facilities and curriculum) are listed in Chapter 3 of the same law. Within this context, Art. 18 identifies as degree programmes a juris doctor degree—with a 3-year duration—and an eventual doctorate programme under school regulations. In addition, the law also admits non-degree research programmes.

Art. 7 attributes to the Minister of Education the determination of the total number of enrolments at law schools, after having considered 'all relevant circumstances', including the smooth supply of legal services for the public and the supply and demand status of legal professionals. This number does not include students enrolled or admitted in the doctorate programme or non-degree research programmes. Admission is limited to those with undergraduate degrees (or deemed to have an equivalent academic education in accordance with the law) (Art. 22). Professional law schools must use undergraduate point averages, the Legal Education Eligibility Test, foreign language proficiency tests, among others, to determine admission (Art. 23). The Legal Education Eligibility Test, which measures the candidate's aptitudes as a legal professional, falls within the responsibilities of the Minister of Education (Art. 24): however, the Minister can designate an institution to administer and conduct the test, which requires the payment of fees (paragraphs 4 and 5 of Art. 24).

Evaluation and promotion. Concluding this Section, it is worth to briefly illustrate the system for the promotion of judges. Art. 44-2 of the Court Organization Act requires the Chief Justice of the Supreme Court to prepare an equitable rating standard to evaluate the service record and qualifications of judges. This rating standard must include, as elements of the evaluation, the percentage of cases handled and processed, period of handling cases, percentage of cases appealed, percentage of cases reversed (including reasons for the reversal) and other elements to assess the judges' service record, sincerity, integrity, etc. as well as their overall qualifications. The Chief Justice of the Supreme Court shall evaluate judges in accordance with the rating standard and shall reflect the results of this evaluation when administering personnel affairs such as serving consecutive terms, assignment and transference of positions, etc.

42. As noted by Chisholm (2014, 926) after the new law schools opened, the judiciary created a system of selecting young 'court researchers' to assist judges at district and high courts from among the highest scorers of the bar exam and the highest performing graduates of new law schools.

5.4 LABOUR DISPUTE RESOLUTION SYSTEM PERFORMANCE (2015–2019)

5.4.1 Number of claims filed, processed, solved and pending

In South Korea, worker-employer disputes are addressed by the LRC, which is constituted by the NLRC, 13 RLRCs, and the SLRC.[43] According to Seoung-jae et al. (2018, 3), the LRC:

> "is an organization that aims to contribute to harmonizing industrial relations and enhancing its stability, by resolving disputes between the labor and management through administrative actions such as mediation and adjudication when such disputes occur. To this end, the LRC is composed of members of three parties representing workers (workers' members), employers (employers' members), and public interest (public interest members)."

In this sense, the LRC is a quasi-judicial body, therefore, "the proceedings of the LRC are different from those of the ordinary judicial system", (ibid.):

> "the LRC mediates labor disputes and adjudicates on requests to remedy unfair labor practice cases according to the Trade Union and Labor Relations Adjustment Act ("TULRAA"), makes rulings on cases of unfair dismissal and cases involving discriminations against employees based on the Labor Standards Act ("LSA"), the Act on the Protection, etc. of Fixed-term and Part-time Employees ("FPWPA") or the Act On the Protection, etc. of Temporary Agency Workers ("TAWPA"), and carries out various other missions that are stipulated by the related laws."

In addition, the LRC "performs various functions such as investigation, hearing, adjudication, conciliation (mediation and arbitration), determination, resolution, approval, adjustment, and filing a lawsuit" (ibid., 24).

We now present several tables related to the Korean Labour Relations Commission, divided according to their nature.

43. Regarding the structure of the LRC, (Seoung-jae et al., 2018, p. 4) states that: "The NLRC and the RLRCs are established under the control of the Minister of Employment and Labor (Labor Relations Commission Act ("LRCA"), Article 2, Para. 2 and 3), and the SLRC is set up under the control of the head of the central administrative agency which has jurisdiction over specific issues). However, the Jeju Provincial Labor Relations Commission among the RLRCs came to belong to the Jeju Special Self-Governing Province instead of the Ministry of Employment and Labor as of July 1, 2006. Currently, as an SLRC, Seafarers' Labor Relations Commission is established under the control of the Minister of Oceans and Fisheries (Seafarers' Act, Article 4)".

TABLE 5.29 Cases handled by the LRC

Classification		Total	Adjustment				Adjudication				Discrimination reparations	Union pluralism
			Sub-total	Mediat-ion	Arbitra-tion	Essencial services	Sub-total	Unfair dismissal, etc.	Unfair labour practices	Others		
2015	Apresentados	15898	956	877	4	75	14026	12572	1276	178	175	741
	Tratados	14075	933	858	3	72	12320	11131	1024	165	138	684
2016	Apresentados	14309	846	822	9	15	12828	11224	1305	299	137	498
	Tratados	12619	816	796	9	11	11247	9932	1129	186	115	441
2017	Apresentados	14483	880	863	3	14	12558	11134	1090	334	182	863
	Tratados	12797	853	839	3	11	10995	9783	928	284	155	794

Source: Seoung-jae et al. (2018, 39).

TABLE 5.30 Cases handled by the NLRC/RLRCs, 2014–2018

Year	Classif.	Total	Adjustment of labour disputes[44]			Union pluralism	Adjudication[45]				Discrimination
			Mediation	Arbitration	Essential minimum services		Subtotal	Unfair dismissal, etc.	Unfair labour practices	Other adjudications	
2014	Total	14476	864	10	15	508	12918	11678	1046	194	161
	NLRC	1728	103	0	3	85	1526	1309	206	11	11
	RLRC	12748	761	10	12	423	11392	10369	840	183	150
2015	Total	14075	858	3	72	684	12320	11131	1024	165	138
	NLRC	1852	116	1	1	131	1570	1305	257	8	33
	RLRC	12223	742	2	71	553	10750	9826	767	157	105
2016	Total	12619	796	9	11	441	11247	9932	1129	186	115
	NLRC	1952	110	3	4	97	1706	1429	264	13	32
	RLRC	10667	686	6	7	344	9541	8503	865	173	83
2017	Total	12797	839	3	11	794	10995	9783	928	284	155
	NLRC	1814	97	1	3	71	1605	1355	238	12	37
	RLRC	10983	742	2	8	723	9390	8428	690	272	118
2018	Total	14224	1130	10	14	701	12047	10939	859	249	322
	NLRC	1866	131	3	3	159	1523	1322	180	21	47
	RLRC	12358	999	7	11	542	10524	9617	679	228	275

Source: National Labor Relations Commission (2019. 2).

First we present tables about cases filed and handled by the LRC. The NLRC report has data for filed cases only from 2015 to 2017, as shown in Table 5.29.

44. "In the Trade Union and Labor Relations Adjustment Act (TULRAA) enacted on December 31, 1996 (effective March 1, 1997), the so-called 'rule of prior recourse to adjustment' was stipulated.15) If a labor dispute arises due to failure of the bargaining between the labor and management parties, only after either party requests adjustment to the LRC and the adjustment of the LRC is carried out, then it becomes possible to wage an industrial action. Adjustment of labor disputes include: 1) mediation, in which the Mediation Committee which is established by the LRC on the request of either party produces a mediation proposal and recommends its acceptance to the parties concerned; 2) arbitration, which both the parties concerned apply for or either party applies for in accordance with their collective bargaining agreement; 3) emergency adjustment, which is rarely carried out only when an industrial action presents a risk of jeopardizing the national economy or people's daily lives. These labor disputes should be resolved when an adjustment is established, and they can go through a dispute settlement process by means of an industrial action when an adjustment is not constituted" (Seoung-jae et al 2018, 111-112).

45. "The term 'adjudication' indicates making a legal judgement on a remedy request based on the results of investigation and the hearing. The Committee decides in favor of the complaint or the respondent, as well as determine the validity of the case. The Adjudication Committee / the Discrimination Redress Committee can adjudicate within the parameters the remedy is requested for" (ibid., 27).

There were 14,224 cases brought to the LRC in 2018. Table 5.30 depicts the statistics regarding cases handled by the NLRC and RLRCs for the 2014–2018 period.

As shown in Table 5.30, the main type of case handled by LRC (either NLRC or RLRCs) is "unfair dismissal, etc.",[46] with over 9,000 cases per year throughout the entire period, well above the sum of all other case types. The second most common type of case handled is related to "unfair labour practices".[47]

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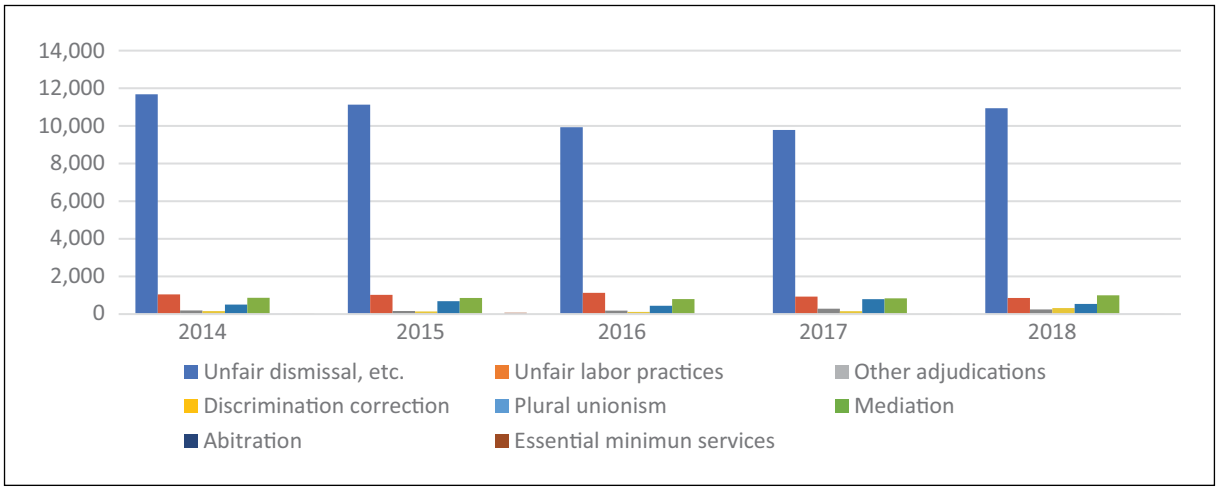
FIGURE 5.6 Cases handled by the LRC per year, 2014–2018



Source: Authors' elaboration based on National Labor Relations Commission (2019, 2).

46. "A case in which a worker who has been subject to an unfair dismissal, etc. (dismissal, forced leave of absence, suspension from work, job transfer, wage cut, and other penalties) files a remedy request with the Labor Relations Commission against such an unfair dismissal, etc". (National Labor Relations Commission 2019).

47. "A case in which a worker or labor union whose rights have been infringed upon by an employers' unfair labor practices files a remedy request with the Labor Relations Commission against such unfair labor practices" (ibid.).

48. "A case in which a worker who has been subject to an unfair dismissal, etc. (dismissal, forced leave of absence, suspension from work, job transfer, wage cut, and other penalties) files a remedy request with the Labor Relations Commission against such an unfair dismissal, etc". (National Labor Relations Commission 2019).

49. "A case in which a worker or labor union whose rights have been infringed upon by an employers' unfair labor practices files a remedy request with the Labor Relations Commission against such unfair labor practices" (ibid.).

From 2014 to 2016, the total number of cases dropped by 12,83 per cent, increasing again in 2017 (1,41 per cent) and 2018 (11,15 per cent over 2017), reaching almost as many cases in 2018 (14, 224 cases) as in 2014 (14,476) .

Figure 5.6 depicts the differences between case types.

Regarding detailed figures by economic sector or type of employment, the Official Statistics only has data concerning discrimination redress for non-regular workers. As acknowledged by the NLRC, this category of workers has been increasing in the country since the economic crisis of 1997, which has led the government to come up with "a legislation for protection of non-regular workers with an aim of redressing unreasonable discrimination against non-regular workers and strengthening the protection of working conditions" (Seoung-jae et al. 2018, 251). In 2007, the "adjudication on discrimination redress for non-regular workers" was introduced.

As defined by the NLRC:

> "Adjudication on discrimination redress is a system in which the LRC adjudicates on discriminatory treatment by an employer and issues a remedy order when non-regular workers (fixed-term workers, part-time workers and dispatched workers) are faced with discriminatory treatment by an employer. An employer should not adversely treat non-regular workers without a justifiable reason in terms of wage, bonuses, performance-based pay, and other working conditions and benefits, in comparison with regular workers (open-end contract workers, ordinary workers, direct employment workers) who are in the same and similar work in the workplace. When such discrimination occurred, an irregular worker may request the redress of such discrimination to the LRC" (ibid.)."

In this subject, we present two tables (Table 5.31 and Table 5.32) depicting the discrimination redress cases filed **by employment type** and **by discrimination type** per year.

TABLE 5.31 Discrimination redress cases filed by employment type, per year (persons)

Classification	Total	Fixed-term workers	Part-time workers	Fixed-term workers + part-time workers	Dispatched workers
2013	745	741 (99.5)	--	--	4 (0.5)
2014	1134	145 (12.8)	3 (0.3)	128 (11.3)	858 (75.7)
2015	732	210 (28.7)	7 (1.0)	85 (11.6)	430 (58.7)
2016	507	360 (71.0)	13 (2.6)	7 (1.4)	127 (25.0)
2017	755	508 (67.2)	67 (8.9)	9 (1.2)	171 (22.7)

Note: The number of persons is based on cases of first instance (excluding cases carried over and review cases). The percentages are given in parentheses.

Source: Seoung-jae, et al. (2018, 271).

TABLE 5.32 Discrimination redress cases filed by discrimination type, per year (cases)

Classification	Total	Base pay	Bonuses	Allowances	Retirement pay	Working hours	Fringe benefits	Others
2013	1085	176	511	229	0	33	88	48
2014	3417	794	835	502	22	0	747	517
2015	1124	45	350	192	3	2	229	303
2016	981	64	217	270	0	0	357	73
2017	1721	201	413	451	21	100	199	336

Note: If there were two or more workers in one case or if there were two or more types of discriminatory treatment for a worker, each type of worker was counted. Other factors include working conditions (number of working days, number of holidays), travel expenses, etc.

Source: Seoung-jae et al. (2018, 272).

In Table 5.31, it is possible to see that "the number of workers who were subject to discrimination redress was usually between 700 and 750, except for 1,134 workers in 2014 and 507 workers in 2016". Also, "when broken down by employment type, fixed-term workers accounted for the majority and dispatched workers also accounted for a large proportion". Finally, it is noticeable that "the number of fixed-term workers has rapidly increased in recent years, while that of dispatched workers has been declining" (Seoung-jae et al. 2018, 271).

Table 5.32 shows that there were a "large number of discrimination in bonuses and allowances, however those in retirement allowance or working hours were relatively low" (ibid.).

TABLE 5.33 Union pluralism cases per year, 2014–2018

Year	Classification	Overall cases handled	Bargaining request		Representative bargaining union		Bargaining unit		Duty of fair representation	
			Cases handled	Proportion (%)	Cases handled	Proportion (%)	Cases handled	Proportion (%)	Cases handled	Proportion (%)
2014	Overall	508	154	30.3	68	13.4	136	26.8	150	29.5
	NLRC	85	5	5.9	22	25.6	22	25.9	36	42.4
	RLRCs	423	149	35.2	46	10.9	114	27.0	114	27.0
2015	Overall	684	265	38.7	66	9.6	184	26.9	169	24.7
	NLRC	131	15	11.5	17	13.0	33	25.2	66	50.4
	RLRCs	553	250	45.2	49	8.9	151	27.3	103	18.6
2016	Overall	441	126	28.6	54	12.2	127	28.8	134	30.4
	NLRC	97	22	22.7	8	8.2	25	25.8	42	43.3
	RLRCs	344	104	30.2	46	13.4	102	29.7	92	26.7
2017	Overall	794	352	44.3	244	30.7	89	11.2	109	13.7
	NLRC	71	12	16.9	17	23.9	11	15.5	31	43.7
	RLRCs	723	340	47.0	227	31.4	78	10.8	78	10.8
2018	Overall	701	348	49.6	85	12.1	110	15.7	158	22.5
	NLRC	159	62	39.0	27	17.0	18	11.3	52	32.7
	RLRCs	542	286	52.8	58	10.7	92	17.0	106	19.6

Source: National Labor Relations Commission (2019, 15).

Other relevant data is related to 'union pluralism' cases. According to the Statistical Yearbook of Labor Relations Commission (National Labor Relations Commission 2019), union pluralism cases are "all the cases involving plural unionism such as bargaining requests, bargaining representatives, bargaining units, fair representation cases, etc". There were 701 union pluralism cases handled in 2018.

Moreover, about union pluralism, Seoung-jae et al. (2018, 47) state that:

> "The procedures to resolve disputes related to union pluralism was introduced in 2011. In 2017, 863 cases were filed, increasing remarkably compared with 498 in the previous year, and out of them, 794 cases were handled. When broken into in more detailed manner, cases on the notification of bargaining request took up the largest proportion in 2017, while bargaining representative determination cases hiked significantly and bargaining unit separation cases were on the decline."

Regarding the number of pending cases, data was only available for 2018. According the National Labor Relations Commission (2019, 11):

> "In 2018, out of the total 12,358 cases handled by the RLRCs, only 4.3% (488 cases) of the 11,359 cases (999 cases are excluded as they are mediation cases) were filed to the court for administrative litigation. The rest 10,871 cases were closed at the LRC phase as their disputes were resolved, showing 95.7% of the dispute settlement rate by the LRC."[50]

Furthermore, the NLRC also claims that the "cases that were closed at the RLRC phase were 9,624, taking up 84.7% of the 11,359 cases handled in the first trial, and 1,247 cases were closed at the NLRC phase, accounting for 11% of the cases handled by the RLRCs" (National Labor Relations Commission, 2019, 11). Thus, the number of pending cases (or, in other words, cases solved neither by the RLRC nor by the NLRC) in 2018 was 612 (4,3 per cent of total received cases).

5.4.2 Indicators: types of request processing, average time, success rate, average number of convictions, and rate of compliance

Since the creation of the Korean Labour Relations System in 1953, the LRC has generally expanded its operation. According to Seoung-jae et al. (2018, 49), "in the beginning, the responsibilities of the LRC have mostly been focused on dispute mediation between the labor and management", but, after a period of time, "adjudication functions such as remedy for unfair labour practices, remedy

50. As also stated by the National Labor Relations Commission (2019, 11), "It indicates the rate of the cases that were closed by the LRC by means of conciliation, withdrawal in agreement, or acceptance of adjudication, not proceeding to the court".

for unfair dismissal, and discrimination redress have been added as well as matters on essential service maintenance and union pluralism".

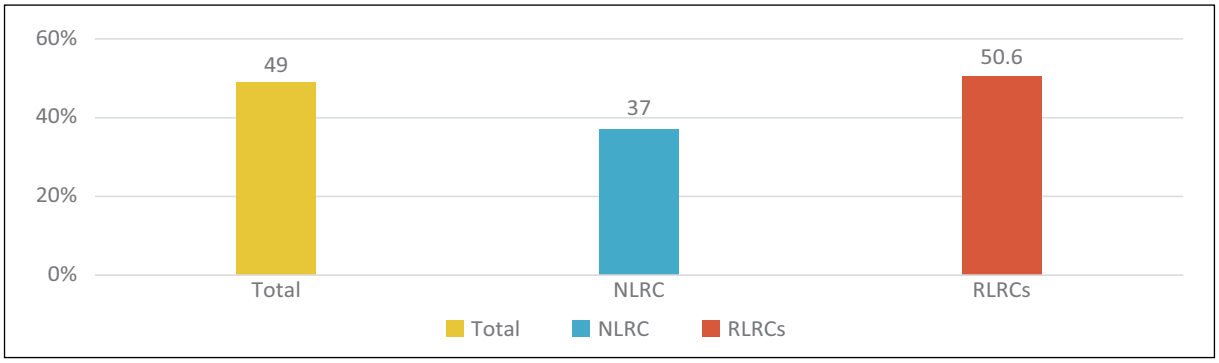
It is important to highlight that the mediation success rate is nearly 60 per cent, across virtually all labour disputes in the country, as the NLRC states:

> "For adjudication cases and union pluralism related cases, about 16% of the cases received by the RLRC (except those that were passed over from the previous year), which were 1,636 out of the 10,307 cases in 2017, proceeded to the NLRC. Also, those that proceeded to the judicial court after the adjudication by the NLRC accounted for 27%, which were 449 out of 1,636. Therefore, less than 5% of the cases received by the RLRC proceeded to the judicial court for litigation (in 2017, 449 out of 10,307). It means that more than 95% of the labor disputes filed to the LRC are resolved at the LRC phase. Moreover, more than 95% of cases are completed within 180 days after they are filed. Compared with litigations that take 550 days until they are closed, the dispute resolution by the LRC is quite rapid. Also, only one out of four cases filed for a lawsuit against NLRC's adjudication has been revoked by the court. As a result, 99% of the cases filed to the RLRCs were either resolved at the LRC phase or closed at the court as adjudicated by the LRC" (Seoung-jae et al. 2018, 50)."

Almost all labour disputes in South Korea (99 per cent) are resolved by a quasi-judicial institution—the LRC (across its regional, special and national dimensions). Concerning the type of request (the causes for requesting LRC action), the NLRC report does not specify more than the figures shown in the tables of Section 4A.

Mediation. The LRC mediated 1,130 cases in 2018, with a success rate of 49 per cent. According to the LRC 2019 Statistical Yearbook, out of 10,000 cases filed to the RLRCs every year, 95.6 per cent of the cases (between 2016-2018 on average) were closed (settled) by the LRCs.

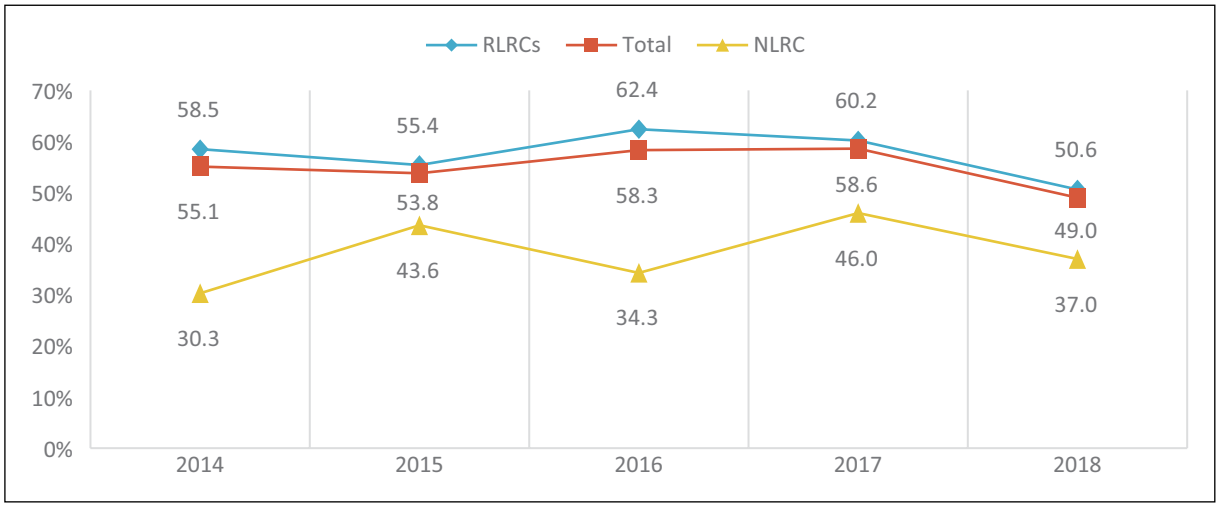
FIGURE 5.7 Mediation success rates in 2018 (as a percentage)



Source: National Labor Relations Commission (2019, 3).

Figure 5.8 illustrates the mediation success rate by year from 2014 to 2018, depicting the RLRC and the NLRC data separately, as well as the total.

FIGURE 5.8 Mediation success rate per year, 2014–2018



Source: National Labor Relations Commission (2019, 3).

TABLE 5.34 Statistics on mediation cases per year, 2014–2018

Year	Classif.	Cases handled	Mediation successful + Mediation failed							Administ. guidance	Cases with-drawn	Mediation success rate (%)
			Total	Mediation successful			Mediation failed					
				Subtotal	Mediation proposal accepted	Withdrawn in agreement	Sub-total	Mediation proposal rejected	Mediation halted			
2014	Total	864	728	401	169	232	327	43	284	45	91	55,1
	NLRC	103	89	27	8	19	62	10	52	3	11	30,3
	RLRC	761	639	374	161	213	265	33	232	42	80	58,5
2015	Total	858	710	382	148	234	328	51	277	42	106	53,8
	NLRC	116	94	41	14	27	53	10	43	5	17	43,6
	RLRC	742	616	341	134	207	275	41	234	37	89	55,4
2016	Total	796	703	410	161	249	293	32	261	14	79	58,3
	NLRC	110	102	35	17	18	67	10	57	3	5	34,3
	RLRC	686	601	375	144	231	226	22	204	11	74	62,4
2017	Total	839	756	443	188	255	313	47	266	16	67	58,6
	NLRC	97	87	40	18	22	47	8	39	3	7	46,0
	RLRC	742	669	403	170	233	266	39	227	13	60	60,2
2018	Total (year by year)	1.130 (291)	1.027 271)	503 (60)	209 (21)	294 (39)	524 (211)	37 (Δ10)	487 (221)	17 (1)	86 (19)	49,0 (Δ9,6)
	NLRC (year by year)	131 (34)	119 (32)	44 (4)	16 (Δ2)	28 (6)	75 (28)	6 (Δ2)	69 (30)	2 (Δ1)	10 (3)	37,0 (Δ9,0)
	RLRC (year by year)	999 (257)	908 (239)	459 (56)	193 (23)	266 (33)	449 (183)	31 (Δ8)	418 (191)	15 (2)	76 (16)	50,6 (Δ9,6)

Source: National Labor Relations Commission (2019, 13).

Table 5.34 presents additional data regarding mediation cases for the period 2014–2018 (last year with available data).

As can be gleaned from Table 5.34, mediation success rate was equal to or above 49 per cent for the entire period, with the highest figure in 2017 (58,6 per cent) and the lowest in 2018 (49 per cent). As underscored by the NLRC (Seoung-jae et al. 2018, 13): "In 2018, the number of overall mediation cases was 1,130 (131 by NLRC, up 35.1 per cent from 97 cases in the previous year, 999 by RLRCs, up 34.6 per cent from 742 cases), up 34.7 per cent from 839 in the previous year".

We now present 3 tables featuring detailed data concerning the main types of cases handled by the LRCs: unfair dismissal, unfair labour practices and discrimination correction for non-regular workers.

Unfair dismissal. The number of unfair dismissal cases handled in 2018 was 10,939, with a remedy rate of 70.7 per cent. This rate is calculated as follows: Remedy rate = (Redress orders + mediations + arbitrations) / (cases handled-withdrawal) ×100 (Seoung-jae, et al. 2018, 271).

TABLE 5.35 Cases of unfair dismissal, etc. handled per year, 2014–2018

Year	Classif.	Cases handled	Cases adjudicated					Cases conciliated	Conciliation rate (%)	Cases withdrawn	Remedy rate (%)
			Total	Cases recognised	Cases dismissed	Dismissed without deliberation	Recognition rate (%)				
2014	Geral	11678	3503	1244	1566	693	35.5	3460	29.6	4715	67.6
	NLRC	1309	893	351	423	119	39.3	102	7.8	314	45.5
	RLRCs	10.369	2610	893	1143	574	34.2	3358	32.4	4401	71.2
2015	Geral	11131	3563	1329	1464	770	37.3	3042	27.3	4526	66.2
	NLRC	1305	925	370	387	168	40.0	80	6.1	300	44.8
	RLRCs	9826	2638	959	1077	602	36.4	2962	30.1	4226	70.0
2016	Geral	9932	3605	1404	1442	759	38.9	2581	26.0	3746	64.4
	NLRC	1429	978	418	386	174	42.7	128	9.0	323	49.4
	RLRCs	8503	2627	986	1056	585	37.5	2453	28.8	3423	67.7
2017	Geral	9783	3.383	1223	1461	699	36.2	2972	30.4	3428	66.0
	NLRC	1355	1007	380	453	174	37.7	118	8.7	230	44.3
	RLRCs	8428	2376	843	1008	525	35.5	2854	33.9	3198	70.7
2018	Geral	10939	3767	1378	1629	760	36.6	3504	32.0	3668	67.1
	NLRC	1322	961	333	457	171	34.7	140	10.6	221	43.0
	RLRCs	9617	2806	1045	1172	589	37.2	3364	35.0	3447	71.5

Source: National Labor Relations Commission (2019, 17).

The average remedy rate was 66 per cent during the period 2014–2018. Moreover, it is possible to see a decrease in the overall number from 2014 (11,678) to 2016, with a slight increase in 2017 and a more substantial one in 2018, but still lower than 2014 (6.32 per cent).

TABLE 5.36 Unfair labour practice cases per year, 2014–2018

Year	Classif.	Cases handled	Cases adjudicated					Cases conciliated	Conciliation rate (%)	Cases withdrawn	Remedy rate (%)
			Total	Cases recognised	Cases dismissed	Dismissed without deliberation	Recognition rate (%)				
2014	Total	11678	3503	1244	1566	693	35.5	3460	29.6	4715	67.6
	NLRC	1309	893	351	423	119	39.3	102	7.8	314	45.5
	RLRCs	10369	2610	893	1143	574	34.2	3358	32.4	4401	71.2
2015	Total	11131	3563	1329	1464	770	37.3	3042	27.3	4526	66.2
	NLRC	1305	925	370	387	168	40.0	80	6.1	300	44.8
	RLRCs	9826	2638	959	1077	602	36.4	2962	30.1	4226	70.0
2016	Total	9932	3605	1404	1442	759	38.9	2581	26.0	3746	64.4
	NLRC	1429	978	418	386	174	42.7	128	9.0	323	49.4
	RLRCs	8503	2627	986	1056	585	37.5	2453	28.8	3423	67.7
2017	Total	9783	3383	1223	1461	699	36.2	2972	30.4	3428	66.0
	NLRC	1355	1007	380	453	174	37.7	118	8.7	230	44.3
	RLRCs	8428	2376	843	1008	525	35.5	2854	33.9	3198	70.7
2018	Total	10939	3767	1378	1629	760	36.6	3504	32.0	3668	67.1
	NLRC	1322	961	333	457	171	34.7	140	10.6	221	43.0
	RLRCs	9617	2806	1045	1172	589	37.2	3364	35.0	3447	71.5

Source: National Labor Relations Commission (2019, 19).

Unfair labour practice. The total number of unfair labour practice cases handled in 2018 was 859, with a remedy rate of 33 per cent.

TABLE 5.37 Discrimination correction cases per year, 2014–2018

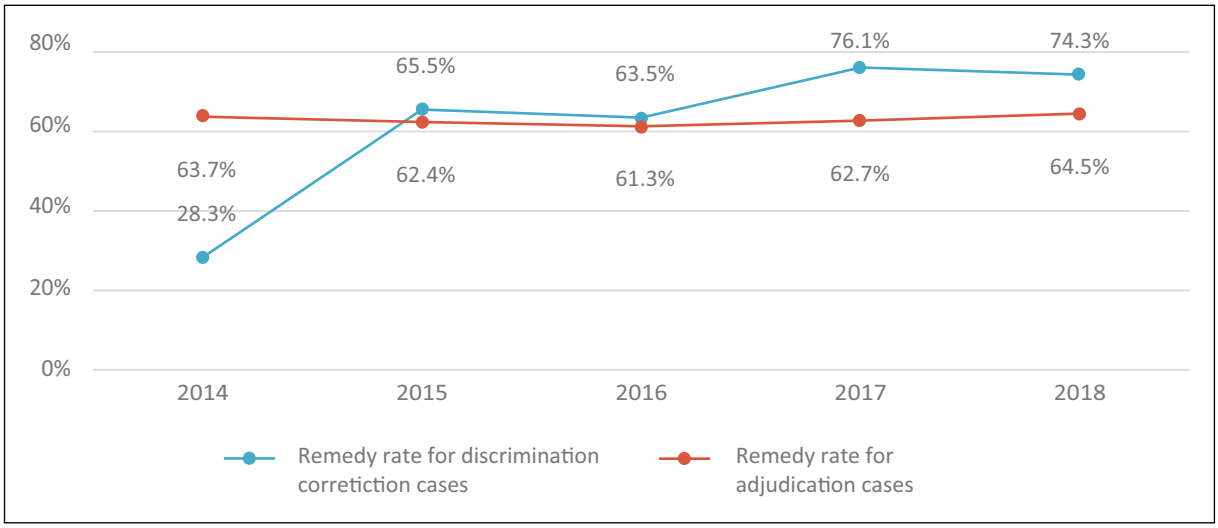
year	Classif.	Cases handled	Casos julgados					Cases conciliated	Conciliation rate (%)	Cases withdrawn	Remedy rate (%)
			Total	Cases recognised	Cases dismissed	Dismissed without deliberation	Recognition rate (%)				
2014	Total	1046	576	59	502	15	10.2	104	9.9	366	24.0
	NLRC	206	152	15	133	4	9,9	8	3.9	46	14.4
	RLRC	840	424	44	369	11	10.4	96	11.4	320	26,9
2015	Total	1024	645	116	482	47	18.0	91	8.9	288	28.1
	NLRC	257	198	50	136	12	25.3	12	4.7	47	29.5
	RLRC	767	447	66	346	35	14.8	79	10.3	241	27,6
2016	Total	1129	675	183	476	16	27.1	96	8.5	358	36.2
	NLRC	264	182	69	112	1	37.9	7	2.7	75	40.2
	RLRC	865	493	114	364	15	23.1	89	10.3	283	34.9
2017	Total	928	545	103	408	34	18.9	80	8.6	303	29.3
	NLRC	238	185	43	129	13	23.2	14	5.9	39	28.6
	RLRC	690	360	60	279	21	16.7	66	9.6	264	29.6
2018	Total	859	513	111	383	19	21.6	87	10.1	259	33.0
	NLRC	180	135	29	101	5	21.5	17	9.4	28	30.3
	RLRC	679	378	82	282	14	21.7	70	10.3	231	33.9

Source: National Labor Relations Commission (2019, 21).

The remedy rate for unfair labour practices is significantly lower than for unfair dismissal cases, with a total average of 30,20 per cent for the period 2014–2018. Even so, it increased from 24

per cent in 2014 to 33 per cent in 2018, while the total number of cases handled dropped 17,87 per cent during the same period.

FIGURE 5.9 Reparation rate for cases of discrimination correction and adjudication, per year



Source: National Labor Relations Commission (2019, 7).

Discrimination correction for non-regular workers. The total amount of cases handled in 2018 was 322 with a remedy rate of 74.3 per cent. There was a substantial increase in remedy rate, jumping from 28,3 per cent in 2014 to 74,3 per cent in 2018 (despite the decrease in the NLRC remedy rate). This is explained mainly by the performance of the RLRCs, which went a remedy rate of 22 per cent in 2014 to 80.6 per cent in 2018, an almost fourfold increase.

TABLE 5.38 Remedy rate of the NLRC/RLRCs per year, 2014–2018

Classification		Total	Adjudication cases	Discrimination correction cases
2014	Overall	63,4	63,7	28,3
	NLRC	41,4	41,2	60,0
	RLRC	67,3	67,7	22,0
2015	Overall	62,4	62,4	65,5
	NLRC	43,1	42,1	88,5
	RLRC	66,3	66,4	55,2
2016	Overall	61,3	61,3	63,5
	NLRC	48,5	48,0	67,9
	RLRC	64,3	64,3	60,9
2017	Overall	62,9	62,7	76,1
	NLRC	42,9	41,9	80,6
	RLRC	67,7	67,6	74,0
2018	Overall	64,8	64,5	74,3
	NLRC	41,4	41,4	40,0
	RLRC	69,2	68,9	80,6

Source: National Labor Relations Commission (2019, 7).

Table 5.38 shows that the annual average rate of administrative litigation against the NLRC is around 30 per cent. Even so, the sustainment rate of adjudication reviews by the NLRC in litigation was 82.8 per cent between 2016 and 2018 (on average).

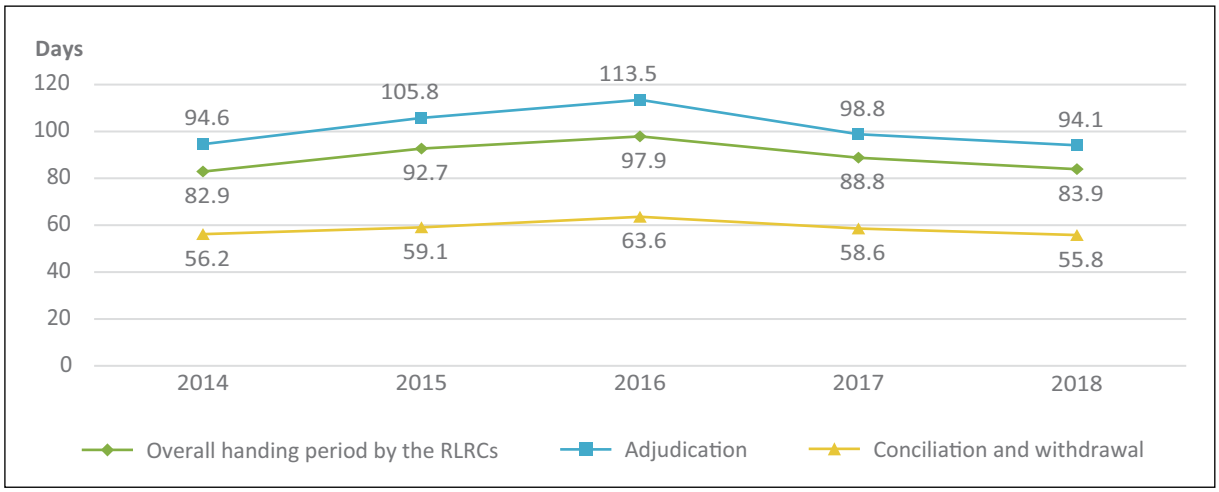
TABLE 5.39 Administrative litigations per year, 2013–2017

Cases subject to litigation	Cases filed for litigation	Litigation rate			Cases closed	Sustainment rate of review award					Still at hearing	Cases subject to litigation		
		Total	Filed by workers	Filed by employer		Total	Cases won	Success rate	Cases lost	Cases withdrawn		Admin. court	High Court	Supreme Court
2013	1463	443	224	219	30,3	340	234	85,1	41	65	87,9	346	151	87
2014	1304	384	211	173	29,4	381	246	80,7	59	76	84,5	357	151	76
2015	1388	415	186	229	29,9	423	285	81,2	66	72	84,4	305	154	52
2016	1423	457	183	274	32,1	387	241	79,5	62	84	84,0	410	164	90
2017	1417	449	201	248	31,7	466	297	74,3	103	66	77,9	421	153	99

*Note: 'Cases subject to litigation' means cases regarding review adjudications, arbitration, decision of the essential minimum services, discrimination redress order, imposition order for enforcement levy of the NLRC (imposition order for enforcement levy has been reflected in the data since July 2013). * Litigation rate=cases filed for litigation/cases disposed by the NLRC * 100 (Since cases disposed by the NLRC and cases filed for litigation are one-year statistics for the respective year, there might be some errors due to limitation period (15 days), petition submission date, cases combined or divided, etc.). * Success rate=Cases won (cases closed–cases withdrawn) (including partial wins) * Sustainment rate of review award=(Cases won+cases withdrawn)/cases closed (including partial wins. The sustainment rate is based on cases that are filed for litigation, not all of the cases disposed by the NLRC such as review adjudications and decisions).*

Source: National Labor Relations Commission (2018, 336).

FIGURE 5.10 Average period for handling cases by the RLRCs, 2014–2018



Source: Authors' elaboration based on National Labor Relations Commission (2019, 4).

The average period for handling LRC adjudication and discrimination correction cases was 55.4 days (49.6 days for the RLRCs, and 90.3 days for the NLRC between 2016 and 2018 on average), which means the cases were handled five times faster than those in general litigation (National Labor Relations Commission 2019, 36).

Regarding data on enforcement levies:

> "[the] LRC imposed enforcement levies on employers who did not comply with the remedy order for unfair dismissal, etc. In 2018, a total of 6.32 billion won was imposed for 578 cases.—The NLRC imposed 1.52 billion won for 104 cases and the RLRCs imposed 4.79 billion won for 474 cases (National Labor Relations Commission 2019, 8)."

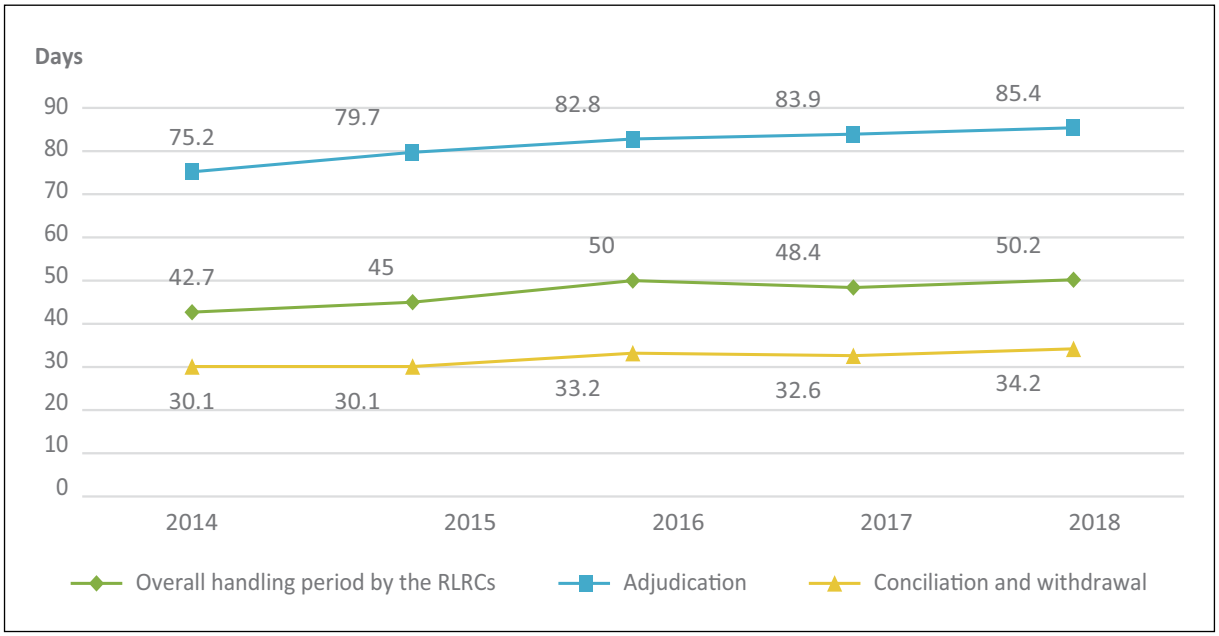
TABLE 5.40 Cases of enforcement levies and the amount imposed by the NLRC/RLRCs per year (unit: cases, KRW billion)

Classification	Total		NLRC		RLRCs	
	Number of Cases	Amount	Number of cases	Amount	Number of cases	Amount
2014	591	9.84	168	5.25	423	4.59
2015	552	8.70	120	2.74	432	5.96
2016	715	8.87	145	2.17	570	6.70
2017	644	8.23	126	2.19	518	6.04
2018	578	6.32	104	1.52	474	4.79

Source: Authors' elaboration based on National Labor Relations Commission (2019, 8).

Figures 5.11 and 5.12 display statistics on imposing enforcement levies and the amount per year for both the NLRC and RLRCs.

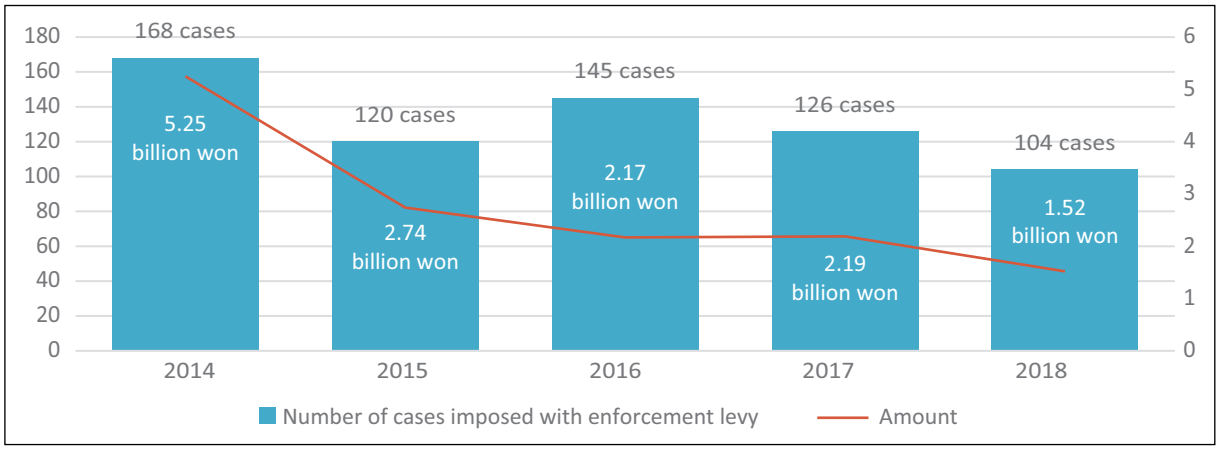
FIGURE 5.11 Statistics on the NLRC's enforcement levies and values per year, 2014–2018



Source: National Labor Relations Commission (2019, 8).

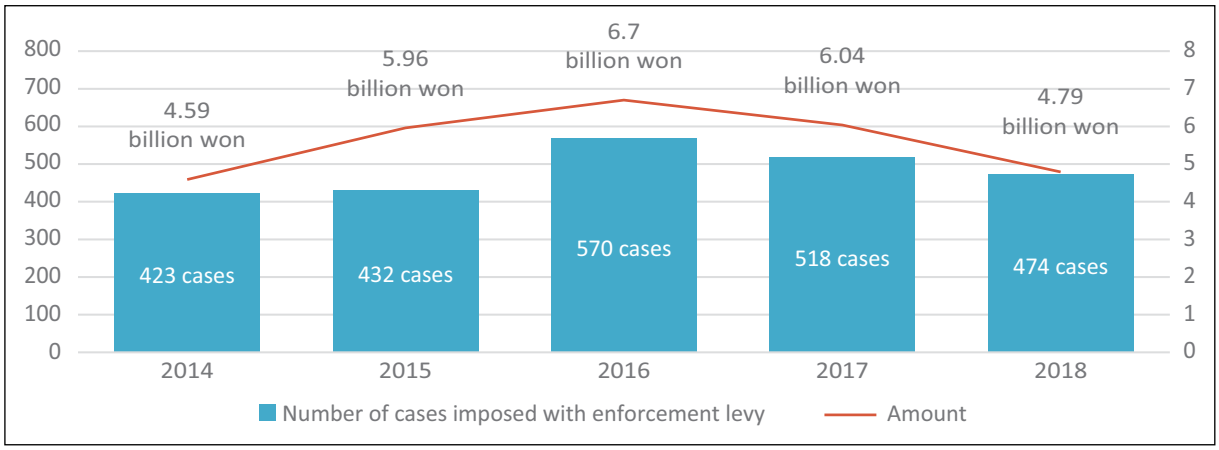
From 2014 to 2018, the NLRC "imposing enforcement levies" decreased by 38 per cent in terms of case numbers and 71 per cent in terms of value (KRW billions). On the other hand, the RLRCs exhibited an increase in both the number of cases and values, 12 per cent and 4.3 per cent respectively, for the same time period (although it had higher numbers in 2016 and 2017).

FIGURE 5.12 Statistics on the NLRC's enforcement levies and values per year, 2014–2018



Source: National Labor Relations Commission (2019, 8).

FIGURE 5.13 Statistics on the RLRC's enforcement levies and values per year, 2014–2018



Source: National Labor Relations Commission (2019, 8).

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CHAPTER 6. CASE STUDY: BRAZIL

6.1 EMPLOYMENT PROTECTION[1]

6.1.1 Historical evolution of labour protection, union organisation and the labour conflict resolution system

Brazil was the last country in the American continent to formally abolish the slavery of black people, in 1888. This regime characterised labour in Brazil for almost four centuries. During the slow and gradual abolition of slavery, norms were created to ensure control and discipline over the black workforce, such as the Law of the Free Womb (*Lei do Ventre Livre*—1871) and the Sexagenarian Law (*Lei dos Sexagenários*—1885), as well as new legislation on service rendering geared especially towards European immigrants to Brazil during the peak of the country's pro-immigrant project. It was only at the end of the 19th century that a system of labour protection was initiated, though in a non-uniform and scattered manner (Delgado 2019, 1623-1624). Labour inspection, a determinant factor in the efficacy of this system, was carried out by states and was subject to local political pressures—therefore, it led to limited protection.[2]

In the 1930s, a period marked by intense labour action and social movements, a fundamental administrative and legal institutional framework for labour protection was created: the Ministry of Labour (*Ministério do Trabalho*), the National Department of Labour (*Departamento Nacional do Trabalho*), the regularisation of unions, Mixed Conciliation Commissions (*Comissões Mistas de Conciliação*), and Conciliation and Judgment Boards (*Juntas de Conciliação e Julgamento*), as well as vacation rights.[3] Labour legislation, which thus far had been scattered and sparse, is collected in the Consolidation of Labour Laws (*Consolidação das Leis do Trabalho*—CLT), featuring various worker protection measures and the institution of the Work Permit (*Carteira de Trabalho*).

1. This section presents Brazil's judicial system of labour protection, featuring historical data, aspects of constitutional labour protection and highlights of sub constitutional legislation. The information presented here was gathered from legislative and bibliographical sources, based on a previously selected, national reference literature regarding labour protection.

2. In 1891, Decree No. 1313, edited by President Deodoro da Fonseca, established measures for the regularisation of work for teenagers aged 12 years old and older, in the factories of Rio de Janeiro, save for apprenticeship positions. In 1911 the State Department of Labour was created, responsible for labour inspection in the state of São Paulo, and in 1918 the National Department of Labour was created, which was responsible for labour inspection in the state of Rio de Janeiro (Dal Rosso 1996, 124). In 1923, the National Labour Council was created as a 'consultative body' for labour-related issues (ibid., 119-121).

3. The Ministry of Labour, Industry and Commerce was composed of the State Secretariat and the National Departments of Labour, Industry, Commerce, Population and Statistics. The creation of the National Department of Labour (DNT) is considered the initial milestone of labour inspection in Brazil (Vasconcelos 2014, 88; Dal Rosso 1996, 114).

This normative-institutional apparatus was inspired by the corporatist model and State control over labour relations, influenced by Italy's legislation in force in1927 (Ferrari et al. 2011, 53), especially the *Carta del Lavoro*. Collective labour law was instituted under the union organisation model. Workers' protests could only occur within strict legal boundaries (Delgado 2019, 1626). In 1935, striking was declared a misdemeanour under the terms of the law, which led to some union demobilisation.

In the 1960s, when Brazil was under a military dictatorship, we can observe the first shift of the labour protection system towards a governmental economic perspective. Although there was little change in the content of labour law, there was an understanding that it should cater to the government's economic goals.

Wage policy started to condition wage increases to official readjustment indexes (Ferrari et al. 2011, 156). The *Fundo de Garantia por Tempo de Serviço* (Unemployment Compensation Fund—FGTS), initially geared towards capturing resources for the housing system, led to repercussions regarding employment relationships. The corporatist and authoritarian union model, with unions largely controlled by the State, was maintained.

Labour Stations (*Delegacias do Trabalho*) started to focus more on union control and less on proper labour inspection (Dal Rosso 1996, 128).

In the 1980s, with the end of the dictatorship, the country's re-democratisation led to the enactment of a new Federal Constitution, which reinforced labour protection, enshrining it as an economic, social and cultural right (Art. 6) and recognising it as a fundamental right (Fonseca 2006). A list of workers' rights was brought into the constitutional text (Art. 7), some of which were completely new.

In particular were guaranteed: freedom of association and autonomy, freedom of striking, prohibition of State interference on the structure and functioning of unions, the creation of incentives to collective bargaining (regarding certain rights) and the permission for unions to legally act in their own name to protect workers (substitution of parties). The Federal Government's exclusive competence over labour inspection was reinforced as well as its competence to legislate on labour was determined.

The Constitution acknowledges the right to work, which can be understood in its individual and collective dimensions,[4] and establishes a list of workers' rights. Collective bargaining is

4. This theoretical distinction considers that the individual dimension relates to the "first moments of the employment relationship"—that is, the period preceding the establishment of the contract, its development and its termination; and that the collective dimension of the right to work is directed at the State's duty to implement policies for full employment, based on Art. 170, paragraph VII of the Federal Constitution (Fonseca 2006, 192-200).

allowed for some rights, as long as the dignity of the worker is protected. The restriction of rights through negotiated flexibilisation—defined as *in pejus*—[5] is a current tendency justified by the argument of economic balance and reduction of unemployment.

From the 1990s onwards, the Brazilian economy underwent changes towards liberal accumulation, depending more on private firms than on the State, driving measures towards the deregulation of the market, privatisation and globalisation (Campos 2015). Thus, the issue of labour was included in discussions around flexibilisation and adaptability.

At the same time, some of the workers' social rights in the areas of social security, social assistance, health care and labour were bolstered during this period due to the implementation of policies foreseen in the Constitution, such as the improvement of the unemployment protection system (Campos 2015). This was largely due to the social movements made possible by the democratic regime.

The 2000s saw a decrease in the demand for labour flexibilisation, as liberal ideas started being questioned and the State expanded the implementation of labour and social policies, as well as increased its investment on socioeconomic structures (Campos 2015). During this period, workers' social rights were expanded in areas such as social security and social assistance and some individual labour rights were broadened, such as the increase in the minimum wage. However, some rights were made more flexible, such as allowing work on Sundays and holidays in retail (Campos 2015). This expansion of various workers' rights can also be attributed to the actions of workers' unions after their degree of freedom increased.

In 2017, the flexibilisation of workers' protection was institutionalised through broad legislative reform—the so-called Labour Reform (*Reforma Trabalhista*, Law No. 13.647/2017), which aimed at reducing the formality of labour relations. The Reform reduced the reach of workers' rights, restricted unions' financing and means of operation.

Some of the main points of the Law refer to new rules regarding work hours, such as expanded time banking, vacation, termination of employment contracts, collective bargaining, and negotiation of new forms of work, such as remote work. It should be highlighted that new forms of on-demand work mediated by technology, a subject that remains extremely relevant, was not included in the Reform.

5. In labour law, modification through heteronomous or autonomous, collective or individual norms, known as 'flexibilisation', can occur due to reasons of protection, adaptation or deregulation (Uriarte 2002, 10-15). We can currently observe the use of 'downwards' flexibilisation or in pejus, which is very distant from the expansion of labour protection (ibid.).

Regarding the forms of work regulated by the Reform, we can highlight intermittent work, autonomous work, remote work and service outsourcing. Intermittent work contracts allow for alternating periods of service provision and inactivity, so that the employer might call on the worker whenever there is demand for their services and remunerate them only for the work carried out during this period. Remote work was regulated, and workers of this modality are no longer subjected to controlled working hours. Autonomous work was recognised by the Law, which instituted prerequisites for this type of worker not to be considered as employed, or, in other words, rules whose observance is necessary to characterise a formal working relationship. Outsourcing, consisting in contracting the provision of services through a third-party company, became more widely allowed for every activity.

Regarding labour lawsuits, the main points brought about by the Law pertain to the possibility of homologation of extra-judicial agreements by the Judicial Power and the modification of procedural rules about procedural costs, making this type of lawsuit more costly.

Finally, the flexibilisation of labour rights is still undergoing significant discussion, renewed in light of the COVID-19 pandemic, which required the maintenance of formal labour positions. In this context, Provisional Measures No. 927 and No. 936 were enacted in 2020, describing several measures to be adopted by employers in the interest of maintaining employment during the period of social isolation, such as reductions in working hours and pay and the suspension of contracts.

6.1.2 Constitutional protection of labour

The Brazilian Federal Constitution lists a series of rights for urban and rural employees, which were extended to domestic employees only in 2013. These rules condition both employers and the State, which is responsible for elaborating public policies to ensure these fundamental rights and improve the social condition of workers. However, protection is limited to formal working relationships. Informal relationships, understood as those in which there is no formal employment attachment anchored in legislation, are excluded from constitutional protection.

These norms concern the individual rights of workers relative to employment—defining its minimum content—as well as more general guarantees for the worker, such as the prohibition of discrimination and child labour, and the guarantee of social security, insurance and pension rights (unemployment insurance, maternity leave, etc.).

Although foreseen in the Constitution, some of these norms can be altered through collective bargaining, if their minimum content is preserved (e.g., paragraph VI).

TABLE 6.1 Workers' constitutional rights

Workers' rights	Paragraph in Art. 7 of the Constitution	Urban worker	Rural worker	Domestic worker	Period when it is active in the employment contract
Employment relationship protected against arbitrary dismissal[6] or without just cause, under the terms of the complementary law, which will foresee monetary compensation, among other rights	I	X	X	X*[7]	During and after
Unemployment insurance[8] in case of involuntary unemployment	II	X	X	X*	After
Compensation fund for time of employment[9]	III	X	X	X *	During and after
Minimum wage, established by law, unified nationally, capable of meeting the basic needs of the workers and of their families regarding housing, food, education, health, leisure, clothing, hygiene, transportation, and social security, with periodical adjustments to preserve its purchasing power	IV	X	X	X	During
Wage floor[10] proportional to the duration and complexity of the work	V	X	X		During
Impossibility of salary reduction, except as described in a convention or collective agreement	VI	X	X	X	During
Guarantee of a wage that is never under the minimum wage for those who receive a variable income	VII	X	X	X	During
Thirteenth salary[11] based on full pay or on the value of retirement	VIII	X	X	X	During
Greater remuneration for night work compared to daily work	IX	X	X	X *	During

→

6. This protection can be verified in the establishment of monetary compensation to the worker as a result of termination without just cause, by initiative of the employer.

7. X *: Rights are guaranteed if "the conditions established in the law are met and observing the simplification of principal and accessory tax obligations resulting from the working relationship and its specificities (Art. 7, single paragraph, of the Federal Constitution).

8. Benefit granted by the State (social security) to temporarily aid the unemployed worker.

9. Account attached to the employment contract, created to assist workers who were fired without just cause. The value is deposited monthly by the employer and can be withdrawn in the situations provided for in the law, such as dismissal without just cause and/or treatment for illness.

10. A wage floor higher than the minimum wage can be established for some types of work, according to their duration and complexity.

11. Bonus paid to the worker at the end of the year, equal to one month's pay.

Workers' rights	Paragraph in Art. 7 of the Constitution	Urban worker	Rural worker	Domestic worker	Period when it is active in the employment contract
Wage protection[12] under the terms of the law, with its wrongful withholding being considered a crime	X	X	X	X	During
Participation in profits or outcomes, detached from remuneration, and exceptionally participation in the management of the firm, as defined by law	XI	X	X		During
Family allowance[13] paid to dependents of low-income workers, under the terms of the law	XII	X	X	X *	During
Regular working hours not exceeding eight hours daily and 44 hours weekly, being possible to provide compensation for worked hours and a reduction in working hours, through agreement or collective convention	XIII	X	X	X	During
Six-hour journey for work carried out in uninterrupted alternating shifts	XIV	X	X		During
Remunerated weekly rest, preferably on Sundays	XV	X	X	X	During
Remuneration of extraordinary work at least 50 per cent higher than normal work	XVI	X	X	X	During
Enjoyment of an annual leave remunerated with at least a third over the normal wage	XVII	X	X	X	During
Maternity leave of 120 days, with no penalty to employment or pay	XVIII	X	X	X	During
Paternity leave under the terms affixed by law	XIX	X	X	X	During
Protection of the female labour market through specific incentives, under the terms of the law	XX	X	X		Before
Prior notice proportional to time of service—at least 30 days—according to the terms of the law[14]	XXI	X	X	X	During
Reduction of risks inherent to work through health, hygiene and safety regulations	XXII	X	X	X	During
Additional pay for hazardous or dangerous jobs, under the terms of the law	XXIII	X	X		During
Retirement	XXIV	X	X	X	Post
Gratuitous assistance to children and dependents from birth until 5 years old in day cares and pre-schools	XXV	X	X	X *	During

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12. Guarantee that the worker's wage will not be withheld for any reason, except for certain cases provided for in the law, such as alimony payments.

13. Benefit paid by Social Security to help support the dependents of low-income workers.

14. The obligatory early communication of termination without just cause of the employment contract.

Workers' rights	Paragraph in Art. 7 of the Constitution	Urban worker	Rural worker	Domestic worker	Period when it is active in the employment contract
Recognition of collective bargaining and conventions related to work	XXVI	X	X		Before, during and after
Protection from automation, under the terms of the law	XXVII	X	X		Before, during and after
Insurance against work accidents, incumbent on the employer, in addition to the compensation they are obliged to pay in case of wilful misconduct	XXVIII	X	X	X *	During
Lawsuit, regarding the earnings resulting from the working relationship, with a 5-year limitation period for urban and urban workers, up to two years after contract termination	XXIX	X	X		After
Prohibition of discrepancies in salaries, the exercise of functions and of admission criteria due to sex, age, colour or marital status	XXX	X	X	X	Before and during
Prohibition of any kind of discrimination regarding wages and admission criteria for workers with disabilities	XXXI	X	X	X	Before and during
Prohibition of distinction between manual, technical and intellectual labour, or among the respective workers	XXXII	X	X		Before, during and after
Prohibition of minors under 18 years old from performing night-time, hazardous or dangerous work, and of minors under 16 years old from performing any work, except under apprenticeship after 14 years old	XXXIII	X	X	X	During
Equal rights between workers with employment relationships and independent workers	XXXIV	X	X		Before, during and after

Source: Authors' elaboration based on the Federal Constitution.

Basic rights, such as working hours, wages and rest are extended to domestic workers. However, they do not enjoy the full roster of rights, to the exclusion of, for example, proportional wage floors.

In addition, the Constitution establishes as a general duty of the legislator to protect the workers when elaborating laws, without excluding any constitutional right. Regarding women workers, the Constitution provides for the creation of specific incentives with a view to protect the female labour market and to prohibit gender-based discrimination. This specific protection was regulated based on norms protecting pregnancy and maternity,[15] as well as against discrimination.[16]

15. The legislation created a temporary stability for pregnant women, prohibiting termination without just cause of the employment contract during pregnancy and for up to five months after childbirth, providing for breastfeeding breaks during the infant's first six months and detailing distancing from hazardous work during the pregnancy and lactation periods.

16. In case of discriminatory practices in working relationships, Law 9.029/1995 establishes a list of criminal practices, such as, for example, requiring medical certificates attesting pregnancy and sterilisation. Therefore, alternatively to Labour Justice being involved in awarding damages, discriminatory practices can lead to criminal lawsuits

6.1.3 Labour law: principles, employment relationship types, employment contract, trade unions organisation, collective bargaining and conciliation

A. Autonomy of labour law

In Brazil, labour law is autonomous, based on its own principles, which are distinct from those in regular civil relationships. Rights are defined by State norms but may also be altered through negotiation by interested parties in some cases. Private rules are made up of collective conventions, company regulations and customs, and their application is restricted to a certain territorial basis or economic sector. State norms are usually defined by the Legislative Power but can also be defined by the Executive Power (through decrees and provisional measures), or even by the Judiciary (court rulings, normative judgements and precedents)—in this case, with limited effects.[17] Binding precedents, for example, are defined by the Supreme Court (*Supremo Tribunal Federal*—STF) and have a normative character with general application, such as laws.

B. Sources of labour law

The sources of labour law can be: (i) material, when they find themselves at a prior stage to the formation of material law; or (ii) formal, when dealing with general, abstract, impersonal and imperative commands—or, in other words, when there is a positivized legal norm (Bomfim 2017, 52). Formal sources can be: (ii.1) autonomous, when elaborated without State intervention; or (ii.2) heteronomous, when they result from State activity.

In this sense, autonomous sources are those elaborated by their own destinataries: collective conventions, collective bargaining, company regulations and customs. Conventions and collective bargaining result from collective negotiation, and institute general laws applicable to individual labour relations in the framework of representation of collective entities. Company regulations, on the other hand, are unilaterally instituted by the employer and are applicable to the employees of that corporate entity, so that their dispositions comprise rules that concern the individual employment contracts.

Heteronomous sources, on the other hand, are those issued by the State: laws, decrees, normative judgements and binding precedents (Bomfim 2017, 53-54). Normative judgements constitute heteronomous sources of labour law because they originate from the Judicial Power and, therefore, the State. These instruments are identified as the collective regulation of working conditions and are characterised by their general nature, abstraction, prediction and

17. Based on the respective court, in the case of court rulings and precedents, becoming equivalent to federal law; and applicable to employees of a company or members of a same professional category, in case of normative judgements.

temporal limitation (Feliciano 2013, 174-175), although their general character is limited to the collective entities on which it was imposed.

Binding precedents, in turn, constitute an instrument for the standardisation of the Supreme Court's jurisprudence. They have a normative character and, therefore, must be observed due to express constitutional determination.

C. Norms and principles of Brazil's labour law

Labour law in Brazil is also based on theoretical concepts, whose main function is to guide the interpretation and application of laws by the Judicial Power and by administrative inspection bodies. Theoretical principles achieve legitimacy through widespread adoption. They usually supplant the absence of a specific norm and are applicable to labour relations, serving mainly to rebalance forces in case of contracts that limit or eliminate rights of the employee, or to recognise an employment relationship that has not been formally established through a contract. They also serve to adjust the minimum content of the contracts in the interests of the dignity of the human person—for example, in terms of wages and working hours.

The principles of labour law that are most commonly adopted in Brazil include: (i) the principle of protection (which can be broken down in the following sub-principles: a) *in dubio pro operario*;[18] b) most favourable norm; and c) most beneficial condition); (ii) the principle of non-waiver of rights; (iii) the principle of continuity of the employment relationship; (iv) the principle of primacy of reality; (v) the principle of reasonableness; (vi) the principle of good faith; and (vii) the principle of non-discrimination.[19]

In practice, principles can be used to justify the invalidation of contractual alterations that are harmful to the worker and the creation of presumptions that are favourable to the worker.

D. Labour contracts and freedom of negotiation

The individual employment contract is, according to Brazilian law, the tacit or express agreement, verbal or in writing, corresponding to the respective employment relationship (Articles 2 and 3 of the CLT). Its minimum content derives from the law and the Federal Constitution, being the application of labour law mandatory. Verifiable factual circumstances are relevant to its characterisation, independently of the content formalised in the contract.

18. In Brazil, this principle constitutes a matter of interpretation (Sussekind 2000) and, therefore, does not cover evidentiary matters. The application of in dubio pro operario can be verified in the presence of two or more viable interpretations to the case; the interpreter must interpret it in the manner that most favours the employee.

19. See Plá Rodriguez (2000).

The employment contract is considered a private instrument with public rules—which are the minimum rights that must be guaranteed to the worker. As with any contract, it must be established by a subject with legal capacity, with a lawful, possible and specific object, with the form required by the law, based on consensus and absent of defects.

In Brazil, individuals have legal capacity to celebrate a contract when they turn 18 years old (or 16, with the authorisation of their legal guardian). Formal work is allowed from 16 years onwards, and apprenticeship is allowed from 14 years onwards. Work in hazardous and unsanitary environments, night work and other types of work that are harmful to health are forbidden to those under 18. In addition, there are specific ages for certain jobs, such as 21 years old for security guards. Although the work of children and adolescents results in a null contract, it still leads to an obligation of the payment of workers' rights.

Employment contracts cannot provide for an illicit, impossible and indeterminate object. The presence of legal defects leads to nullity.

The law imposes certain limitations to the autonomy of the will in employment contracts, such as the waiver of workers' minimum and basic rights, such as working hours, minimum wage and health and safety measures at the workplace. Although it admits prior contract negotiation, the Brazilian legislation prohibits any alteration of the contract to the detriment of the worker, except to include additional advantages, under penalty of annulment of the specific clause. Recently, after the Labour Reform of 2017, the law started to allow the free determination of contractual conditions when the worker possesses higher education and receives a monthly wage that is superior to twice the upper limit of the benefits of the General Social Security System. As a result, there might be contractual alterations for these workers that lead to less favourable conditions (Art. 611-A of the CLT).

Finally, in labour relationships, the contract can either have a fixed term or not, as well as be of the intermittent modality. As a rule, the contract is for an indeterminate period, except for the eventual determination of a definite term, which must be expressed (e.g. prefixed term, execution of a specified service or some predictable event). This determination leads to the fixed-term contract, which is possible only in specific cases: temporary services, temporary entrepreneurial activities, and/or probation contracts.

E. Types of working relationships and employment relationships

Brazilian labour legislation envisages different types of working relationships according to their specificities and special needs, which are the legal bonds of service provision by an individual. In this sense, the employment relationship is a type of working relationship, whose subjects fit the legal definitions of employer and employee.

An 'employer' is defined as the "firm, individual or collective, which, running the risks of economic activity, allows, pays for and directs personal service provision", including "independent workers, charitable institutions, recreational associations or other not-for-profit institutions" (Art. 2 of the CLT) On the other hand, 'employee' is defined as "every person who provides services on a non-sporadic basis to an employer, under their responsibility and by means of a wage" (Art 3 of the CLT).

Therefore, these are the basic characteristics of the employment relationship in Brazil: private person employment, personality,[20] non-occasionality,[21] onerosity,[22] and subordination.[23] If the service provision does not contain any (or some) of the prerequisites, it will generally be considered as a working relationship and be subjected to a less comprehensive protection scheme. In addition, even if the legal requirements are in place, the law might explicitly preclude the employment relationship due to that mode of work targeting a specific end. This situation is exemplified by internships whose objective is educational.

Employment relationships can differ regarding the location where services are provided, such as urban, rural or domestic. It should be noted that urban work is the standard relationship, while rural and domestic work have specific requirements—in addition to the standard prerequisites for constituting an employment relationship listed above—and can be distinguished according to the rights of each category. Specifically, rural work is regulated by Law No. 5.889/1973[24] and is characterised by services rendered in rural properties, in which the employer exploits agroeconomic activities.

Domestic work, in turn, is regulated by Supplementary Law No. 150/2015 and is characterised by not-for-profit services rendered to people/families in households, over twice a week.

There are additional labour relations in Brazilian law. Autonomous work is characterised by a civil relationship between employer and employee, which was regulated by the Labour Reform so that the contracting—as long as it adheres to legal formalities—can be exclusive or not, continuous or not, does not establish an employment relationship.

20. 'Personhood' regards who should carry out the service, considering that workers are chosen for their personal qualities and cannot be replaced in the service provision of the employment contract in place—in other words, the relationship is established between a concrete private individual and the employer.

21. 'Non-occasionality' refers to the provision of a service for which a company has a permanent need, so that labour cannot be merely sporadic.

22. 'Onerosity' means that there is no gratuitous employment contract—there must be a monetary counterpart to services rendered.

23. 'Subordination' concerns the duty of obedience owed by the employee to the employer in the context of service provision: the employer directs and controls the factors of production in the company, including the workforce.

24. Rural work entails specific rights and features, such as prior notice, salário-utilidade (a share of the salary paid in goods, services or other utilities) and night working hours. The regular labour legislation (CLT) is applicable, albeit subsidiarily, when there is no specific rule for rural work.

This mechanism intends to avoid the characterisation of the employment relationship, given that subordination and continuity in the realm of service provision are possible indications of fraud in the contracting process.[25]

Independent/temporary workers are represented by unions to render services without an employment relationship, usually in ports (independent port workers, who are represented by the Workforce Managing body—*Órgao Gestor de Mão de Obra* (OGMO). Although there is no employment relationship, these workers are guaranteed the labour rights specified in the Constitution.[26]

Work intermediated by third parties is commonly known as 'outsourcing' and is characterised when the workforce is contracted by an intermediary company that establishes a (civil) contract with the service-requesting company. With Law 13.429/2017, outsourcing was permitted for the end activities and support activities of companies, and no longer restricted to temporary work, temporary substitution of permanent personnel and/or temporary supplementary demand.[27] The law does not require parity of rules between outsourced workers and the regular employees of the service-taking company, including in terms of salary, and the contracting company is additionally responsible for labour obligations regarding the period of service provision. Additionally, it is possible to identify an employment relationship with the service-taking company, depending on the prerequisites and the concrete situation.

Apprenticeship is a special mode of labour contract, directed at those between 14 and 24 years old, enrolled in a technical-professional apprenticeship programme. It is regulated by specific legislation, and purports to ensure learning through both the labour activities and adequate time dedicated to carrying out educational activities.

Intermittent work was introduced by Law No. 13.467/2017, enabling service provision during alternating periods of activity and inactivity. Thus, continuity is not a requirement, and there are specific rules for hiring and labour dues, which will be proportional to the effective period worked. Intermittent work contracts are allowed for any type of activity, save for aeronautics, and there is no provision regarding the effective call to service, which might be refused by the employee and is not subjected to the hierarchical power of the employer, which does

25. Although it lies in the realm of service provision contracts under Civil Law, autonomous work comprises one of the main sources of corruption in the application of labour legislation in Brazil, considering that it is a common practice for companies to hire workers and require them to constitute legal entities (pessoas jurídicas) for service provision, in the interests of avoiding the prerequisites of personhood and subordination and, therefore, the employment relationship and decurrent obligations. Despite legal provisions, if the prerequisites of an employment relationship are identified in the factual circumstances, it will be so characterised and recognised by the Judicial Power.

26. The regulation of this type of work is justified by the occasional nature and short duration of work in ports and in transporting goods—service provision is not necessarily continuous for the contracting firm. Law No. 12.023/2009 admits and regulates independent work and the transportation of goods in general, while Law No. 12.815/2013 regulates independent port labour specifically.

27. In 2003, the TST issued a precedent (Súmula 331) containing the rules for outsourcing: temporary jobs; surveillance, conservation and cleaning jobs; and jobs connected to the support activities of the contracting company, as long as the features of personhood and subordination are not present. In 2017, the intermediation of labour was regulated and started being allowed even for the end activities of the contracting company. The Supreme Court considered that outsourcing, under the terms of existing legislation (Law 13.429/2017), does not violate the Constitution.

not overrule subordination, as described by law. Moreover, intermittent contracts must be established in writing and must specify the value of the hour of work, which must not be below the minimum wage and must be equivalent to that of other employees of the establishment where the work is to be performed.

Civil service is submitted to its own legal (statutory) regime under public law, in which the worker is usually admitted after being approved in a public examination featuring aptitude tests and/or evaluation of titles, and they are assured stability in the position after an initial trial period. The rights, duties and functions of this employment relationship are regulated by legislation (federal, state or municipal, according to the service provided)—which can be altered, except regarding vested or acquired rights—and additionally through collective bargaining.

In civil service there is also the possibility of temporary work, in appointed positions and trusted functions, as well as of hiring through private law, regulated by normal labour legislation—although with some specific rules originating from standard civil service, such as investiture, accumulation of positions, remuneration, and others (Di Pietro 2018, 744).

Finally, labour relations are subdivided into formal (when the prerequisites of the employment relationship are present) and informal (when those prerequisites are absent). Currently, informal labour relations dominate the debates around labour rights in Brazil due to remote work, work intermediated by new technologies and work on demand. The difficulty of framing them under the legal requirements of subordination and personality preclude their characterisation as an employment relationship. These labour relations find themselves in a regulatory limbo in the country: there is no specific legislation[28] and workers resort to Labour Justice, and there are legal decisions with conflicting interpretations, especially regarding subordination. At times, the employment relationship is recognised based on structural subordination,[29] while being discarded in others.[30]

F. Types of labour relations

Table 6.2 presents information and rights regarding the various labour relations admitted by Brazilian law.

28. Although there is no specific legislation, there are proposals to regulate work on demand. FGV (2021).

29. The existence of a relationship of subordination by the insertion of the worker in company's productive structure.

30. The organisational structure of firms such as Uber and Ifood is such that it reduces the contact between them and their employees, restricting communication to a technological apparatus and therefore incentivising individualised labour relations, creating conditions to avoid the incidence of social labour rights (Antunes 2020).

TABLE 6.2 Types of labour relations

Type of labour relation	Description	Legal provision (norm)
Urban employment relationship	Provision of service by the worker (individual), featuring personhood, onerosity, non-eventuality, and subordination, to the employer (individual or collective company and similar)	CLT
Domestic employment relationship	Provision of service by the domestic worker (individual), featuring personhood, onerosity, non-eventuality, and subordination, to the employer (individual or family) in a residence and without any lucrative purpose	Supplementary Law No. 150/2015
Rural work	Provision of service by the worker (individual), featuring personhood, onerosity, non-eventuality, and subordination, to the rural employer (considered as those who exploit agroeconomic activities) in a rural property	Law No. 5.889/1973
Apprenticeship	Provision of service by the worker (worker between 14 and 24 years old), adjusted by a special labour contract, in writing and with a fixed term (up to 2 years, except for persons with disabilities), whereby the employer must ensure the worker's technical-professional education	Law No. 11.180/2005 and Art. 428 da CLT
Professional internship	Provision of service with the goal of improving the interns' (youth and adults) professional training, which is part of the pedagogical project of higher education, technical education, secondary education, and the final years of basic education	Law No. 11.788/2008
Occasional work	Provision of service of an urban or rural nature by the worker (individual), featuring personhood, onerosity, non-eventuality, and subordination, to different service takers, on a one-off basis	Art. 12, V, g of Law No. 8.212/1991
Casual work	Service provision by the worker of transporting goods in general (individual), featuring onerosity and subordination, in an eventual character (with no employment relationship), to different service takers and requiring the intermediation of a union *Casual work is a type of occasional work (Delgado 2019, 2014) *Regulated by Law 12.815/2013, casual work can be carried out in ports if intermediated by the category's union and administrated by OGMO	Law No. 12.023/2009 and Law No. 12.815/2013 (for casual port work)
Outsourcing	Provision of service by the worker (individual), hired by the company providing services to third parties, to the service-taking company. The relationship between the service-taking company and the company providing services is a civil contract *Outsourcing can result from a temporary contract (Delgado 2019, 555)	Law No. 13.429/2017
Cooperatives	Provision of service by the member of the cooperative, governed by the principles of double quality (the person affiliated to the cooperative must also be its client) and differentiated public retribution (allowing for the member of the cooperative to earn a personal remuneration resulting from autonomous activities) (Delgado 2019, 389-396), to the cooperative	Law No. 12.690/2012
Independent work	Provision of service by the worker, featuring onerosity and eventuality, to the service-taker, through service provision contracts (Arts. 593-609 of the Civil Code), special-order contracts (Arts. 610-626 of the Civil Code), commercial representation contracts (Law 4.886/1965), and agency and distribution contracts (Arts. 710-721 of the Civil Code), which might or not possess a personhood clause (Delgado 2019, 397-400)	Civil Code and Law No. 4.886/1965
Volunteer work	Provision of service by the worker with a "benevolent impetus and cause" (Delgado 2019, 412) to the service-taker, which must be a public entity of any kind or a private non-profit institution, as well as the community itself (Delgado 2019, 414)	Law No. 9.608/98
Civil service	Provision of service to the State with an employment relationship established by law, after approval in a public examination featuring aptitude tests and/or examination of titles	Federal Constitution (base) and scattered laws for each type of work and federative entity

Source: Authors' elaboration based on the national reference literature.

G. Rules for dismissal

The Federal Constitution establishes, in the roster of workers' rights (Art. 7), the employment relationship protected against arbitrary dismissal or without just cause, in the terms of a supplementary law, which disposes, among other things, about compensation. In this sense, Brazilian law determines the disbursements to which the worker in each type of contract termination is entitled to i) dismissal without just cause; ii) dismissal for just cause; iii) indirect termination; iv) request for dismissal; v) consensual termination; vi) termination for reciprocal guilt.

When the contract is terminated exclusively due to the employee's conduct, under the terms of the law, it is considered as just cause.[31] In this case, the employee will be entitled to a wage proportional to days worked and accrued vacations, in addition to the constitutional one-third extra holiday pay, not including additional proportional tranches. In the case of request for dismissal, the worker is only entitled to the rights acquired as a result of the work already performed, such as wage balance, 13th wage and proportional holidays, and they must give prior notice to the employer.

As for dismissal without just cause, the termination of the employment contract is carried out by initiative of the employer, without legal justification—Brazilian labour law allows for the employer to decide about whether or not to fire the employee, regardless of personal or economic justification. In these cases, in addition to the rights acquired by the worker or during the period of the contract, they will also be entitled to advance notice (worked or compensated), withdrawal from the FGTS, a 40 per cent benefit calculated based on the value of FGTS deposits and unemployment insurance paid by the government, if the legal requirements are met.

However, even though no justification is required for the unmotivated termination of the employment contract by the employer, dismissal cannot occur due to discriminatory reasons, under penalty of moral damages to the employer, who will be entitled to demand compensation through Labour Justice.

31. Art. 482—Just causes for termination of an employment contract by the employer include: a) act of improbity; b) misconduct or wrongdoing; c) ordinary negotiation on own account or on behalf of others without the employer's permission, and when this action configures competition against the company for which the employee works, or is harmful to the worker's activities; d) criminal conviction of the employee, after appeals, if there is no suspension of the execution of the sentence; e) negligence in carrying out the worker's functions; f) regular inebriation or inebriation during work; g) violation of company secrets; h) act of indiscipline against any person, or physical offense, under the same conditions, except for self-defence or in defence of others; k) attempt on the honour or reputation, or physical offence against the employer or hierarchical superiors, except in self-defence or in defence of others; l) constant gambling; m) loss of permit or of prerequisites established in law for the exercise of the function, due to the employee's harmful misconduct. Single paragraph—Similarly, it is considered just cause for the dismissal of an employee the practice, effectively demonstrated by administrative inquiry, of acts against national security. Currently, considering that chronic alcoholism is recognised as a persistent disease, labour jurisprudence has been considering regular inebriation as a disease, therefore excluding it from the list of just causes.

H. Collective labour relations: unions, negotiations and collective agreements, union action

In the realm of collective labour relations, Brazilian law foresees instruments for the protection of workers including corporate and employees' unions. Collective labour rights are regulated by specific principles, geared especially towards unions, allowing for the equivalence between unions and negotiation limits. The most common principles are: i) principle of freedom of association; ii) principle of autonomy; iii) principle of union intermediation on collective standardisation; iv) principle of equivalence between collective parties to the contract; iv) principle of loyalty and transparency in collective bargaining; v) principle of judicial creativity in collective bargaining; and vi) principle of negotiated sectorial adequation.

The Constitution guarantees freedom of union association and restricts State intervention, maintaining an exclusive system[32] and affixing rules for unions and the State (see Art. 8). Workers' unions are required to participate in collective bargaining[33] and have the possibility of defending the rights as well as collective and individual rights in judicial and administrative bodies, regardless of individual authorisation by the workers. The right to strike is ensured in broad terms, save for legal exceptions, as for military personnel. Workers can make decisions regarding the opportunity, convenience and subject of the strike, as long as they are not abusive and with certain restrictions in case of essential services. Workers are ensured representation in companies with over 200 employees (Articles 10 and 11 of the Constitution) and are able to participate in collegiate public bodies in which their professional or social security interests are the object of discussion or deliberation.

In Brazil, unions are organised through the confederative system across three levels: unions, federations and confederations, with exclusive representation by category and profession.[34] Union entities act on a regional territorial basis; federations and confederations are composed of groups of unions which can act across the national territory. Autonomy relative to the State is relative. Although the Constitution guarantees the freedom of association, there are rules for the creation of unions, especially regarding territoriality and the respective category. Due to union exclusivity, it is forbidden to create more than one union, on any level, representative of a professional or economic category, with an area larger than the limit of a municipality.[35] However, Brazilian law forbids any interference in the internal structuring and organisation of unions, and the State may only verify the fulfilment of formal prerequisites and the observance of union uniqueness.

32. The prohibition of more than one union, in any degree, from representing a professional or economic category, in the same territory, which will be defined by the interested workers or employers, as long as it is larger than the area of a municipality.

33. Collective conventions, which are part of the pact between the workers' and employers' respective unions, and collective bargaining, which refers to the agreements between one or more companies and workers' unions.

34. "A confederative system, characterised by the relative autonomy before the State, the representation by category and profession, exclusivity and bilaterality of the group" (Nascimento 1989, 139).

35. According to the law, the professional category is a basic social expression composed of similar life conditions originating from a common profession or work in an employment situation in the same, similar or related economic activity.

Up until the Labour Reform, the union system was financed by mandatory contributions by workers, withheld directly from their salaries. After Law No. 13.467/2017, the worker must give explicit and prior authorisation for this contribution to be charged.[36] It should be highlighted that unions represent all workers in their base, and not only affiliates.

Unions are required to act in collective bargaining regarding the employment contracts of the respective professional category. There are two types of instruments of collective labour bargaining. The 'collective convention' has a normative character among representative unions of the economic and professional categories. On the other hand. a 'collective agreement' is established between workers' unions and companies in the corresponding economic category.

Brazilian law allows for collective bargaining to prevail over the law in some respects, regardless of the principle of application of the norm that is most favourable to the worker, as long as: the terms that are collectively agreed on are lawful, do not compromise workers' basic rights, the human dignity in labour relations, health-protective regulations, safety and hygiene in the workplace, and if they do not involve the object of public policies. For example, collective bargaining is not allowed regarding the norms for filling out of work permits, unemployment insurance, FGTS, minimum wage, remunerated rest and vacations, norms for the protection of women's labour market, for the protection of workers' health, retirement, among others.

The 2017 reform included a list of examples of subjects which collective conventions and agreements can dispose on. As highlighted by Delgado (2017), such disposition leads to an "extreme and disproportionate increase of the powers of labour collective bargaining, especially regarding its new prerogative of deteriorating contractual and workplace conditions".

This results from one of the guidelines of the Reform, which is the prevalence of what has been negotiated over what has been legislated. One such example is the authorisation for collective bargaining to define degrees of insalubrity, which is a matter pertaining to labour health and safety, strictly linked with the premise of human dignity.

Delgado posits that although the Reform expanded the themes that can be the object of collective bargaining, the regulatory parameters for collective standardisation should be the Constitution and international rules for the protection of human labour, based on the principle of negotiated sectoral adequacy, according to which collective labour norms can only prevail when they implement a standard of rights that is superior to the one established in law, or when they deal with labour matters that are non-

36. This legislative change led to an imbalance in the financing of labour unions—as highlighted by Justice Edson Fachin, "the union regime established in the 1988 Constitution is based on three basic pillars: uniqueness (Art. 8, II), compulsory representativeness (Art. 8, III) and union contribution (Art. 8, IV)"; therefore, it is not possible to eliminate only one of these pillars without risking weakening unions, as they must represent all workers and all workers will reap the benefits of this representation, however none of them will be required to pay their dues. Even so, the Supreme Court decided in favour of the constitutionality of this law.

disposable (Delgado 2017). Therefore, although there is legal permission to negotiate various themes, freedom of negotiation is limited by the minimum standard of basic labour rights. Therefore, norms on work health and safety, for example, can only be the subject of collective bargaining to increase the level of protection for workers.

The Reform also imposed limitations on collective bargaining, under penalty of annulment. The high number of limitations expressed in the law reflects the legislator's intention of considering the list as exahustive (Delgado 2017), so that any object that is not present can be negotiated. It is not, however, decisive, because the legality or illegality of the negotiation must be assessed on a case-by-case basis, by verifying whether the minimum standard of labour rights was maintained.

Unions and companies cannot refuse to participate in collective bargaining when provoked. In case of refusal, it is possible to make a claim to Labour Justice (collective dispute before the competent Regional Labour Court—*Tribunal Regional do Trabalho* (TST)). The normative judgement, in this case, will define the norms and conditions applicable to the respective category of workers according to the circumstances, and will remain valid up to four years.

A specific law (Law No. 7.783/1989) regulates private workers' right to strike. It can be occur when collective bargaining is frustrated or when appealing for arbitration is deemed impossible (Art. 3). Labour contracts are considered suspended during striking.

The law does not restrict the rights that can be defended through striking, but judicial precedents and expert opinions posit that only those rights relative to labour contracts can be the object of striking—therefore excluding demands of a political nature.

For a strike to be considered legitimate, the law requires the existence of a prior attempt by the parties to resolve the conflict among themselves. If this attempt—and, afterwards, the strike—are not successful, the law provides for the filing of a collective agreement, about which the Judicial Power will issue a normative decision.

When collective bargaining fails, striking is the only means of collective action permitted by law to workers, so they can pressure their employers regarding the carrying out of conventions or collective agreements. Initiatives that restrict the freedom of movement in the workplace, promote the destruction of property or violence are forbidden.

Striking is strictly forbidden for members of the Armed Forces and Military Police and, according to a decision by the Supreme Court, for all members of the police force and other civil servants that work directly in the field of public security. In addition, striking is allowed in civil service and essential services and activities, except for urgent and indispensable services.

6.1.4 Indicators for employment and the labour market, unions and collective bargaining (2015–2019)

A. Employment and the labour market

In this subsection, we present information regarding the situation of employment and the labour market in Brazil, especially from 2015 to 2019. To that end, we have systematised quantifiable data regarding: the population and the workforce; employment; labour productivity; labour profit and revenue; unemployment; union density and collective bargaining coverage rates; and industrial action.

B. Population and the workforce

We have compiled data on population projections, the working age-population, the workforce, and rates of participation in the workforce. ILOSTAT data point to the progressive growth of the working-age population, mainly comprising women, and of the workforce, mainly comprising men. This difference is reflected in workforce participation rates, which, during the period analysed, were higher for men, even if they are decreasing. It should be highlighted that the rates of female participation in the workforce have been increasing since 2016.

TABLE 6.3 Population projections

		Year				
		2015	**2016**	**2017**	**2018**	**2019**
Sex	Female	103,814,243	104,712,864	105,601,737	106,473,081	107,316,359
	Male	100,657,516	101,450,192	102,232,088	102,996,239	103,733,160
	Total	204,471,756	206,163,054	207,833,826	209,469,321	211,049,519

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.4 Working-age population

		Year				
		2015	**2016**	**2017**	**2018**	**2019**
Sex	Female	83,838,020	84,895,924	86,160,641	87,276,321	88,271,750
	Male	76,307,028	77,496,771	78,366,785	79,037,907	79,673,822
	Total	160,145,048	162,392,694	164,527,426	166,314,228	167,945,571

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.5 Workforce

		Year				
		2015	**2016**	**2017**	**2018**	**2019**
Sex	Female	43,400,666	43,939,721	45,230,942	45,991,511	47,168,314
	Male	58,199,637	58,569,097	59,029,751	59,550,675	60,285,373
	Total	101,600,301	102,508,817	104,260,693	105,542,188	107,453,686

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.6 Rate of participation in the workforce

		Year				
		2015	**2016**	**2017**	**2018**	**2019**
Sex	Female	53.3%	53.3%	54.1%	54.4%	55.1%
	Male	75.3%	74.9%	74.5%	74.3%	74.4%
	Total	64.1%	63.8%	64.1%	64.1%	64.5%

Source: ILOSTAT <https://ilostat.ilo.org/>.

C. Employment

Regarding employment, data were compiled on: the employment-to-population ratio; employment distribution by economic activity; employment distribution by job status; number of temporary workers; amount of part-time work contracts; and informal employment. ILOSTAT data point to a reduction in the employment-to-population ratio for both sexes from 2015 to 2016, and an increase from 2016 onwards. As for employment distribution, the greatest concentration was found in the economic activity of 'retail, transportation, room and board, businesses and administrative services' and in the status of 'employee', both in 2019. According to the 2019 Annual Social Information Report (*Relação Anual de Informações Sociais*—RAIS),[37] formal temporary labour contracts represented less than 0.2 per cent of the workforce in Brazil.

Data on part-time labour contracts indicate that, regardless of the drop between 2015 and 2016, it was possible to observe a percentage increase from 2016 to 2018. With the 2017 Labour Reform, the norms for part-time work were altered, increasing its duration to 30 hours per week, with no possibility of overtime, or 26 hours per week, with the possibility of an additional 6 extra hours per week (Art. 58-A of the CLT). On the other hand, data on informal employment points to a progressive increase during the period, especially among men.

37. Available at: <http://pdet.mte.gov.br/images/RAIS/2019/2-Sum%C3%A1rio_Executivo_RAIS_2019.pdf>.

TABLE 6.7 Employment-to-population ratio

		Year				
		2015	**2016**	**2017**	**2018**	**2019**
Sex	Female	46.7%	44.9%	45.1%	45.4%	46.1%
	Male	68.3%	65.8%	64.6%	64.7%	65.2%
	Total	**57.0%**	**54.9%**	**54.4%**	**54.6%**	**55.1%**

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.8 Employment distribution by economic activity

	Year				
	2015	**2016**	**2017**	**2018**	**2019**
Agriculture	10.2%	10.1%	9.5%	9.3%	9.1%
Construction	8.2%	8.1%	7.6%	7.3%	7.2%
Manufacturing	12.6%	11.4%	11.5%	11.5%	11.4%
Mining, electricity, gas, water	1.5%	1.4%	1.4%	1.4%	1.4%
Public administration, Community, social services and other services and activities	27.8%	28.8%	28.9%	29.5%	29.6%
Retail, transportation, room and board, business and administrative services	39.8%	40.1%	41.1%	41.0%	41.3%
Unclassified	0.0%	0.0%	0.0%	0.1%	0.0%

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.9 Employment distribution by status

	Year				
	2015	**2016**	**2017**	**2018**	**2019**
Employee	68.7%	68.2%	67.7%	67.2%	66.9%
Employer	4.4%	4.4%	4.7%	4.9%	4.7%
Own-account worker	24.2%	25.1%	25.2%	25.6%	26.1%
Assistant family employee	2.7%	2.3%	2.4%	2.3%	2.2%
Unclassified	0.0%	0.0%	0.0%	0.0%	0.0%

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.10 Number of temporary employees

	Year				
	2015	**2016**	**2017**	**2018**	**2019**
Amount	N/A	N/A	143,000	164,653	183,829

Source: RAIS (2019).

TABLE 6.11 Incidence of part-time contracts

		Year				
		2015	2016	2017	2018	2019
Sex	Female	33.9%	31.9%	34.1%	35.5%	35.3%
	Male	18.7%	17.7%	19.7%	21.0%	20.9%
	Total	25.2%	23.8%	25.9%	27.3%	27.2%

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.12 Informal employment

		Year				
		2015	2016	2017	2018	2019
Sex	Female	16,849,189	17,599,651	18,500,760	19,084,154	19,620,590
	Male	25,008,303	23,552,089	23,802,798	24,236,468	24,690,901
	Total	41,857,492	41,151,740	42,303,558	43,320,621	44,311,491

Source: ILOSTAT <https://ilostat.ilo.org/>.

The data collected suggest an increase in the share of labour productivity from 2015 to 2017. However, after 2017 the percentage of the rate of annual production growth per worker started decreasing.

D. Labour productivity

TABLE 6.13 Labour productivity—Rate of annual production growth by worker, 2011 constant GDP; international USD purchasing power parity (PPP) (as a percentage)

Year	2015	2016	2017	2018	2019
Percentage	-3.3%	-0.7%	1.0%	-0.5%	-1.1%

Source: ILOSTAT <https://ilostat.ilo.org/>.

E. Labour income

ILOSTAT data reveal an increase in the average monthly wage from 2015 to 2017. However, starting in 2017, it is possible to identify its progressive and significative reduction.

TABLE 6.14 Average monthly wage (USD)

Year	2015	2016	2017	2018	2019
Wage	551.74	589.60	681.06	625.23	603.46

Source: ILOSTAT <https://ilostat.ilo.org/>.

F. Unemployment

We have systematised data regarding unemployment and inactivity rates. These data indicate that women concentrate the highest rates of unemployment and inactivity, both of which have been decreasing since 2018.

TABLE 6.15 Unemployment rates

		Year				
		2015	**2016**	**2017**	**2018**	**2019**
Sex	Female	10.0%	13.4%	14.7%	14.2%	14.1%
	Male	7.2%	10.2%	11.3%	10.8%	10.2%
	Total	8.4%	11.6%	12.8%	12.3%	11.9%

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.16 Inactivity rates

		Year				
		2015	**2016**	**2017**	**2018**	**2019**
Sex	Female	48.1%	48.1%	47.2%	47.1%	46.4%
	Male	26.4%	26.8%	27.1%	27.5%	27.4%
	Total	37.8%	37.9%	37.6%	37.8%	37.4%

Source: ILOSTAT <https://ilostat.ilo.org/>.

G. Union density and collective bargaining coverage rates

Data on unionisation in Brazil[38] indicate that there are 17,223 unions registered in the National Registry of Union Entities, of which 11,868 are workers' unions and 5,365 are employees' unions. They also indicate a gradual decrease in unionisation and in union density over the years.[39]

ILOSTAT does not feature data on collective bargaining coverage rates for the analysed period; however, for illustrative purposes, up to 2014 an upwards trend could be observed in the share of workers covered by collective bargaining.

38. Available in a webpage of the former Ministry of Labour and Employment (currently a specific bureau in the Ministry of the Economy), reportedly up to date as of 22 March 2021.

39. As reported by the Brazilian National Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatística—IBGE) in the 2019 report "Additional characteristics of the labour market" (Características adicionais do mercado de trabalho), whose data can be accessed through the SIDRA System: <https://sidra.ibge.gov.br/tabela/6410>.

TABLE 6.17 Union density

	Year				
	2015	**2016**	**2017**	**2018**	**2019**
Percentage	19.5%	18.9%	N/A	N/A	N/A

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.18 Union membership—people aged 14 years old or older, in employment during the reference week or who had been employed previously (in thousands)

Union membership	**Year X sex**									
	2015		**2016**		**2017**		**2018**		**2019**	
	M	**W**	**M**	**W**	**M**	**W**	**M**	**W**	**M**	**W**
Affiliated to a union	10,118	8,015	9,099	7,672	8,857	7,366	7,776	6,935	7,260	6,481
Not affiliated to a union	59,728	60,807	60,482	61,158	61,701	63,643	64,027	66,313	65,672	68,587
Total	69,846	68,821	69,581	68,829	70,558	71,008	71,803	73,248	72,932	75,067

Source: IBGE—Additional characteristics of the labour market (2019) <https://sidra.ibge.gov.br/tabela/6410>.

TABLE 6.19 Collective bargaining coverage rates

Year	**2011**	**2012**	**2013**	**2014**
Percentage	63.1%	63.8%	65.7%	70.5%

Source: ILOSTAT <https://ilostat.ilo.org/>.

H. Industrial action

Industrial action covers data regarding the number of strikes, workdays lost, and workers involved, as well as which strikes were carried out, stoppages and number of workers. ILOSTAT data signal an increase in the number of workers involved from 2015 and 2016, which represented the apex in the series. In the following years, however, the number of strikes and workers involved declined. In 2016, the largest share of workers who participated in strikes were from the areas of 'retail, transportation, room and board, business and administrative services'.

TABLE 6.20 Number of strikes

Year	**2015**	**2016**	**2017**	**2018**	**2019**
Total	1,980	2,127	1,574	1,461	1,118

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.21 Workdays lost

Year	2015	2016	2017	2018	2019
Total	17,368	17,718	12,002	8,710	5,697

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.22 Workers involved

Year	2015	2016	2017	2018	2019
Agriculture	0	0	0	400	0
Construction	118,340	14,928	4,793	3,508	4,258
Manufacturing	87,155	61,739	28,263	19,651	53,090
Mining, electricity, gas, water	4,950	19,381	2,630	34,904	110
Public administration, Community, social services and other services and activities	527,712	193,313	282,059	69,052	100,534
Retail, transportation, room and board, business and administrative services	546,521	471,606	46,701	40,134	8,207
Unclassified	0	0	120	0	0
Total	1,284,678	760,967	364,566	167,649	166,199

Source: ILOSTAT <https://ilostat.ilo.org/>.

TABLE 6.23 Strikes carried out and stoppages

Year	Strikes	Stoppages (total hours)	Hours per strike
2015	N/A	N/A	N/A
2016	2.093	140,214	67
2017	1.566	94,066	60
2018	1.453	69,233	48
2019	1.118	44,650	40

Source: DIEESE (2017–2020).

TABLE 6.24 Strikes by number of workers

Number/ Year	Up to 200	201–500	501–1,000	1,001–2,000	2,001–5,000	5,001–10,000	10,001–20,000	Over 20,000	Total
2015	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2016	301	138	57	40	26	6	3	1	572
2017	173	57	29	18	12	4	2	0	295
2018	122	49	21	20	8	7	1	0	228
2019	91	16	8	10	3	4	3	0	135
Total	687	260	115	88	49	21	9	1	1,230

Source: DIEESE (2017–2020).

National data on strikes carried out between 2016 and 2019,[40] slightly different from ILOSTAT's, also point to a reduction in striking activity, confirming a shorter average duration per strike.

The share of workers involved, according to available data, was in most cases less than 500 workers per strike during the period 2016–2019.

6.2 LABOUR DISPUTE RESOLUTION SYSTEM

6.2.1 Organisational structure of the dispute resolution system

A considerable part of labour protection in Brazil is carried out through the administration of labour disputes via resolution channels. The Judicial Power has a leading role in this task, but other bodies, including legal and political ones also play a part—regarding striking, collective bargaining in the realm of union entities, private negotiations and intermediated agreements, and even private arbitration in certain cases.

TABLE 6.25 Resolution methods for labour disputes

Type of referral	Participants	Definition	Examples
Self-defence	Parties	Act of self-defence, in which one of the parties imposes the decision on the other	Strikes and lockouts[41]
Auto composition	Parties	Conflict resolution is achieved by initiative/agreement of the parties, whether in or out of court	In-court conciliation, collective labour agreement and out-of-court collective labour convention
Hetero composition	Parties and third party	Conflict resolution through a third party, whose decision has binding force on both parties	Jurisdiction and arbitration

Source: Authors' elaboration based on Leite (2019, 150–155).

Labour disputes (and the respective dispute resolution mechanisms) are not limited to lawsuits, but the Judicial Power is a recurring venue for the referral of these types of disputes in Brazil. For the sake of comparison, while in 2019 3,530,197 new cases (individual and collective) were brought to Labour Justice in the country, in the same period 42,329 collective bargaining instruments were brought to the Executive Power's competent body. In the period 2015-2019 we can observe a similar trend between the number of new lawsuits (including both individual and collective suits) and instances

40. Organised by the Inter-union Department of Statistics and Socio-economic Studies (*Departamento Intersindical de Estatística e Estudos Socioeconômicos*—DIEESE), an entity created and maintained by the Brazilian union movement.

41. Lockouts are illegal in Brazil.

of collective bargaining. Data on collective negotiations deal mostly with coverage rate and union density. In this sense, it can be verified that the reduction in union density from 2015 to 2016 did not result in a drop in collective negotiations—which in fact increased during the period.

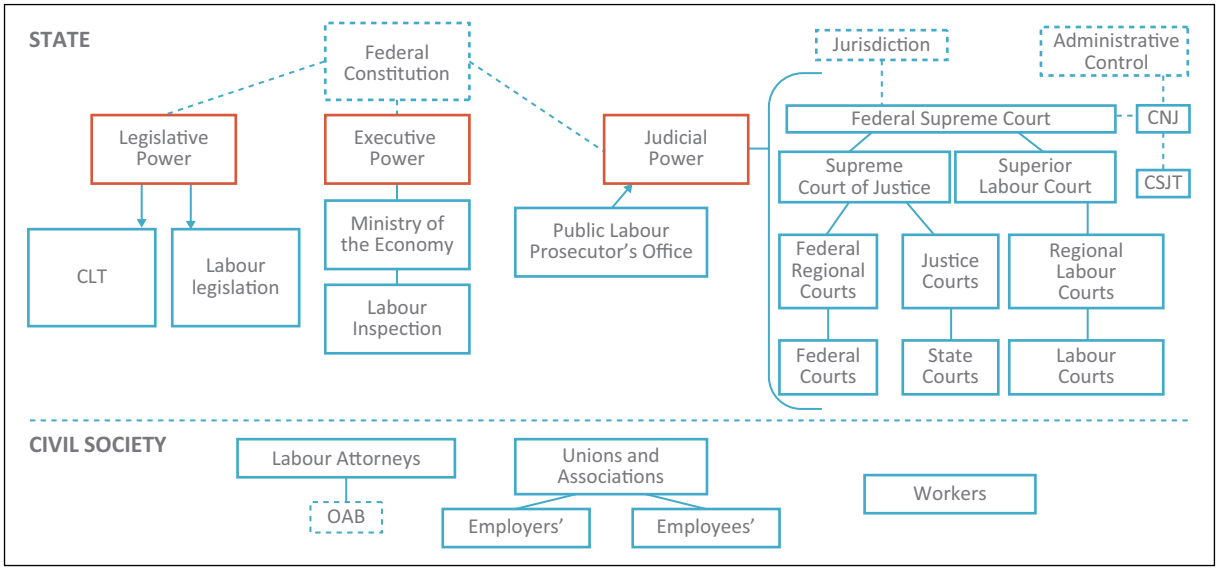
TABLE 6.26 New lawsuits and collective negotiations, percentage change[42]

Year	Collective negotiations	Percentage change	Lawsuits	Percentage change
2015	46.633	-	4.061.374	-
2016	48.563	4.1%	4.262.066	4.9%
2017	47.572	-2.0%	4.321.995	1.4%
2018	41.314	-13.2%	3.460.875	-19.9%
2019	42.329	2.5%	3.530.197	2.0%

Source: Justice in Numbers (Justiça em Números) 2016-2020 (CNJ) and MEDIADOR.

In Brazil, the labour dispute administration system is composed of State bodies (especially, but not exclusively the Judicial Power) and civil society bodies (unions and associations, for example).

FIGURE 6.1 Brazilian labour dispute administration system



Source: Authors' elaboration based on the Brazilian Federal Constitution and legislation.

A. Organisation of justice (Federal Justice, State Justice and Labour Justice)

Being not available data on the overall number of labour disputes in Brazil, the proportion of those that are forwarded to the Judicial Power is unknown. Most disputes are forwarded

42. The comparison above was carried out between individual lawsuits and collective negotiations because there were no available data regarding the amount of collective lawsuits. In any case, the number of lawsuits depicted in the table includes individual and collective lawsuits and, according to recent data (Cunha 2021), this category represents less than 10 per cent of total lawsuits, which are mostly individual.

to Labour Justice—an area of the Brazilian judiciary charged mainly with labour relation disputes.

Others are referred to 'ordinary justice': Federal Justice, which hears 'labour criminal law', dealing with crimes against personal freedom, including the reduction of a worker to a condition analogous to slavery;[43] and a list of the so-called crimes against the organisation of labour (Penal Code, Art. 197-207); and State Justice, which prosecutes and judges over claims for State compensation due to work accidents. These claims are quite numerous.

With Constitutional Amendment No. 45/2004, which expanded the competence of Labour Justice, it was not clear whether these disputes were the purview of State Justice or Labour Justice. In 2005, the Supreme Court decided on the issue, splitting the competence: Labour Justice was responsible for claims involving moral and property damages resulting from work accidents, while State Justice was responsible for accident lawsuits and of benefits paid for work accidents (*Súmula Vinculante* No. 22 and Statement No. 50, both from the STF).

Labour Justice, in turn, is especially charged with conciliating and adjudicating disputes between employees and employers; disputes resulting from labour relations, whether individual or collective;[44] and disputes that discuss compensations due to work accidents.

As a special branch of the Judiciary (one of three 'special justices', together with Electoral Justice and Military Justice), Labour Justice has an autonomous structure, organised in three levels: first instance Labour Courts, second instance Regional Labour courts and the Superior Labour Court as the appellate court—in addition to the STF in its role as supreme constitutional court.[45]

In addition, the High Board of Labour Justice (*Conselho Superior da Justiça do Trabalho*—CSJT); a body instituted by Constitutional Amendment No. 45/2004, has the function of administrative, budgetary, financial and patrimonial administration of the first and second instances of Labour Justice. CSJT decisions are mandatory.

43. Also known as 'contemporary slave labour' or 'contemporary slavery', the study "Slave Labour in the Scales of Justice" (*Trabalho Escravo na Balança da Justiça*) (Haddad, Miraglia, and Silva 2020, 472) concluded that, in the period 2008-2019, 3,450 inspection operations were carried out; 1,650 found labour analogous to slavery. These operations led to the rescue of 20,174 workers, and to the charging of 2,679 defendants for incurring in Art. 149 of the Criminal Code, 112 of which were definitively convicted. The study concluded, considering the sentences handed out, that "only 27 of those convicted could not benefit from substitution for restrictive sanctions; in other words, only 1 per cent of the defendants would be subjected to arrest".

44. Art. 643 of the CLT. "Disputes resulting from the relationships between employees and employers, as well as between independent workers and service-takers in activities regulated by social legislation, will be resolved by Labour Justice, according to the present title and in the form established by labour law procedures."

45. Labour Justice was instituted by the 1988 Constitution, in Art. 92 and Art. 111, and follows the regulations of its third chapter (Of the Judicial Power), Section I (Overall Dispositions), Arts. 92-100, and of Section V (Of the Superior Labour Court, of Regional Labour Courts and of Labour Justices), Arts. 111-116. According to Art. 92: "The following are bodies of the Judicial Power: II-a—The Superior Labour Court; (Included by Constitutional Amendment No. 92, of 2016 [. . .]; IV—the Labour Courts and Justices [. . .]"; Art. 111: "The following are bodies of Labour Justice: I—the Superior Labour Court; II—Regional Labour Courts; III—Labour Justices".

In parallel, the Comptroller-General of Labour Justice (*Corregedoria-Geral da Justiça do Trabalho*—CGJT) is responsible for the inspection, discipline and administrative orientation of the TRTs, its judges and judicial services, which they carry out through ordinary and extraordinary 'corrections' (*correições*).[46] The TRTs are subject to the Comptroller General's inspection, including all their organisms, presidents, chief judges and appointed judges, in addition to the respective judiciary sections and services.

B. Labour Justice: Courts, instances and territorial distribution

The internal organisation of the units that comprise Labour Justice (bureaus and auxiliary services, labour courts, etc.) is defined by each TRT in their internal bylaws.

Labour courts are the point of entry of normal labour disputes into Labour Justice. These courts rule on lawsuits relative to the individual disputes that arise in labour relations. The most common mechanism used by claimant workers is the labour complaint.

Each labour court covers the territory of its respective district—which is the judicial unit corresponding to the municipality in which the labour judge has jurisdiction. The judicial district can cover one or more municipalities and the creation of new courts is defined by the TRTs, following criteria regarding the number of formal workers in that specific location or regarding the number of existing labour lawsuits (Law No. 10.770/2003).
Their functioning and organisation are regulated in the CLT and in specific legislation.

The functions and competence of labour courts are specifically defined in Arts. 652-653 of the CLT,[47] including: disputes regarding the acknowledgement of the employee's stability; remuneration; vacations and compensation for termination of the individual employment contract; disputes regarding the individual employment contract; inquiries on serious misconduct; homologation of extrajudicial agreements, among others. Although the

46. Ordinary corrections examine case files, registries and other documentation of the judiciary bureaus and sections and, moreover, whether magistrates present good public behaviour and are timely and diligent in meting out justice, or if they exceed legal and procedural deadlines without reasonable justification, or commit mistakes that demonstrate incapacity or negligence, in addition to everything that is considered necessary or convenient by the Comptroller General. Extraordinary corrections, general or partial, are carried out according to specific needs, according to the body's own initiative or on demand from regional courts or bodies of the Superior Labour Court.

47. Art 652: It is up to the labour courts to: a) conciliate and adjudicate i) disputes whose goal it is to recognise the stability of the employee; ii) disputes concerning remuneration, vacation and compensation due to the termination of an individual labour contract; iii) disputes resulting from construction contracts in which the contractor is a worker or a craftsman; iv) the remaining disputes concerning individual labour contracts. V) lawsuits between port workers and port operators, or OGMO, resulting from the labour relation (included by Provisional Measure No. 13.467/2017). Single paragraph—Preference will be given to disputes regarding payment of wages and those resulting from employment bankruptcy, and the President of the Registry, on the request of the interested party, may establish a separate lawsuit whenever the complaint deals with other subjects.

Art. 653: It is also up to the Conciliation and Judgement Boards to: a) request competent authorities to carry out the necessary investigations in order to clarify deeds under their appreciation, representing against those who do not meet these demands; b) carry out investigations and practice the procedural acts ordained by the Regional Labour Courts or by the Superior Labour Court; c) decide on suspicions raised against its members; d) decide on cases of incompetence brought to their attention; e) issue letters rogatory and carry out those that were requested of it; carry out, in general, in the interests of Labour Justice, any other attributions resulting from its jurisdiction.

mentioned articles refer to the old Conciliation and Judgement Boards (*Juntas de Conciliação e Julgamento*), these dispositions apply to the current labour courts.

Differently from other spheres of Brazilian law, labour courts were originally charged by the Constitution (Art. 114, original version) with not only adjudicating disputes, but also conciliating them. Even though a later reform (EC No. 45/2004) removed the term "conciliate", its original version, as well as the corresponding norm in the CLT (Art. 649) are a record of the conciliatory role that Labour Justice has always played in Brazil. The complaint of the worker to Labour Justice will initially be the object of a conciliation attempt between the parties, intermediated by Justice (CLT, Art. 649) before being processed into a lawsuit.

Labour courts are composed of a labour judge and/or an assistant judge (Art. 116 of the Constitution). In places where there are no labour courts, labour disputes will be forwarded to a judge operating in ordinary justice, but their decision may be challenged[48] in the TRT (Art. 112 of the Constitution).

The changes in the structure of first instance courts between 2015 and 2019 suggests a tendency to downsize the administrative structure of Brazil's Judicial Power in general and of Labour Justice in particular.

TABLE 6.27 Labour law units (first instance) compared with the total units in the Judiciary (first instance)[49]

	2015	2016	2017	2018	2019
Labour Justice units	1,570 (10%)	1,572 (9.8%)	1,572 (10.2%)	1,587 (10.7%)	1,587 (10.7%)
Justice units per 100,000 people	0.768	0.763	0.757	0.761	0.755
Total units of the Judiciary	15,773	16,053	15,398	14,877	14,782

Source: Authors' elaboration based on data from Justice in Numbers (Justiça em Números) 2016-2020 (CNJ) and from "População residente nas Unidades da Federação e Grandes Regiões, enviada ao Tribunal de Contas da União—2001–2019" (IBGE).

The second instance of Labour Justice in Brazil is composed of 24 TRTs spread across the 27 Brazilian states. Its structure and basic functioning are defined by the Federal Constitution (Art. 115) and by the CLT (Arts. 670-689).

The TRTs judges challenges against decisions of first instance labour judges, as well as some special disputes that are directly referred to them—such as collective disputes, terminations, writs of mandamus, *habeas corpus* and instrument appeals.

48. A type of appeal used to challenge a first instance decision, which will then be analysed by a court of second instance.

49. The General Labour Justice Reports, produced by the TST, feature various data from 2017 to 2019. For these years, the reports indicate that the number of Labour Justice courts remained stable at 1573.

TABLE 6.28 TRT distribution by state

Region	State
1ª	Rio de Janeiro
2ª	São Paulo (capital)
3ª	Minas Gerais
4ª	Rio Grande do Sul
5ª	Bahia
6ª	Pernambuco
7ª	Ceará
8ª	Pará and Amapá
9ª	Paraná
10ª	Tocantins and Distrito Federal
11ª	Roraima and Amazonas
12ª	Santa Catarina
13ª	Paraíba
14ª	Acre e Rondônia
15ª	São Paulo (interior)
16ª	Maranhão
17ª	Espírito Santo
18ª	Goiás
19ª	Alagoas
20ª	Sergipe
21ª	Rio Grande do Norte
22ª	Piauí
23ª	Mato Grosso
24ª	Mato Grosso do Sul

Source: Authors' elaboration.

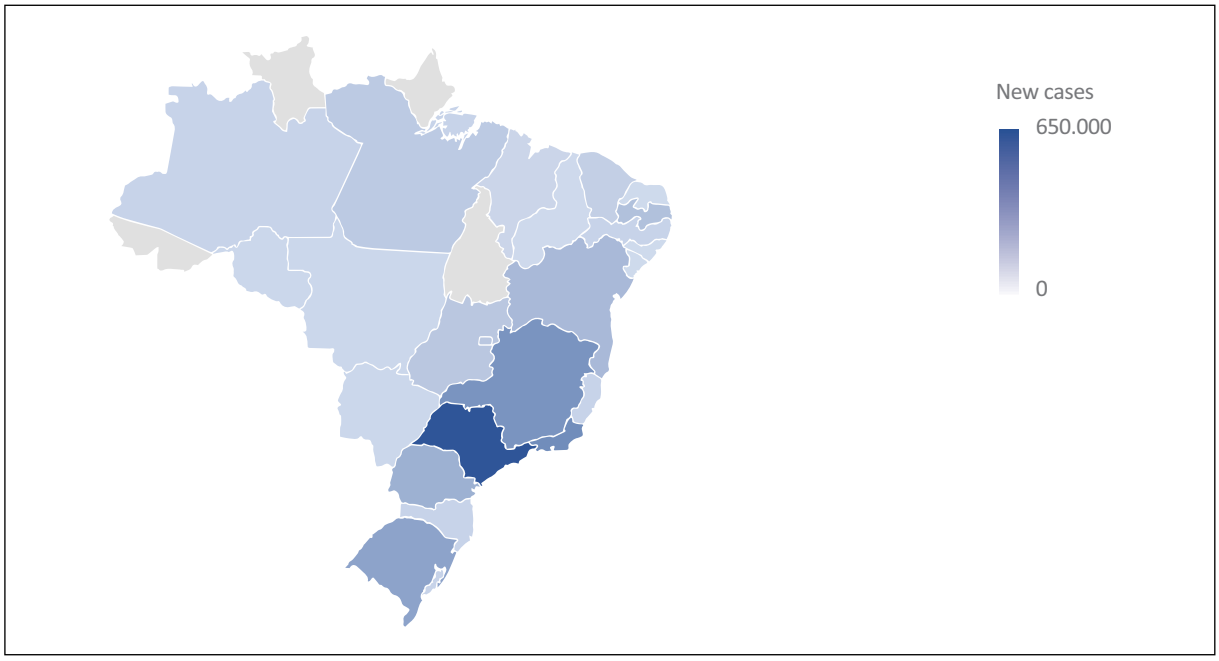
TRTs are composed of appellate judges—known in Brazil as *desembargadores*—appointed from a pool of labour judges, and, in the proportion of 1 to 5, from members of the Public Prosecutor's Office (*Ministério Público)* and lawyers—all Brazilian citizens between 30 and 65 years of age, and in the case of external members, those with at least 10 years of professional activity.

Constitutional Amendment No. 45/2004 allowed for TRTs to institute the so-called Itinerant Justice (*Justiça Itinerante*), created to make it easier for citizens to access the justice system. Through it, Labour Justice exercises jurisdiction in cities that are not covered by labour courts, to carry out hearings and other procedures. With the same purpose as Itinerant Justice, TRTs adopted a decentralised model, functioning through regional chambers.

The superior instance of Labour Justice is concentrated in the TST, headquartered in the Federal District and whose jurisdiction extends over the entire national territory. It is the ultimate Labour Justice body and is regulated by the Federal Constitution (Art. 111-A) and the CLT (Arts. 690-708). Its main function is to standardise decisions uttered by the

labour courts and circuits and its competences include conciliation and arbitration of economic or legal collective disputes, and of individual disputes. The TST is composed of 27 judges, ranked "Ministers" (*Ministros*), spanning career judges and members of the Public Labour Prosecutor's Office (*Ministério Público do Trabalho*—MPT) 1 for every 5)—[50] all Brazilian citizens, aged at least 35 years old, possessing extraordinary knowledge of the law and having a flawless reputation.

FIGURE 6.2 Organisation of Labour Justice and Brazil's political subdivisions



Source: Superior Labour Court and Infoescola.com <http://www.tst.jus.br/web/estatistica/trt/orgaos>.

In parallel, there are the Law Centres for Conflict Resolution and Citizenship (*Centros Judiciários de Solução de Conflitos e Cidadania*—CEJUSC) in the first instance and the Permanent Conciliation Centres (*Núcleos Permanentes de Conciliação*—NUPEC) in the second instance, both instituted through CNJ's legal policy in 2010 (Res. No. 125 of the CNJ).[51]

CEJUSCS started being installed in Labour Justice soon after the CNJ's recommendation. They deal with both pre-trial complaints and lawsuits, and are responsible for mediation and conciliation, in the interest of solving conflicts in a simplified and expedited manner.

50. The selection of the so-called 'constitutional fifth' is carried out as follows: representative bodies of attorneys and of the MPT compose a list of candidates with 6 names and send it to the TST. The TST will then compose a list with 3 names and send it to the President of the Republic, who, within 27 days, shall choose a new member. The chosen member must undergo an interview and approval process by an absolute majority in the Federal Senate.

51. The National Council of Justice (*Conselho Nacional de Justiça*) is a body of the Judicial Power responsible for the administrative and financial control of the courts (Art. 103-B of the Constitution, under the letter of EC No. 45/2004). It instituted a national policy for the adequate treatment of conflicts (CNJ Res No. 125/2010), which incentivises friendly resolution and appoints courts to establish CEJUSCs.

NUPECs carry out actions geared towards the adequate treatment of conflicts of interest and necessary measures to conduct conciliatory hearings regarding the lawsuits handled by the TST.

It is important to note that the Brazilian Judiciary has implemented digitalised systems, through the Electronic Legal Procedure (*Processo Judicial Eletrônico*—PJe). It was developed in 2011 by the CNJ in partnership with the courts. The TST and the Labour Justice Council developed the PJe-JT. Therefore, procedural acts are developed online, with digital signatures. By 2017, 100 per cent of first and second instance bodies were connected to the PJe.

C. Labour Justice players

Labour Justice is composed of magistrates (judges of first and second instance), assistants (conciliators, interns, lay judges, outsourced personnel, and volunteers), and judicial analysts and technicians. Magistrates can act in labour courts (labour judges), TRTs (*desembargadores*), and the TST (Ministers).

Under the terms of the law, labour judges are responsible for conciliating and arbitrating conflicts regarding individual labour contracts and promoting all actions that are relevant to the adequate provision of law in these procedures as well as compliance with their decisions, in addition to being able to validate extrajudicial agreements for matters concerning Labour Justice (Art. 652 of the CLT). *Desembargadores* act in panels (*turmas*) or collegiate courts to conciliate and adjudicate labour dispute appeals and judge claims of its original competence, such as collective disputes.

Labour Justice is assisted by support services that comprise the vast majority of its civil servants. These support services operate in the internal workings of labour registry offices, courts and circuits (judiciary analysts and technicians), external arrangements (judicial officers), or in specific tasks related to the lawsuits (examinations, translation, etc.). Internal secretary tasks range from more formal ones—such as procedures, as well as registration and certification of documents—to ones with direct effects on the trial results—such as screenings, research and the elaboration of minutes for decisions and verdicts.[52]

Labour Justice employees are organised in two categories: judiciary analysts and technicians. Analysts are the higher category, carrying out analysis activities in labour complaints and lawsuits; elaborating minutes of decisions; carrying out studies and issuing opinions; providing

52. Judiciary technicians are responsible for getting labour lawsuits of their region's TRT under way. Some of their attributions include: providing technical and administrative support; carry out tasks in support of the judicial activity; file documents; transportation and custody of lawsuits and documents; providing service to internal and external audiences; classify and assess lawsuits; carry out studies, research and administrative routines; elaborate, type and review various procedures. Source: Regional Labour Court, 2nd Region (2018) <https://bit.ly/3Icy591>.

technical and administrative support to judges; updating databases; among others. In sum, they provide support to judicial activities and to administrative organisation.

The careers of Analysts and Technicians is organised in three classes. The salary brackets, as defined by Law No. 13.317/2016, are composed of a base value (ranging from BRL5,189.71 to BRL7,792.30 for Analysts and from BRL3,163.07 to BRL4,611 for Technicians), to which is added a value of 140 per cent as a Gratification for Judiciary Activity (*Gratificação de Atividade Judiciária*). In addition, they receive a salary bonus if they occupy a commissioned position, as well as a list of benefits (means allowance, healthcare allowance, childcare allowance, and a bonus for educational improvement—1 per cent for professional training courses with a course load of at least 120 hours; 7.5 per cent for specialisations; 10 per cent extra for those with a master's degree; 12.5 per cent extra for those with a Ph.D.).[53]

D. Alternative dispute resolution

In addition to the dispute resolution system comprising the Judicial Power, there are other methods to manage labour complaints that do not involve trial by a judge, which may or may not involve Labour Justice. Some examples include mediation, conciliation and arbitration.

The arbitration of labour disputes started being admitted for some cases with the 2017 legislative reform. The Labour reform allowed to include an arbitration clause in individual labour contracts with remuneration above a certain monthly value,[54] as long as it is driven by initiative or explicit agreement of the employee and if it respects the legal dispositions of the arbitration (Law No. 9.307/1996).

The understanding that labour law is indisputable, which has so far precluded arbitration from labour disputes, was made more flexible and gave way to the hypothetical figure of the 'hyper-sufficient' worker, able to provide regarding their rights. The criterion for identifying such a figure is the value of monthly remuneration. Labour contracts that envisage remunerations lower than this floor cannot be forwarded to arbitration.[55] In collective labour disputes, arbitration was already allowed due to the presumed balanced between collective parties; however, it is restricted to claims that do not involve non-disposable workers' rights.

Conciliation, in turn, can be judicial if carried out within a lawsuit in Labour Justice, as explained, or extra-judicial when it occurs without State intervention. One example of extra-judicial conciliation provided for in labour legislation is the one carried out in the Prior

53. See: <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11416.htm>.

54. Twice the value of the benefits of the General Social Security System—around BRL12,867.14.

55. It is worth noting that the average value of the wages of judicialised labour contracts in Brazil is of BRL2,446, around 19 per cent of the floor for labour arbitration (Cunha 2021).

Conciliation Commissions (*Comissões de Conciliação Prévia*), an optional institution created by companies and unions, with equal representation between employers and employees, whose function is to attempt to reconcile individual labour disputes.

The law states that any labour claim will be submitted to a Prior Conciliation Commission if one was established in the location where services are provided. In other words, the Judiciary can only be accessed after conciliation has been attempted at the Commission. However, in 2018 the STF issued an interpretation in light of the Constitution to the mechanism that states that this conciliation attempt is not mandatory, so that the employee might opt to file a labour complaint directly to the Judiciary, due to the principle of non-obviation of jurisdiction.

Mediation differs from conciliation regarding the participation of a third party in the facilitation of dialogue between parties. This is a neutral an impartial party who aids in communication, without interfering in the proceedings and in resolution proposals, so that the parties might reach an agreement of their own accord.

Another method used in the management of labour conflicts that has constitutional backing is the election of a workers' representative in companies with over 200 employees, with the exclusive function of promoting a direct understanding between the employees and the employer. This is a self-compositional method with a collective character, in addition to being a constitutional right of workers, which facilitates the communication and understanding of workers' needs within the company.

In the context of collective workers' rights, the company can avoid a class action promoted by the MPT against the violation of labour legislation if it establishes a Conduct Adjustment Agreement (*Termo de Ajuste de Conduta*—TAC) with the MPT, committing to ceasing the violation of labour rights and adopting appropriate conducts and practices to efficiently guarantee them. In addition, the unions themselves carry out informal mediations and conciliations between employers and employees, especially regarding severance pay.

E. The role of Public Administration—Undersecretary of Labour Inspection (*Subsecretaria de Inspeção do Trabalho*—SIT) and Labour Inspectors

The Brazilian Constitution attributes to the federal government the exclusive competence to organise, maintain and execute activities related to labour inspection (Art. 21, paragraph XXIV; in the same sense, see ILO's Convention 81). A specific professional category linked to the Executive Power,[56] the Labour Inspectors, perform this function.

56. Currently under the SIT, which is linked to the Labour Secretariat (former Ministry of Labour), which, in turn, is attached to the Ministry of the Economy.

The objective of the labour inspection system is to ensure compliance with the rules established in laws and contracts (general rules, including ratified international conventions; acts and decisions of competent authorities; collective bargaining instruments, etc.) to guarantee the protection of workers.[57]

The working areas of the Undersecretary of Labour Inspection, to which the Labour Inspectors are linked, include: overall labour legislation; eradication of child labour; fight against informality; FGTS; fight against work in conditions that are analogous to slavery; port and ship labour; workplace safety and security; inclusion of people with disabilities; and integration of apprentices.

Labour inspection can lead to an administrative proceeding with the participation of inspected individuals or companies, which might result in a sentence to pay fines. The Labour Inspector, when verifying irregularities during the course of their inspection, must draw up infraction notices, leading to an administrative proceeding at the Undersecretary of Labour Inspection.[58] In the proceeding, which respects the adversarial principle, the notified individual or company has the opportunity of providing their full defence. At the end, if an undue practice has been verified, a fine will be applied. This decision can be appealed through the Judiciary after the end of the administrative proceeding.

6.2.2 Labour dispute resolution system processes

A. Evolution of Labour Justice

In Brazil, according to Leone Pereira (2019, 37): "The history of the labour processual framework is intertwined with the history of the organisation of Labour Justice itself". Labour Justice and procedural labour law started being drafted around 1850, when Regulation No. 737 determined that lawsuits pertaining to labour contracts were to be judged by ordinary justice judges. Subsequently, Law No. 1.637 of 1907 instituted the Permanent Conciliation and Arbitration Councils (*Conselhos Permanentes de Conciliação e Arbitragem*), bodies of equitable composition to be created in unions. They were supposed to resolve disputes between capital and labour but ended up not being implemented.

57. Regulation of Labour Inspection (Decree No. 4.552/2002).

58. Labour inspectors, among other attributions: verify compliance with legal and regulatory determinations (registration in the work permit and social security, as well as collection of FGTS funds, for example); orient, inform and provide technical advice to workers and people subjected to labour inspection; inspect workplaces, the functioning of machinery, and the use of equipment and installations; analyse situations presenting a potential risk of causing occupational diseases and work accidents; notify people subjected to labour inspection to require compliance with obligations or the correction of irregularities; proposing the closure of an establishment, service sector, machinery or equipment, or the suspension of a construction when verifying a situation configuring grave and imminent risk to the health of physical integrity of workers; carrying out investigations and audits and elaborating technical reports; register a term of commitment resulting from a special inspection procedure; register a violation notice for the non-observance of legal instruments; and analysing the administrative procedures of violation notices, debt notifications or others that may be assigned to them.

In 1911, the state of São Paulo created a law for Rural Patronage (*Patronato Agrícola*—State Law No. 1299-A), which aimed at providing legal assistance to rural workers. In 1922, it instituted the Rural Courts (*Tribunais Rurais*), with similar goals. In 1923, Decree No. 16.027 instituted the National Labour Council (*Conselho Nacional do Trabalho*), linked to the Ministry of Agriculture, Industry and Commerce as a consultative body regarding labour matters.

Starting in 1930, with the end of the Old Republic, president Getúlio Vargas created the Ministries of Labour, Industry and Commerce (Decree No. 14.433) and in 1932 the Mixed Conciliation Commissions, which acted on collective disputes, but did not judge them. If an agreement was not reached, there was an arbitration tentative; if refused, the dispute was forwarded to the Ministry of Labour, Industry and Commerce. In that same year, the Conciliation and Judgement Boards were created (Decree No. 22.312) as administrative bodies that reconciled and judged over individual conflicts. Their decisions were carried out by ordinary justice. They were composed of a judge of law and two class judges, representing employers and employees and chosen by their respective unions, and the Mixed Conciliation and Arbitration Commissions, exclusively for unionised employees (Delgado 2019, 1627).

It was only in 1934 that Labour Justice was created but separate from the Judicial Power and linked to the Executive Power. Decree-Law No.1346 (1939) institutionalised Labour Justice and Decree No. 6.596 (1940) organised it. After that point, it became more autonomous, and was separated from the Executive Power and ordinary justice. It also remained apart from the Judiciary. It was only on 1 May 1941 that Vargas installed Labour Justice with eight Regional Councils and six Conciliation and Judgement Boards.

Therefore, Labour Justice was structured in three instances: the first included the Conciliation and Judgement Boards, composed of a president with a Law degree and appointed by the President of the Republic, and two lay judges (*vogais*), which represented employers and employees and judged individual conflicts. In the second instance were the Regional Labour Councils, which judged the appeals of the Conciliation and Judgement Boards and resolving disputes in their regions. Finally, there was the National Labour Council, which was equivalent to today's TST. It was subdivided into Labour Justice Chamber (*Câmara da Justiça do Trabalho*) and of Social Security.

Labour Justice only became part of the Judicial Power with the 1946 Constitution. Afterwards, the bodies became known as Conciliation and Judgement Boards, Regional Labour Courts and Superior Labour Court.

Currently, the Brazilian legislation on labour relative to material and procedural law is consolidated in the CLT, which is the compilation of all laws in effect at the time it was elaborated (1943), in addition to its own changes. Brazil still does not have a Procedural Labour Code. The 1988 Constitution maintained the 1939 Constitution's structure of Labour Justice, until the Constitutional Amendment No. 24/1999, which eliminated class representation (*vogais*) and renamed Conciliation Boards into Labour Boards (*Varas do Trabalho*).

Law No. 7.701/98 regulated the functional competence of the TST and other labour courts over collective disputes. Law No. 8.984/95 expanded the material competence of Labour Justice (Art. 114) and created new rules about the role of TRTs (Art. 115, paragraphs 1 and 2).

In 1999, with the extinction of the Conciliation and Judgement Boards, Labour Justice started to comprise only judges of law, selected through a public examination, who decide monocratically regarding labour disputes.[59]

In procedural terms, Law No. 9957/2000 created the 'accelerated procedure' (*procedimento sumaríssimo*) (Arts. 852-A of the CLT) to expedite labour disputes with a value under 40 minimum wages.

Amendment No. 45/2004 created the National School of Magistrates (*Escola Nacional de Magistratura*—ENAMAT) and the CSJT (Art. 111-A). This amendment further increased the competence of Labour Justice to judge all labour—and not only employment—relations.

Also relevant to the theme are laws No. 5.584/70, No. 6.830/80, No. 7.115/83 (documentary evidence), No. 8.073/90 (establishing the National Wage Policy),
No. 7.627/87 (addresses the termination of expired proceedings in Labour Justice bodies), and No. 9.958/2000, establishing the Prior Conciliation Commissions.

B. Legal labour procedures

The procedures and processing practices of labour disputes in the circuits, TRTs and TST present some peculiarities compared to the other branches of Brazil's justice. The labour processual framework is based on a set of theoretical principles which, formalised or not in regulations, orient both the conduction and resolution of disputes. Some of these principles pertain to all types of legal proceedings, while others are specifically implemented in labour proceedings.

The general principles of legal proceedings in Brazil are concentrated in the Federal Constitution: due legal process (Art. 5), publicity of procedural acts (Art. 5, LX and Art. 93, IX), motivation of decisions (Art. 93, IX of the Constitution and Art. 371 of the Civil Procedural Code), gratuitous justice to those who cannot abide with procedural costs (Art. 5, LXXIV), double degree of jurisdiction (Art. 5, LV), procedural celerity (Art. 93, XII and XV, and Art. 5, LXXVII; and Art. 765 of the CLT), and legal security (Art. 5, XXXVI).

59. The Conciliation Boards were terminated in 1999, under the allegation that the absence of legal training made resolving more complex issues more difficult.

The specific principles of labour proceedings, generally derived from the procedural rules embedded in labour laws, refer, for example, to the secondary application of ordinary procedural legislation,[60] the lack of possibility to appeal regarding intermediary (interlocutory) decisions, the primacy of orality (Arts. 847 and 850 of the CLT), and the concentration of procedural acts (Arts. 849 and 818, paragraph 2 of the CLT), among others. These last two principles, orality and concentration, are responsible for the peculiar procedural characteristic of labour law proceedings: the concentration of argumentations, evidence and debates in a hearing. Additional principles of labour law include: preference for conciliation (Arts. 846 and 850 of the CLT) before resolution via the judiciary; the general non-negotiability of labour rights (Arts. 9 and 444 of the CLT); the physical identity of the judge (insofar as the same judge who collects the evidence must judge the case).[61]

Despite the valuation of conciliation and the tendency of making rules more flexible, there is a jurisprudential orientation that understands that labour procedural rules must follow the public interest and may not be altered through collective bargaining or by decision of the parties—which precludes the use of procedural conventions in labour legal proceedings, which have been allowed in ordinary civil proceedings since 2015.

Labour legal proceedings are governed by the CLT and, alternatively, by ordinary procedural law (such as, for example, the Civil Processual Code, Law No. 13.105/2015, which applies to civil legal proceedings in general). The Labour Reform altered the procedural rules, with a view to establish a more equitable treatment between workers and employers in the proceedings and reduce the number of disputes in courts, especially so-called 'adventurous litigation' (*litigância aventureira*). Therefore, procedural rules were made more flexible, procedural burden regimes were altered and the spaces for collective bargaining were expanded.

Some highlights of procedural alterations brought about by the Labour Reform include: the possibility of arbitration for certain employees (Art. 507-A of the CLT); the homologation of agreements established outside the Judiciary (Arts. 855-B and 855-E of the CLT); the way gratuitous justice is granted (Art. 790, paragraphs 3 and 4 of the CLT);[62] arbitration of forensic fees (Art. 790-B of the CLT),[63] possibility of legal fees for the losing party even if they are the beneficiary of gratuitous justice (Art. 791-A of the CLT); limitation of procedural costs to up to four times the benefit ceiling of the General Social Security System (Art. 789 of the CLT); plea

60. The TST issued Normative Instruction No. 39 to guarantee legal security and prevent breaches of procedure.

61. This principle started being applied in Labour Justice only in 2012, with the cancellation of TST Binding Precedent 136. Before the Amendment No. 24/1999, Labour Justice was composed of Conciliation and Judgement Boards, in which the structure of first degree of jurisdiction was collegiate; therefore, this principle was not in the purview of Labour Justice.

62. TST's Normative Instruction No. 39 understands that procedural business does not apply to labour proceedings.

63. The losing party, before the Labour Reform, paid all forensic fees, except if it was a beneficiary of gratuitous justice. Currently, even a party that is beneficiary of gratuitous justice must pay the fees if they lose. If the beneficiary party does not have enough legally recognised credit to pay for the expense, then the federal government will pay it (Art. 790-B, paragraph 4 of the CLT and Precedent 457 of the TST).

with a definite and net request (Art. 840, paragraphs 1 to 3), non-induction of false confession[64] faced with the absence of the defendant; possibility of the attorney producing evidence or documents in the absence of the claimant (Art. 844, paragraph 5 of the CLT); regulation of lawsuits in bad faith (Arts. 793-A and 793-D of the CLT); and execution of the sentence, with prior liquidation of the values determined (Arts. 876, 879, paragraphs 2 and 7; Articles 882 and 884, paragraph 6 of the CLT).

There are many types of legal instruments that lead to the instalment of labour proceedings, although less varied than those in a regular civil proceeding. In general terms, three basic types of lawsuits are admitted with ordinary procedures, lawsuits with special procedures and constitutional lawsuits; it is also possible to use actions of civil lawsuits in labour lawsuits. Some of these instruments serve to declare rights, others to carry out obligations, yet others for both; similarly, some are geared at individual lawsuits, others at collective lawsuits; and yet others at both.

TABLE 6.29 Classes and types of labour lawsuits and criteria for classification

	Lawsuit	Classification	Nature of the dispute
Lawsuits with ordinary proceedings	Act of acknowledgement	Acknowledgement	Individual
	Precautionary action	Acknowledgement/ Execution	Individual/Collective
	Writ of execution	Execution	Individual
Lawsuits with special proceedings	Inquest to investigate grave misconduct	Acknowledgement	Individual
	Collective bargaining	Acknowledgement	Collective
	Action to comply with a normative judgement	Execution	Collective
Constitutional lawsuits	Writ of mandamus	Acknowledgement	Individual/Collective
	Habeas corpus	Acknowledgement	Individual/Collective
	Habeas data	Acknowledgement	Individual/Collective
Civil lawsuits	Payment consignment	Acknowledgement	Individual
	Rescissory actions	Acknowledgement	Individual
	Dunning procedure	Acknowledgement	Individual
	Public civil lawsuit	Acknowledgement	Collective
	Collective civil lawsuit	Acknowledgement	Collective
	Action for annulment of collective instruments	Acknowledgement	Collective
	Possessory actions	Acknowledgement	Individual/Collective
	Accountability actions	Acknowledgement	Individual

Source: Authors' elaboration based on the Federal Constitution and Brazilian labour.

64. Assumption of the veracity of the facts alleged by the claimant.

Through ordinary acts of acknowledgement, the worker usually requests the acknowledgement of employment relationships to claim unpaid dues (such as compensation, advance notice, wage balance, overtime, etc.). Through precautionary measures, they seek a temporary measure to protect themselves or their rights (for example, avoiding an abusive relocation or promoting the reintegration of a union leader). Through writs of execution, they seek to uphold a decision, a conviction or an obligation, recognised in a court ruling or an extrajudicial agreement.

Special labour lawsuits can be used, for instance, to request the enactment of an inquest (investigative procedure) to ascertain grave misconduct—such as dismissal of a stable employee such as a union leader or a civil servant (*celetista*). They also serve to request the start of collective bargaining—which may be of an economic nature, to create norms or working conditions; a legal nature, to declare and interpret clauses of the normative instruments of a given category; or of a mixed nature, such as striking. They are also used to demand the enforcement of a 'normative judgement', which are court rulings based on collective agreements and labour conventions.

Constitutional lawsuits can be used in all kinds of disputes, as long as the situation merits constitutional protection. Labour disputes often use the writ of mandamus (such as against acts carried out by Labour Inspectors, Registry Office Officials that do not promote the registration of the union entity or members of the MPT in public civil inquiries). It is also appropriate to use the constitutional remedies of *habeas corpus* (in case of violation or threat to the individual's freedom of movement) and *habeas data* (to access/correct data in the registries or databases of government or public authorities).

The civil lawsuits commonly used in labour proceedings include: payment consignment actions (to discharge the debtor of their obligation, after the judicial deposit of the amount owed); rescissory actions (to declare the annulment of a decision after appeals, due to irremediable defects); dunning procedures (the declare the execution of an obligation not based on written evidence); possessory actions (for violations of possession);[65] and accountability actions (for legal reporting and the payment of outstanding balances). Among civil collection lawsuits, those appropriate to labour proceedings include the use of public civil lawsuits (in defence of collective rights) and actions for the annulment of collective instruments (to invalidate instruments or collective bargaining clauses, such as agreements or collective labour conventions).

Labour lawsuits basically follow three types of procedural tracks, defined and regulated in law: regular (*rito ordinário*), expedited (*rito sumário*) and accelerated (*rito sumaríssimo*), classified according to the quantity and dispersion of outlined acts.[66] In addition, there are

65. Including: reintegration and possession actions, for cases of loss of possession; actions for the maintenance of possession, for cases of trespassing; and prohibitory actions, in cases of threat to possession.

66. Regular and accelerated rites also differ regarding deadlines, the possibility of summons by edict, number of witnesses, admitted evidence, formal aspects of the sentence and possibility of appeal.

special proceedings according to each of the special lawsuits provided for in legislation, according to Table 6.30.

TABLE 6.30 Regular labour law procedures

Rite	Value of the claim	Appropriateness	Proceeding
Sumário (Law No. 5.584/1970)	Up to 2 minimum wages	-	Single instance (appeal only regarding constitutional matters).
Sumaríssimo (Arts. 852-A to E of the CLT)	Two to 40 minimum wages	Not appropriate to the legal inquest to ascertain grave misconduct (rito próprio) and disputes with public administration	Single hearing (conciliation, evidence and trial)
Ordinário (Arts 837-852 of the CLT)	Over 40 minimum wages	Disputes with public administration whose values are above 2 minimum wages	Hearing divided into three parts (opening conciliation hearing, evidentiary hearing and trial hearing)

Source: Authors' elaboration.

There seems to be a majority preference for the *rito ordinário*. Considering lawsuits sentenced in 2018 (Cunha 2021, 41), it is used in 61.3 per cent of cases, while the *rito sumaríssimo* is used in 29.3 per cent of cases.

According to official data (CNJ 2015-2019), the amount of labour lawsuits decreased between 2015 and 2019, despite the increase of total new cases in the Brazilian Judiciary.

TABLE 6.31 New Labour Justice cases compared to total new cases in the Brazilian justice system[67]

	2015	2016	2017	2018	2019
New Labour Justice cases	4,058,477 (14.9%)	4,262,444 (14.5%)	4,321,842 (14.8%)	3,460,875 (12.3%)	3,530,197 (11.7%)
New cases in the Judiciary	27,280,287	29,352,145	29,113,579	28,052,965	30,214,346

Source: Authors' elaboration based on data from Justice in Numbers (Justiça em Números) (2015–2019).

C. Individual dispute (ordinary procedure)[68]

The first step to initiate a labour lawsuit in Brazil is the initial petition. The law establishes formal prerequisites without which it is not admitted (Arts. 787 and 840, paragraph 1 of the

67. Figures are different when compared to reports elaborated by Labour Justice itself: according to those, for 2016, the number of new lawsuits was 3,700,642; 2017: 3,675,042; 2018: 2,900,573; and 2019: 3,056,463.

68. Labour lawsuits follow a specific procedure according to the type of rite utilised. To illustrate the procedure in broad terms, the *rito ordinário* is detailed in this subsection.

CLT). Usually, the party has legal representation, but exceptionally self-representation is admitted, i.e. without an attorney (*jus postulandi*).[69]

In individual labour lawsuits, the claim can also be verbal; the employee must present it to the court in person (Art. 786 of the CLT). The Constitution determines a prescription term for credits originating from labour relations (Art. 7, XXIX): 5 years for urban workers and rural workers, presented up to 2 years after the termination of the contract.

Once the complaint is forwarded and distributed to one of the labour courts, the defendant will receive a summons to present their defence—usually in an initial hearing.[70] If the defendant does not attend the initial hearing or does not contest the complaint (judgement *in absentia*), the facts alleged by the claimant are considered to be true, which may lead to the termination of the lawsuit and the acceptance of the requests—[71] which will not happen in exceptions provided for in the law (and expanded by the 2017 Labour Reform) and in collective conflicts. If the claimant does not attend the initial hearing, he will be ordered to pay procedural fees (even if they benefit from gratuitous legal assistance) and the complaint will be dismissed (Art. 844 of the CLT).

The defendant can present his defence orally (for 20 minutes) or in writing during the initial hearing[72] and can question the formal validity of the lawsuit, or the content of the allegations and requests (contestation).[73] A recent survey identified contestations in 78.4 per cent of decided lawsuits in 2018 (Cunha 2021, 49).

The legislation provides for a peculiar occurrence in the initial hearing. If the judge is already convinced that the severance funds requested by the claimant are incontrovertible, the defendant will be required to pay them immediately; if they do not do so, they will have to pay a 50 per cent fine on top of the original value at the end of the lawsuit (Art. 467 of the CLT).

69. Although the Federal Constitution understands that the presence of an attorney is essential for the administration of justice (Art. 133), this does not preclude the possibility of the worker to engage in Labour Justice by themselves (Art. 791 of the CLT). The STF has decided on the matter (ADIn 1,127), foregoing the attorney in some jurisdictional acts. On the other hand, Agreement 425 of the TST understands that precautionary actions, rescissory actions, writ of mandamus and appeals to the TST's competence must have the participation of an attorney.

70. According to Ipea (2019), a 'hearing' is the main procedural act in labour lawsuits (87 per cent of the cases) (p. 47). Single hearings occurred in 51.3 per cent of analysed cases, with a verdict or determination of new audience in 47.1 per cent of the cases. Only 1.5 per cent of cases were forwarded to a CEJUSC (p. 49).

71. The Labour Reform provided examples where judgement *in absentia* will not lead to a penalty of false confession (Art. 844, paragraph 4 of the CLT): if, among many defendants, one disputes the lawsuit; if the dispute is about un-negotiable rights; if the initial petition does not feature an instrument that the law understands to be indispensable to proving the act; and if the allegations are in fact false or if they contradict the evidence filed at court.

72. The Labour Reform allows for the written defence to be delivered through the electronic judicial system up until the start of the hearing (Art. 847 of the CLT). This norm does away with the formal receipt of the defence by the judge.

73. Another strategy is the counterclaim, which is similar to a counterattack. In simple terms, it is as if the defendant took on the role of claimant in a second lawsuit, which will be proposed against the claimant of the first lawsuit or against a third party that is related to the dispute (Art. 343 of the Civil Code).

The hearing also serves as an obligatory attempt to reconcile the parties (Arts. 764, 846 and 850 of the CLT). If an agreement is reached, it will be validated by the judge, except in cases where they are considered harmful to the worker. The decision to validate confers the agreement the efficacy of a legal sentence without the possibility of appeal.[74] Otherwise, the case will continue according to the most adequate procedure.

Conciliation[75] can also occur at any point in the lawsuit, including after sentence is passed, during execution. A recent national survey identified that agreements established in labour lawsuits cover less than 50 per cent of the claims presented in the initial petition, which might be indicative of the proportion of waiver of rights (Cunha 2021). According to CNJ's *Justiça em Números* reports (2016-2020), the conciliation rates in Labour Justice were of 25 per cent in 2015 and 2017, increasing 1 per cent in 2016 (26 per cent). In 2018, they remained around 24 per cent and at 23.7 per cent in 2019.

After the hearing, the lawsuit will be judged and a sentence will be issued—which, as stated previously, can be challenged by ordinary appeal. The sentence will become immutable if no appeals are filed or after all appeals have been judged.

As a rule, decisions cannot transpose the limits of the lawsuit—in other words, there are no *ultra* or *extra petita*[76] decisions in Brazilian procedural law.[77] However, it is possible to discuss the admission of these types of decisions in certain cases. Jurisprudence suggests that decisions will not be voided when the defendant is ordered to pay a higher sum than the original request, because it allows for a reduction of the limits of what was claimed.[78]

Additionally, it might be allowed for sentences to stand in *extra* or *ultra petita* judgements to protect the weakest part of the labour relationship. Art. 496 of the CLT, for example, provides an example of an *extra petita* judgement to determine the payment of twice the value of the compensation instead of sentencing the company to reintegrate the employee. There is also an understanding that if there is a non-waivable right by the employee, it is possible for the judge to decide *extra*/*ultra petita* to fulfil the employee's right to social protection. An example of non-waivable right is the one detailed by Statement (*Enunciado*) No. 276 of the TST: "The right to prior notice is non-waivable by the employee".

74. Friendly conciliation must be validated, except if they are harmful to the employee (*Súmula* 418 of the TST and Art. 855-E of the CLT). The annulment of the agreement is only possible through a rescissory action, subject to strict formal requirements.

75. The award *Conciliar é Legal* was created to incentivise conciliation. Promoted by the Managing Committee of the CNJ, covering Ordinary Law and Specialised Law, with a focus on the TRT, the award aims to acknowledge good practices of the Judiciary geared towards conflict resolution.

76. *Extra petita* decisions answers to claims outside of the initial claim. *Ultra petita* decisions award the claimant more than was asked for.

77. According to Art. 141 of the Civil Code: "The judge shall decide on the merit within the limits proposed by the parties, and it is forbidden to him to acknowledge matters that have not been cited, regarding which the law demands initiative from the party". And Art. 492 states: "It is forbidden to the judge to utter a decision of a different nature than that of the claim, as well as to convict the party to a higher amount or to a different object than what was claimed".

78. TRF, 3rd panel, 10 December 1982. Appeal 78.515-SE, rap. Min. Carlos Madeira, DJ of 3 March 1983. 5th Chamber, Appeal No. 22.616, rap. Des. Barbosa Moreira.

Of the decided lawsuits in 2018, labour lawsuits ended in agreement (38.9 per cent) and partial granting of the claims (36 per cent) (Cunha 2021). Claims were fully granted only in 4.3 per cent of cases and 10.4 per cent of cases were completely rejected (ibid., 52).

(Ordinary) appeal against the decisions is directed at the respective TRT, within 8 days of the decision and can be entered electronically or through a registry office. Filing an appeal requires the payment of procedural costs and the consignment of the value of the condemnation (appeal bond). Before being examined, every appeal is examined for formal consistency—which not infrequently results in non-admission. In general, the admissibility examination is not carried out by the body that judges the appeal, but by a body of the same level as the judge that issued the challenged decision.

If the arguments of the appeal are accepted (appeal provision), the challenged decision can be voided or replaced by another—depending on the type of irregularity found in the original decision and on the type of request detailed in the appeal. The appellant party can give up on the appeal, either partially or completely, at any time and regardless of consent by the other party or authorisation from the judge.

If the party that was sentenced to pay compensation or carry out some other task does not comply with the decision, it is possible for the labour claimant to return to the judge within two years to demand the execution of the decision, forcing the defaulting party to fulfil their obligation (enforcement of the decision). The same might happen if, even if no lawsuit exists, one of the parties in a labour relationship does not uphold the terms of an agreement or another type of understanding between the parties. The writ of execution, which is the name given to the procedure used to demand the fulfilment of private pacts, can be used, requesting the judge to force the other party to fulfil their obligations, even without an acknowledgement process. Private agreements can be executed directly, as long as it is of one of the types provided for in law.

The fulfilment of decisions and the writ of execution are based on the financial liability of the debtor. It is worth pointing out that the judge orders the debtor to pay the condemnation defined in the decision or the obligation agreed to in the private agreement, under penalty of expropriation. If the debtor does not fulfil the payment order in 48 hours, their assets will be seized[79] and delivered to the creditor or sold in their benefit.

Financial liability represents a procedural law bond whereby the assets of the debtor or of a responsible third party are subject to forfeiture and destined to satisfy the creditor. As a rule,

79. This is a coercive manner for the State to seize the assets of the executed party which are necessary to pay the claimant (Art. 846 of the CPC). Any additional assets may not be sold. There is an order of preference to asset forfeiture. Priority is given to money, followed by public debt securities, real estate securities, land vehicles, real estate, movable assets, livestock, ships and aeroplanes, equities, share of the debtor company's revenue, jewellery and precious metals, right to acquire property resulting from a sales and purchase agreement and from fiduciary alienation in guarantee of other rights.

the executed party is the debtor, who is directly responsible for the satisfaction of the creditor, and the responsibility for this debt is transmitted to their estate, heirs or successors, within the limits of inheritance.

However, financial liability can be extended to third parties. The most common cases in labour law are those that involve the execution of companies of the same economic group as the debtor; labour succession; outsourcing; the application of the theory of legal de-personalisation and the responsibility of the withdrawing partner for obligations incurred during the period they were a partner and in the two years following their withdrawal.

The secondary financial liability of companies in the same economic group occurs whenever one or more companies (even though they each have a unique legal personality) are under the direction, control or administration of another, or even when, even maintaining their own autonomy, they compose an economic group. The companies in the economic group are jointly liable for the obligations resulting from the employment relationship, and thus may be executed in the labour lawsuit even if the service was not directly provided in one of the participants.

In outsourcing, the service-taking company can be called to answer subsidiarily whenever labour obligations are not met by the employer, as long as it has participated in the procedural relationship and is present in the enforceable title, under the terms of Precedent No. 331, IV of the TST.

In the context of labour succession, there is a change in the property or the legal structure of the company that does not affect the rights of employees, and thus it is up to the successor to answer for the labour debts of the original debtor in the execution, even if the successor has not participated in the acknowledgement process.

Financial liability can also be extended to partners of the debtor company, even if they did not figure as parties in the main lawsuit, whenever there is, to the detriment of the worker, abuse of rights, abuse of power, infringement of the law, unlawful fact or act, or violation of the statutes or the social contract. It will be disregarded in the event of bankruptcy, insolvency, closure or inactivity of the legal entity caused by mismanagement. In labour jurisprudence, there is also the possibility to disregard the personality of the partner when the employer is insolvent, due to the principle of otherness, according to which the employer takes on the risk of the activity. The withdrawing partner can also answer for the employer/debtor's debts, subsidiarily, in cases of the company's labour obligations referring to the period they figured as partner and for those contracted up to two years after their withdrawal.

In practice, however, the efficacy of writs of execution and fulfilment of sentences is very low, especially because of failure to locate the debtor's assets. To revert the low effectiveness of

executions, the Brazilian Judiciary has established partnerships with other state institutions to track and seize debtors' assets. The most frequently used one was the one established with the Brazilian Central Bank (Sisbajud), through which any judge can request the seizure of the debtor's or liable third parties' financial assets that are in financial institutions.[80]

The writ of execution can be challenged by the debtor (objection to execution) and by third parties that have not participated in the procedure and whose assets are restricted as a result of the execution (objection by third parties). They serve to question the value of the condemnation, the responsibility for the obligation or to point to any procedural irregularities. These objections (*embargos*) can suspend the execution until they are judged.

D. Collective disputes (procedure)

Collective disputes, which are instruments used to seek intermediation by the Judiciary in collective labour bargaining, follow a procedure structured around a conciliation attempt between the collective parties. They are processed by a TRT or the TST and can lead to a homologated agreement[81] or a decision that will define the terms of the relationship between the parties (normative judgement).

The procedure starts with the initial petition, under the forms established by law (Art. 858 of the CLT), and the designation of a conciliation hearing, which, if it results in an agreement, will be homologated by the court. If there is no legal agreement, the case will be randomly assigned to one of the magistrates of the court, who will act as its reporting judge before the collegiate.

Unions act as procedural proxies for the category, as claimants. The MPT can only enter this lawsuit if there is a strike in some service considered as essential (Art. 114, paragraph 3 of the Constitution; Art. 856 of the CLT; Art. 8, Law No. 7783/89). Prior to the trial, the MPT will issue a written statement or deliver an oral statement at the hearing. Only then will the court's president judge the cause (Art. 862 of the CLT).[82]

80. The TST and the Central Bank have established an agreement that created the Bacen-Jud system, to carry out asset seizures online. The execution judges forward to Bacen and financial institutions the requests for the banking accounts and financial applications of the executed parties, and determinations to freeze or unfreeze accounts. The judges themselves, who are registered in the system, can securely access the company accounts and their deposited values through the Internet.

81. Successful extrajudicial agreements do not need to be homologated by justice, but merely deposited at the Ministry of Labour (Jurisprudential Orientation No. 34 of the SDC-TST)

82. To file a claim of this type it must be possible to create a collective norm for the category through collective bargaining. Civil servants, for example, are not entitled to collective bargaining, as the economic advantages of this category depend on the law (Art. 39, paragraph 3 and Art. 7, XXXVI of the Constitution). In addition, the union must authorise the filing through general assembly, as it represents the entire category of workers.

The competence for judging collective disputes lies with the TRTs when regarding local or regional disputes, and the TST for supra-regional or nationwide disputes (Law No. 7701/88, Arts. 2, I and 6).[83]

The sentence resulting from the trial is a normative judgement,[84] and it is not passive to discussions of *ultra petita* or *extra petita* decisions, as there is no claim, but rather a conciliation proposal. Usually, normative judgements discuss economic clauses relative to wage adjustments, increased productivity and establishment of a category's wage floor. Social causes are also discussed, such as employment guarantees and labour advantages that do not directly encumber companies, such as paid absences and establishment of less strenuous working conditions. Union clauses that regulate the relationship between the union and companies are also discussed.

In the trial, Labour Justice can act until there is fair retribution against capital (Art. 766 of the CLT), as it is not possible to allow for clauses that compromise the economic viability of companies. In addition, it is not possible to establish less advantageous conditions than the ones already afforded to workers.

E. Lawsuits for specific categories of workers

Despite the variety of labour relations, the vast majority of labour disputes are resolved in Labour Justice through the proceedings discussed previously. However, disputes that involve statutory civil servants or autonomous workers, such as commercial representatives, are resolved in ordinary justice.

Thus, beyond criminal disputes related to labour, Federal Justice processes and judges labour disputes involving federal civil servants. In turn, State Justices, whose competence is residual relative to Federal Justice, process and judge labour disputes involving municipal and state civil servants, as well as autonomous labour contracts, such as commercial representation.[85] individuals or legal entities which, with no employment relationship, mediate (commercial) business deals on a non-sporadic basis for one or more people (Law No. 4.886/1965).

83. After Constitutional Amendment No. 45/04, Labour Justice can only judge collective disputes if both parties request the intervention of the Judicial Power after failed negotiations. Therefore, Labour Justice, after having been chosen by both parties, acts as an arbiter in the matter. However, the TST understood that if the lawsuit was proposed by only one of the parties and if there was no resistance from the other party, the judiciary could deal with the case. This theme was decided on in 2020 by the STF, as it was considered a matter of general repercussion. Therefore, an understanding was established that it is necessary to require a common agreement between the parties to file a collective dispute lawsuit.

84. Unlike a common sentence, a normative judgement grants advantages according to convenience and opportunity and is not constrained by legality. Therefore, as a heteronomous source of labour law, it establishes norms and conditions for work, applies to all and not only between the parties (general and abstract nature) and serves to supplement the law.

85. Despite disagreements regarding the nature of the relationship of commercial representatives with the represented companies, in 2020, in Extraordinary Appeal (*recurso extraordinário*) 606003, with general repercussion (Theme 550), the STF decided to understand the relationship as commercial and, therefore, designated for the competence of ordinary (state) justice.

F. Appeals

Legal labour procedures provide for instruments to challenge legal decisions—termed 'appeals'. There are three types of appeals: grievance (*agravo*); ordinary appeal (*recurso ordinário*); and review appeal (*recurso de revista*). In addition, there is the extraordinary appeal (*recurso extraordinário*), which is used to plead a violation of a constitutional norm.

The ordinary appeal is the standard appeal mechanism in labour proceedings,[86] used to challenge first-instance decisions, usually those from labour courts, and eventually from regional courts when they act as courts of first instance.[87]

Grievance (*agravo*) is used against certain intermediate decisions (issued in the execution procedure/stage; appeal denial; and issued by a magistrate under the terms of the law), without terminating them.[88]

The review appeal is used to challenge decisions of regional courts in ordinary appeals, to harmonise them according to national jurisprudence.

The extraordinary appeal, submitted to the Supreme Court, is used to challenge single-instance decisions (competence disputes, which undergo the ordinary rite in labour courts and are not appealable, except if dealing with a constitutional matter) and decisions issued by the TST, when they contradict and/or directly offend the Constitution, as well as declaration of unconstitutionality of a federal treatise or law.

Also functioning as appeals, although directed at the same body that issued the decision, are the so-called motions for clarification (*embargos declaratórios*), employed to clarify or lead to small formal corrections in the decision. There are also motions for reconsideration (*embargos de divergência*), used to standardise divergent decisions between TST panels or harmonise them according to national jurisprudence (of the TST or the STF).

Although the overall data point to a large number of lawsuits being processed by courts (CNJ, multiple years), litigants make use of appeal instruments in less than half the cases.

86. The ordinary appeal is used in 88.2 per cent of all lawsuits, according to data referring to lawsuits decided in 2018 (Cunha 2021, 68).

87. The ordinary appeal depends on the request of both parties, except for: decisions issued against public administration bodies, which are reviewed immediately, even in the absence of a specific challenge.

Additionally, it is only received in the devolutive effect (which implies returning it to the jurisdiction that will judge it) (Schiavi 2018, 954). However, it is possible to grant a suspensive effect (which suspends the efficacy of the challenged decision until the appeal is judged) to the ordinary appeal, based on preventive injunctions and/or upon request to the court/rapporteur when it is demonstrated that the immediate efficacy of the challenged decision might lead to "serious or hard-to-repair damage" (Schiavi 2018, 959-988.

88. There are four types of grievances: of petition (Art. 897-A of the CLT), applicable in decisions issued in the lawsuit and/or execution phase; of instrument (Art. 897-B of the CLT), applicable in decisions issued by the magistrate and under the terms of the courts for the plenary; and internal (Arts. 894, paragraph 4, and 896, paragraph 12 of the CLT; Art. 39 of Law No. 8.038/90), applicable to monocratic decisions (which do not allow review appeals) issued in the appeals by reporting judges.

Only 38.7 per cent of labour litigants make use of instruments to challenge legal decisions, according to a survey of lawsuits decided in 2018 (Cunha 2021).

There was a small increase in external challenges (ordinary, review and extraordinary appeals) in Brazilian labour courts between 2015 and 2019, but a considerable increase in internal challenges (grievances and motions for clarification) during the same period.

TABLE 6.32 Internal and external appeals in Brazilian Labour Justice, 2015–2019

	2015	2016	2017	2018	2019
Internal	13.5%	13%	14%	17%	20%
External	52.8%	46%	42%	50%	51%

Source: Authors' elaboration based on data from Justice in Numbers (Justiça em Números) (2015-2019).

If we break these figures down, we see that in Labour Justice appeals are most often used against decisions of first instance judges. Data referring to the use of appeals against second instance decisions suggest that regional courts function as a "rite of passage from litigation to the superior instance" (CNJ 2016, 181).

G. Evidence and the role of technical experts

In the Brazilian procedural model, evidence is not only presented in courts, but also produced within the lawsuit. Usually the documents are presented in advance, and testimonial evidence and expert assessments[89] are produced within the lawsuit, after authorisation by the judge and formal acts that integrate the procedure.[90]

In labour lawsuits, evidence is only produced after requested and admitted by the judge.[91] If the judge forms an opinion based on the result of a given piece of evidence, they may waive the introduction of additional ones (Art. 380 of the Civil Code), as long as they substantiate the reason for the waiver.

The jurisdictional body may request new evidence, considering that the labour judge has ample instructory powers and a duty to observe the principle of free motivated conviction and

89. Considered an officer of the court, the technical expert's function is to provide expert evidence—that is, carry out an examination, inspection or evaluation that depends on technical and scientific knowledge, and, subsequently, produce an expert report containing the necessary information for the "clarification of facts and the formation of the judge's opinion" (which is not restricted to the report) (Arts. 156 and 464 of the Civil Code, Art. 769 of the CLT).

90. According to Ipea (2019), in the analysed labour lawsuits, it was observed that when evidence is specified in the initial petition, expert assessment is required in 16.5 per cent of the cases, personal testimony is required in 14.6 per cent of the cases and testimonial evidence is required in only 13.8 per cent of the cases. In almost all cases, documentary evidence is added to the initial petition.

91. They can be produced before admission if it is impossible to introduce them after admission and this fact compromises the lawsuit.

the adversarial principle (Schiavi 2020). In addition, Art. 765 of the CLT grants ample freedom in the steering of the procedure to labour courts, allowing for the instalment of any inquiries necessary for the clarification of claims, including, therefore, the production of evidence.

Each party is responsible for proving the facts alleged by them and which sustain their rights (burden of proof; Art. 373 of the Civil Code; Art. 818 of the CLT). The claimant is responsible regarding the constitutive facts of their rights; the defendant is responsible for producing evidence regarding facts that impede, modify or extinguish the claimant's rights.

The most common types of evidence in labour lawsuits are personal testimonies by the parties, public or private documents of any nature, testimonial evidence, technical assessments and inspections carried out by the judge.

Technical assessments by the exoerts are usually the most complex and time-consuming pieces of evidence and is present in 14 per cent of lawsuits (Cunha 2021). Among the types of assessments, work safety assessments (64.9 per cent) and medical assessments (31.1 per cent) comprise almost the entirety of the cases (p. 52).

H. Workers' health and safety

Regarding workers' health and safety, Labour Inspectors assess the conditions of workplaces and working conditions, carry out the National Campaign for the Prevention of Workplace Accidents (*Campanha Nacional de Prevenção de Acidentes do Trabalho*—CANPAT), and coordinate the elaboration/improvement of Regulatory Norms (*Normas Regulamentadoras—NRs)*. Therefore, Labour Inspectors may register a Notice of Violation (*Auto de Infração*—AI) when they determine, during their inspections, irregularities in the fulfilment of workers' health and safety regulations. This Notice determines an administrative proceeding, respecting the adversarial principle and the right to full defence of the defendant. At the end of this proceeding, the Notice of Violation may be confirmed, with the possibility of appeal, and lead to the application of a fine.

I. The role of the MPT

Between the Executive and Judicial Powers, the Brazilian Constitution provides for, among the institutions that are essential to the jurisdictional function of the State, the Public Prosecutor's Office (*Ministério Público*—MP), an autonomous institution relative to the remaining powers, charged with the "defence of the legal order, of the democratic regime and of inalienable social and individual interests" (Art. 127 of the Constitution).

The MP has a remarkable, though not exclusive, role in the justice system. It is structured across the municipal, state and federal levels and is internally organised in various autonomous structures, corresponding to the organisation of Justice: the Public Prosecutor's Office of the Union, comprising the Federal Public Prosecutor's Office, the Labour Public Prosecutor's Office and the Military Public Prosecutor's Office, and the various State Public Prosecutor's Offices (Art. 128 of the Constitution).

The institutional attributions of the MP, provided for in the Constitution, include especially a role in labour protection, which is carried out by a specific body, the MPT, linked to the Public Prosecutor's Office of the Union (Art. 128, paragraph I-B of the Constitution; Supplementary Law No. 75/1994).

The MPT acts in the court procedures, together with the bodies of Labour Justice (proposing collective lawsuits in defence of collective labour interests and intervening in labour lawsuits that involve public interests)[92] and extrajudicially (in the intermediation of collective agreements between employers and employees; inspection—together with Labour Inspectors—regarding working conditions and issuing recommendations).

The MPT also performs investigative functions (for example, instituting a civil inquiry and other administrative proceedings; requesting to the competent federal administrative authority and labour protection bodies the instalment of administrative proceedings, being able to follow through and produce evidence) and conciliatory functions (carrying out mediation upon request by the National Mediation Centres and establishing TACs.)

The MPT acts in the following thematic areas: public administration; child and adolescents; labour fraud; freedom of association; work environment; promotion of equality; labour in conditions analogous to slavery; port and ship labour.

The MPT is organised at the federal level, but it has regional representation in almost every state and main municipality. The General Labour Prosecutor's Office (*Procuradoria Geral do Trabalho*—PGT) is headquartered in Brasília, and the Regional Labour Prosecutor's Offices (*Procuradorias Regionais do Trabalho*—PRTs) are headquartered in the 24 regions of Labour Justice, in addition to Municipal Labour Prosecutor's Offices (*Procuradorias do Trabalho nos Municípios*—PTMs).

92. The MPT is responsible for: manifesting itself in any stage of the labour lawsuit, by request of the judge or of its own volition, when it understands that there is a public interest that justifies intervention; promoting civil public labour lawsuits; proposing appropriate lawsuits to declare the annulment of a contract clause and/or of an instrument of collective bargaining; promoting or participating in the instruction and conciliation of conflicts resulting from the stoppage of services; and acting as an arbiter, if requested by the parties, in disputes pertaining to labour law.

TABLE 6.33 Instruments and subjects involved in the MPT's actions, 2013–2017

Year	Civil inquiries and preparatory proceedings	TACs	Collective lawsuits	Main subjects
2013	50,887	12,172	2,936	Work environment
2014	51,549	11,746	10,356	General labour rights themes
2015	47,712	9,947	4,192	Work environment
2016	40,740	8,817	4,061	General labour rights themes
2017	41,449	8,833	4,726	Work environment

Source: Authors' elaboration based on data from the Transparency Portal (Portal da Transparência) of the MPT.

The career follows the same structure: in addition to the General Labour Prosecutor and Deputy-General Labour Prosecutor (in Brasília), there are the Regional Labour Prosecutors and the Labour Prosecutor. In 2021, according to data from the institution, there were 609 Labour Prosecutors, 122 Regional Labour Prosecutors and 35 Deputy-General Labour Prosecutors.[93]

6.2.3 Access to Labour Justice

Access to justice can be considered from various perspectives and is a theme that is subject to interpretative disputes.[94] To provide an outline of the situation in the framework of Brazilian labour law, the first—and most intuitive—understanding of the term is associated with the workers' mobilisation for his rights.

A. Profile of litigants and of labour lawsuits

A second understanding of workers' access to justice is associated with the profile of litigants that enter Justice, in addition to the degree of participation that they can have in the proceedings. Some indicators can serve to illustrate this dimension, including: the profile of the litigant itself; forms of procedural representation used; and the number of financial challenges to be overcome in litigation (in the case of the Judiciary, payment of procedural and legal fees).

93. See: <https://mpt.mp.br/MPTransparencia/pages/portal/cargosVagosEOcupadosMembros.xhtml>.

94. M. Cappeletti and B. Garth, traditional authors in the theme of access to justice, understand that there are three waves in the guarantee of access: legal assistance, protection of collective interests and differentiated procedures. M. Galanter, in turn, associated the term 'access' to the effectiveness of the legal order in light of the different results that litigants obtain in justice (1974). The same author, in 2020, highlighted that the analysis of instruments that facilitate access to courts, the trajectory of conflicts from their origin until transformation in litigation and the alternative means of dispute resolution, are also ways of visualising access to justice. On the other hand, R. Sandefur points to a classification of interpretations of access to justice as behavioural or perceptive, depending on whether the analysis considers the behaviour of the bodies or actors involved or what these actors understand by justice (Sandefur 2009).

As a rule, the labour lawsuit opposes a claimant against a defendant (71.46 per cent of the cases). Claimants are most often individuals (92.1 per cent), of the male sex, with an average age of 39 years. Defendants are legal entities of private law (81.7 per cent).

The audience served by Labour Justice in Brazil is mostly composed of a population earning a middle-low income. In 90.1 per cent of cases, the wages of labour contracts discussed in lawsuits were under BRL4,000. Most (62.5 per cent) involved wages of up to BRL1,996 (Cunha 2021, 30).

Among the professional categories that sought Labour Justice, workers and retail salesmen appear more frequently (33 per cent), followed by workers in the production of industrial goods and services (27 per cent) (ibid., 31).

In this sense, the classification of the litigants' economic activities over the last few years reveals, in addition to a non-uniform variation, a decrease in the participation of the main categories—such as industry, services, commerce, agriculture, transportation, tourism and education. Few recorded an increase during the period—such as financial services and public administration (until 2018 at least).

TABLE 6.34 Most recurring economic activities in labour lawsuits

	2016	2017	2018	2019
Industry	835,584	641,182	560,177	489,001
Services	625,157	443,013	397,295	383,244
Commerce	404,013	346,788	316,482	315,880
Transportation	214,842	↓189,773	↓162,746	214,894
Public administration	187,184	216,572	215,995	182,993
Financial system	128,420	130,194	132,030	137,315
Tourism, hospitality and food	112,768	106,521	92,954	101,134
Communications	99,785	90,235	79,533	90,239
Agriculture, extraction and fishery	87,495	81,074	75,281	↓76,501
Education, culture and leisure	82,129	78,554	72,536	79,821

Source: Authors' elaboration based on data from Labour Justice reports (TST) (2016–2019).

B. Conditions for access to Labour Justice and legal assistance

The conditions for access to justice refer to the prerequisites that enable, beyond being able to file a lawsuit before Labour Justice, that the Judicial Power analyses the merit of the lawsuit (Leite 2019, 400). Based on the Civil Procedural Code (Art. 17), conditions refer to the legitimacy of parties and to procedural interest.

Legitimacy is the subjective pertinence of the lawsuit; in other words, there must be a legal relationship between the rights of the parties and the substantive right deduced in court. Generally, the parties of a labour contract—employer and employee—are the same ones that figure at the extremes of the procedural relationship that deals with employment relationship issues.

Procedural interest is subdivided into necessity and adequation. Necessity is based on the idea that the judicial path is indispensable for the achievement of the good that the party wishes to obtain, while adequacy consists in the choice of the adequate procedural path.

Procedural assumptions, on the other hand, relate to legal existence and the validity for their development. Thus, the procedural assumptions for existence—known as "assumptions for the constitution of the procedure" (*pressupostos de constituição do processo*—Art. 485, IV of the Civil Code)—are related to the initial petition, jurisdiction and summons (Leite 2019, 400); and the procedural assumptions of validity refer to the "valid and regular development of the procedural relationship", whose absence might lead to its annulment, and refer to the eligible initial petition, the competence of the jury, the capacity (procedural and postulatory capacity), the valid citation and the impartiality of the judge (positive procedural assumptions of validity), as well as to *litis pendens*, the matter on trial and peremption (negative procedural assumptions of validity) (ibid., 400–406).[95]

Capacity can present itself under three types: capacity of being a party,[96] procedural capacity and postulatory capacity. As procedural assumptions, procedural capacity consists in the capacity to figure as a party in the lawsuit without the need for assistance or representation, which happens usually after 18 years of age; and postulatory capacity consists in permission to postulate in court, which, as a rule, is granted to attorneys, notwithstanding the fact that in some labour lawsuits the parties can also have this permission (*jus postulandi*). In practice, attorneys are present in most labour lawsuits. According to recent data, unattended parties represent only 2.2 per cent of cases (Cunha 2021, 36).

The practice of law, in addition to being a liberal profession founded on free initiative, is considered by the Brazilian Constitution an essential function to the administration of justice, which gives it a social character and substantiates the legal norm for the requirement of the presence of an attorney in every lawsuit. In this sense, law practice comprises the private activity carried out by professionals registered in the Order of Attorneys of Brazil (*Ordem dos Advogados do Brazil*), and the activity carried out by public attorneys, selected through public competition for bodies of the public administration. Private attorneys serve civil society in

95.. According to Leite (2019, 405), for some legal experts, the convention of arbitration can be understood as a negative procedural assumption of validity.

96.. The capacity of being a party in a lawsuit results from civil capacity. Thus, it is enough for the individual to be born, as it is enough for the legal entity to be legally constituted, to be a holder of rights and duties subject to claim under law.

general through service provision contracts. Public attorneys act in the defence of State bodies (at the federal, state and municipal levels).

According to OAB, there are currently 1.2 million attorneys in Brazil.[97] The Brazilian Association of Labour Attorneys (*Associação Brasileira de Advogados Trabalhistas*—ABRAT) estimates that around 300,000 attorneys act mainly in the labour area.[98]

Among professionals working in labour lawsuits, private attorneys are the most sought after by litigants and are present in 89.2 per cent of cases. Union attorneys are present in 8.5 per cent of cases, while public attorneys, legal practice centres and court-appointed attorneys (*advogados dativos*) have reduced participation (Cunha 2021, 35–36).

In addition to attorneys, members of the Public Prosecutor's Office, discussed previously, and public defendants also have postulatory capacity. In this sense, the Brazilian Constitution guarantees legal assistance to people with insufficient resources (Art. 5, LXXIV), which dispenses them from paying procedural costs, including appeal bonds.

In Brazil, gratuitous legal assistance is provided by a specific professional category of public attorneys, the public defendants of the Office of the Public Defender (*Defensoria Pública*). In the federal sphere, members of the Office of the Public Defender of the Union (*Defensoria Pública da União*—DPU) carry out public defence and provide gratuitous legal assistance.

As Labour Justice in Brazil is linked to the Union and not to the individual states, the public defenders of the Union are the ones—in theory—invested with the legitimacy to provide legal assistance in matters related to labour.[99] This attribution, however, rarely materialises. According to the DPU's Service Letter (DPU 2021), due to reasons regarding the institution's structuring and budget limits, legal assistance for labour matters is provided only in the Federal District.

C. Procedural costs, attorney fees and burden of loss

To access Labour Justice, parties can either benefit from gratuitous legal assistance or must otherwise bear the procedural costs.

97. See: <https://www.oab.org.br/institucionalconselhofederal/quadroadvogados>.

98. Personal communication.

99. The Office of the Public Defender is a permanent institution that provides legal, judicial and extra-judicial assistance at all levels, in a complete and gratuitous manner, to those who can substantiate their lack of resources. Art. 14 of Complementary Law No. 80/1994 establishes that the Office of the Public Defender of the Union has the competence to act in the justice of the Union, comprising Federal Justice, Labour Justice, electoral justice, military justice, upper courts and administrative bodies of the Union.

The benefit of gratuitous legal assistance grants exemption from procedural costs and can be granted at various times during the lawsuit, including indirectly, by exemption/waiver of fees, to the party that can prove receiving a salary equal to or inferior to 40 per cent of the upper limit (ceiling) of the earnings of the General Social Security System and/or insufficient resources (Art. 790, paragraphs 3 and 4 of the CLT). This proof is established (for individuals) by providing a declaration of insufficiency (*declaração de hipossuficiência*) (TST, *Súmula* 463).

The 2017 Labour Reform promoted significant changes to the incentives for the mobilisation towards rights, including: the losing party having to pay expert fees and loss fees (regardless of benefitting from gratuitous legal assistance (Art. 791-A of the CLT). If the beneficiary party does not have legally acknowledged funds that are sufficient to pay for technical experts' fees, the Union will pay them (Art. 790-B, paragraph 4 of the CLT and *Súmula* 457 of the TST).

According to Cunha (2021),[100] gratuity of costs was required in 90.5 per cent of cases and granted, for individuals, in 79.1 per cent of cases. There were loss condemnations in attorney fees in 33.8 per cent of the cases, and in 54.8 per cent of cases the claimants were condemned to pay attorney and/or expert fees. Workers had to pay expert fees in 48.5 per cent of the cases, while employers had to pay them in 53 per cent of the cases. Even so, exemptions from paying procedural costs are very frequent in labour legal decisions: in lawsuits where the claimant is condemned to pay procedural costs, exemptions are granted in 87.9 per cent of cases.

According to Schiavi (2018, 502), procedural costs refer to all expenditures in the lawsuit, including: transportation, legal fees (to technical assistants and attorneys), legal fees, emoluments and edicts. In Brazilian labour law, procedural costs for individual and collective labour disputes are limited to four times the ceiling of the benefits of the General Social Security System (Art. 789 of the CLT).

Attorney fees are subdivided into contractual fees and loss fees. Contractual fees regard the values agreed on by the attorney and the client for the provision of service. Loss fees (*honorários sucumbenciais*) are those paid by the losing party to the winning party's attorney (Art. 85 of the CPC). In labour lawsuits, loss fees are fixed at 5 per cent to 15 per cent over the award calculation, of the economic benefit obtained from the decision, or, when it is not possible to measure it, the updated value of the litigation (Art. 791-A of the CLT).

100. The survey considers, when calculating revenue, expenses with the execution phase, fees and eventual taxes, revenues resulting from estate taxes and lien on assets, fiscal execution activities, social security execution and execution of penalties imposed by labour relation inspection bodies and income tax revenue—therefore, it is not limited to legal fees in a strict sense.

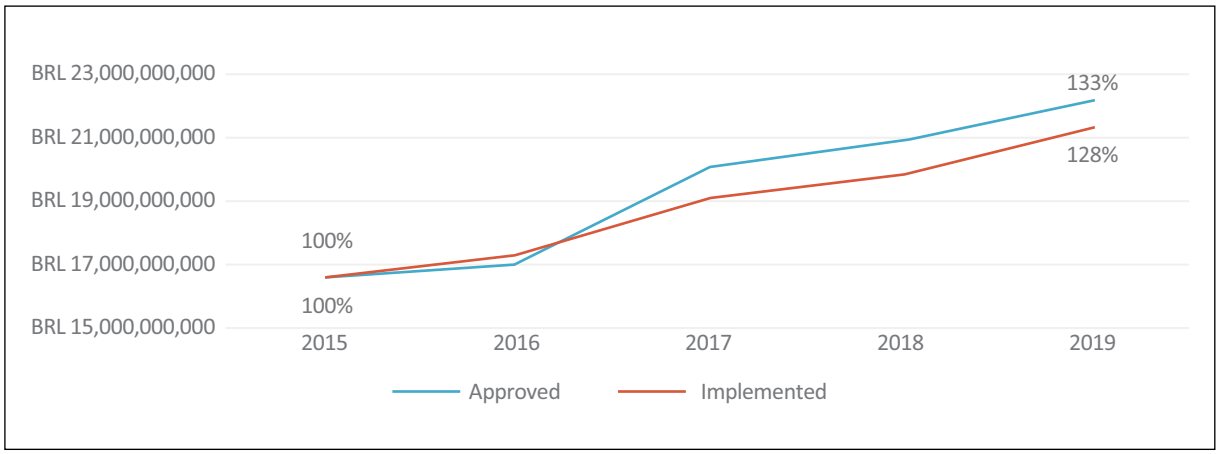
6.3 ADMINISTRATIVE ORGANISATION OF THE LABOUR DISPUTE RESOLUTION SYSTEM

6.3.1 Administrative and budget autonomy

The Federal Constitution attributes administrative[101] and financial autonomy the Judicial Power, which results in the Judiciary having its own independent budget.[102] Therefore, although the Executive and Legislative powers are involved in the commencement and approval of the budget, within the system of checks and balances, the independence and harmony resulting from the separation of powers is maintained, as the Judiciary can elaborate its own budget proposals within the limits of the Law of Budget Guidelines (*Lei de Diretrizes Orçamentárias*—LDO) (Art. 99 of the Constitution).

As mentioned in subsection 3-A, the body responsible for acting in budgetary, financial and asset oversight of Labour Justice is the CSJT.

FIGURE 6.3 Approved and implemented budget of Labour Justice, 2015–2019



Source: Authors' elaboration based on Annual Budget Laws and the "Budget" CNJ webpage.

Labour Justice is a body of the Judicial Power of the Union, directly linked to it for budget purposes. As such, the federal Judiciary branch received the most resources, according to the allocation of the Annual Budget Laws, in the period 2015-2019: on average, 44 per cent

101. For example, in the elaboration of the internal regulation, organisation of bureaus and secondary services, provision of the positions of career judges, granting of leaves of absence and vacations (Conti 2019, 152).

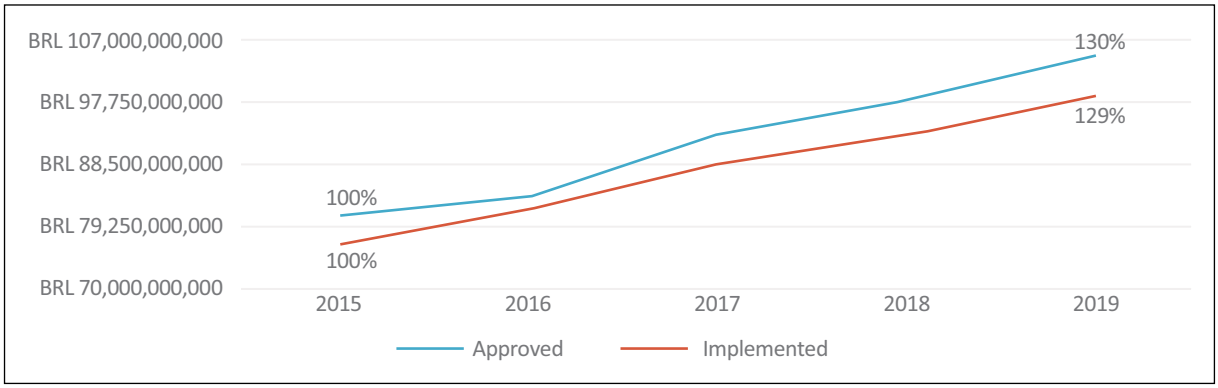
102. Resources can come from: "a) own sources of funding; b) transfer of resources that are constitutionally assured; c) earmarked revenues; d) participation in other sources o revenue; and e) administration of special funds" (Conti 2019, 155–156).

of the budget destined to all other bodies. Regarding the budget of the entire Judiciary, including the State Judiciary, this figure reaches 21 per cent.[103]

The approved budget for Labour Justice increased 33 per cent between 2015 and 2019, which is a higher increase than the percentage increase of the effectively implemented budget, of 28 per cent.

This increase follows a general increasing trend in the Judicial Power budget.

FIGURE 6.4 Approved and implemented budget of the Judicial Power, 2015–2019



Source: Authors' elaboration based on Annual Budget Laws and the "Budget" CNJ webpage.

TABLE 6.35 Planned and implemented budget (in BRL)

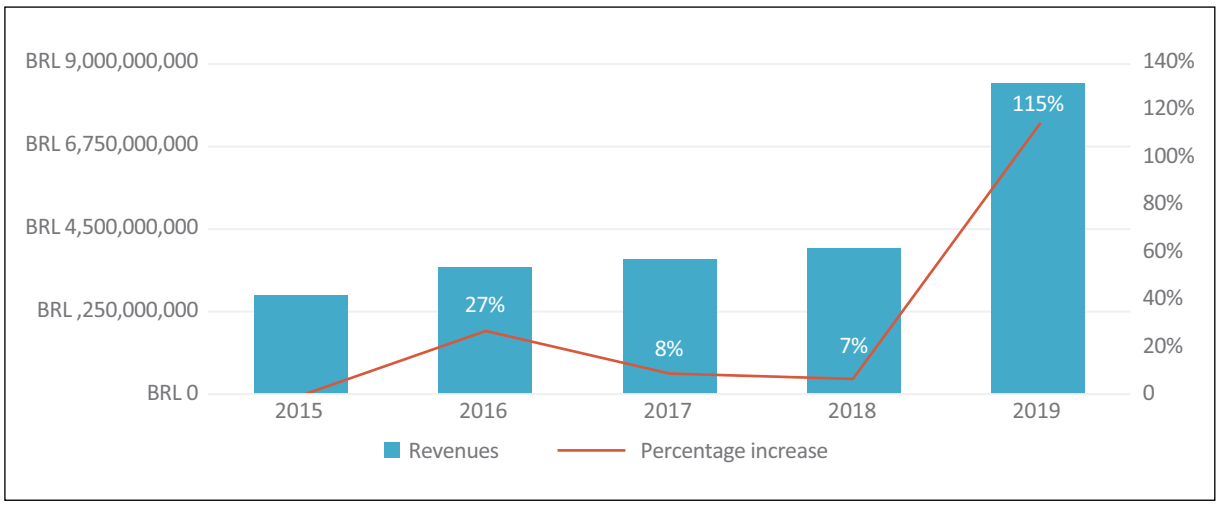
Year	Labour Justice				Judicial Power			
	LOA	%	Pago	LOA	%	%	LOA	%
2015	16,676,696,355	-	16,663,549,781	-	80,752,024,973	-	76,640,403,617	-
2016	17,126,685,840	3%	17,338,743,454	4%	83,862,362,623	4%	82,174,105,608	7%
2017	20,133,813,958	18%	19,113,590,629	10%	93,043,427,794	11%	88,456,445,371	8%
2018	20,903,063,300	4%	19,849,990,969	4%	98,183,709,271	6%	93,008,593,563	5%
2019	22,184,838,196	6%	21,394,430,121	8%	104,733,627,573	7%	98,783,375,911	6%

Source: CNJ's "budget" webpage.

Labour Justice revenues also registered a significant increase during the period, with special focus on 2019 (115 per cent), in a proportion not seen in other branches of Justice.

103. It is worth clarifying the data gathering methodology. For the allocated budget, the amount destined to bodies of the Judicial Power of the Union was gathered from each year's Annual Budget Law (including the Labour Justice budget)—disregarding eventual additional credits, supplementation, cancellation or withheld amounts. We have opted to use the budget's initial funding, as approved by the constitutional rite, instead of effectively available funding. For state bodies of the Judiciary, we have resorted to consolidated budget execution reports, issued annually by the CNJ—also opting to use the initial funding as a parameter. Regarding the implemented budget, we have considered the amount effectively disbursed (which is a lesser amount than what was earmarked or liquidated), also obtained from the annual CNJ reports, both for bodies of the state Judiciary as for those of the Union—again, including Labour Justice.

FIGURE 6.5 Annual Labour Justice revenue, 2015–2019



Source: Authors' elaboration based on data from Justice in Numbers (Justiça em Números) 2016–2020 (CNJ).

Under the framework of the federal budget law, Labour Justice's expenditures are part of Direct Public Administration and, therefore, the overall government budget, according to the principle of budget unity. Thus, to understand its budget, we must consider the subdivisions of institutional classification: in the federal sphere, the division in powers (Executive, Legislative and Judiciary) results in the subdivision into budget bodies and, subsequently, into budget units, which are the "centre for planning, budget elaboration, budget execution, internal control, and verification of costs and results" (Conti 2019, 73).

TABLE 6.36 Fiscal budget and Labour Justice expenditures, 2015–2019

Year	Fiscal Budget Expenditures (*Despesa do Orçamento Fiscal*—DOF)	Percentage DOF	Labour Justice Expenditures (*Despesa da Justiça do Trabalho*—DJT)	Percentage DJT
2015	BRL 1,278,744,997,530	100%	BRL 16,676,696,355	1.304%
2016	BRL 1,425,398,520,951	100%	BRL 17,126,685,840	1.201%
2017	BRL 1,800,923,807,399	100%	BRL 20,133,813,958	1.117%
2018	BRL 1,625,647,682,049	100%	BRL 20,903,063,300	1.285%
2019	BRL 1,750,831,718,583	100%	BRL 22,184,838,196	1.267%

Source: Authors' elaboration based on annual legislation on budget and public finances.

Therefore, when considering the Federal Judicial Power, Labour Justice comprises a budget body, covering 25 budget units (TST and 24 Regional Labour Courts) (Brazil 2016, 121–122).

TABLE 6.37 Annual revenue by branch of the Judiciary

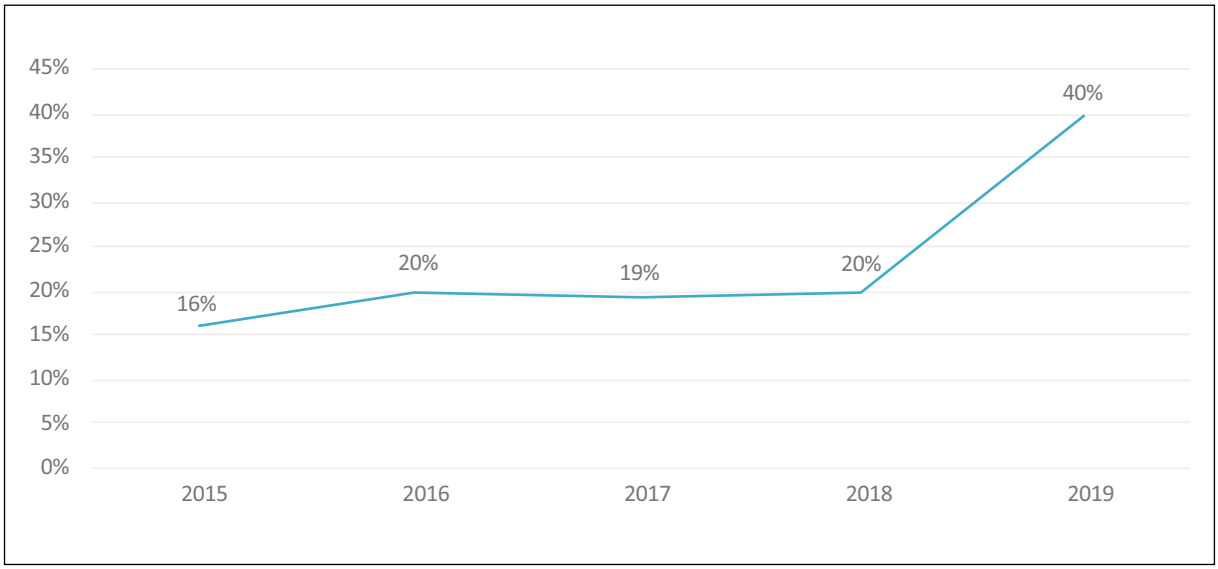
Revenue	Court	2015	2016	2017	2018	2019
Electoral J.	TREs	0	0	0	0	0
State J.	TJs	17,967,190	16,722,621	19,147,997	23,603,755	35,931,946
Federal J.	TRFs	23,977,875	18,881,005	25,802,556	31,110,424	31,994,894
Military J.	TJMs	1,413	1,929	1,432	1,666	1,255
	JMU	0	0	0	0	0
Higher Courts	STJ	45,786	31,828	33,243	36,916	44,274
	STM	N/A	N/A	N/A	N/A	N/A
	TSE	0	0	0	N/A	N/A
	TST	2,991	2,949	0	2,692	2,420
Labour J.	TRTs	2,684,735	3,417,618	3,697,291	3,941,202	8,458,231
Judicial Power	Total	44,679,990	39,057,950	48,682,518	58,696,656	76,433,020

Source: CNJ (2020).[104]

In terms of revenue, Labour Justice returns considerable values to the public coffers, with an increasing trend—as with other branches of the Judiciary.

Despite the increases in the planned budget and in expenditures over the period, tax revenue collected by Labour Justice seems to have increased at an even higher rate.

FIGURE 6.6 Annual Labour Justice revenue relative to budget expenses, 2015–2019



Source: Authors' elaboration based on CNJ (2020) and CNJ's "Budget" webpage.

104. CNJ makes its databases available at <https://www.cnj.jus.br/pesquisas-judiciarias/justica-em-numeros/base-de-dados/>. The version used in this report is dated 25 August 2020.

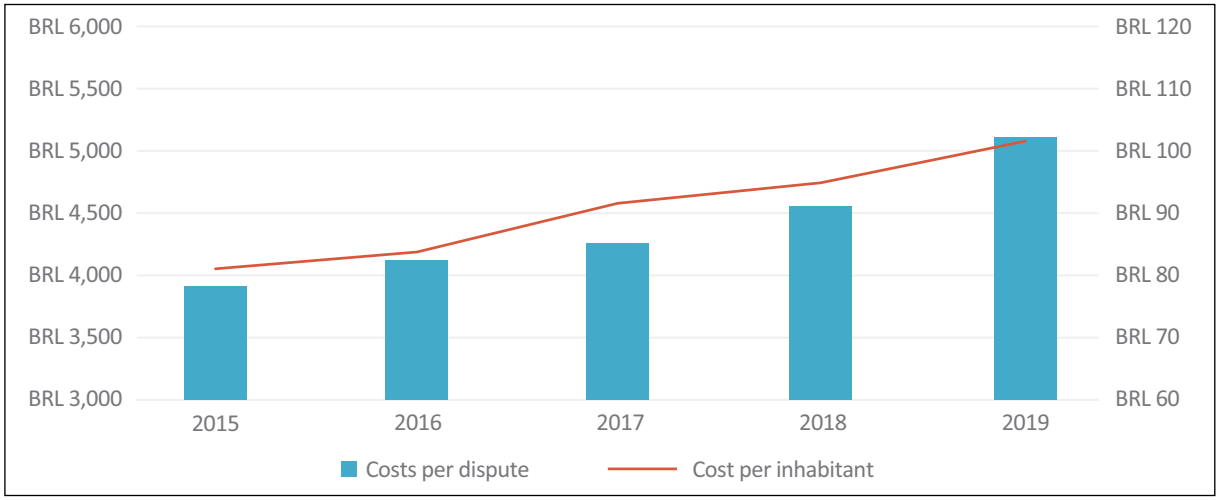
TABLE 6.38 Labour Justice expenditures

Year-base	Human resources (BRL)					Human resources (%)	Other expenses (R$)		Other expenses (%)	Total expenditures (R$)
	Personnel	Interns	Outsourced workers	Benefits[105]	Others		Capital and ongoing expenses[106]	Computing expenses		
2015	13,529,917,953	51,481,844	381,130,512	865,481,553	323,504,508	91.9	1,221,935,819	113,360,000	8.1	16,485,133,575
2016	14,304,429,117	36,337,352	380,546,547	905,187,863	307,587,522	93.5	985,764,143	126,741,470	6.5	17,046,594,014
2017	15,521,103,482	38,151,077	370,319,509	919,177,224	337,653,074	94.0	960,867,011	135,877,439	6.0	18,283,148,816
2018	15,980,359,779	51,514,748	385,960,383	946,374,420	331,835,944	92.3	1,278,891,388	193,916,046	7.7	19,168,852,708
2019	17,549,615,145	45,937,527	406,621,408	945,196,133	166,535,812	93.1	1,236,097,864	190,943,889	6.9	20,540,947,778

Source: Authors' elaboration based on the Justice in Numbers (Justiça em Números) reports (2016–2020).

Labour Justice's budget forecast is reflected in the expenses, which, according to Table 6.38, are subdivided into two main categories: human resources and other expenditures (capital expenses, ongoing expenses and computing expenses). From 2015 to 2019, human resources were responsible for 92.9 per cent of expenditures, while the average rate of other expenditures was of 7.4 per cent.

FIGURE 6.7 Cost of Labour Justice per archived lawsuit and per inhabitant



Source: Authors' elaboration based on data from Justice in Numbers (Justiça em Números) 2016-2019 (CNJ), the CNJ's "Budget" webpage and Continuous PNAD (IBGE).

105. The 'benefits' category includes, for example, meals allowances, daily allowances and transportation allowances.

106. According to the SADIPEM Manual of the National Treasury (System for the Analysis of Public Debt, Credit Operations and Guarantees of the Union, States and Municipalities—*Sistema de Análise da Dívida Pública, Operações de Crédito e Garantias da União, Estados e Municípios*), expenditures can be classified into two economic categories: running expenses, covering those referring to the maintenance and functioning of public services in general (such as graphic materials, pen drives, dailies paid to providers of services for public administration, software maintenance, infrastructure supports and users of information and communications technologies); and capital expenses, which refers to "expenses that contribute for the production or generation of new goods and services and will be incorporated into public property" (such as construction works; installations; machinery; equipment; software acquisitions; vehicles; and movable goods).

An interesting point is that the Labour Law budget has increased constantly, although the number of new cases has decreased after 2017.

6.3.2 Personnel, types of jobs and attributions, remuneration and pay scales

The scope of operations of Federal and State Justices in labour matters can be partially illustrated by the quantity of civil servants that are attached to the Union and to states. According to Ipea (2021), the participation of public service employment per federative sphere is as follows:

TABLE 6.39 Number of federal, state and municipal civil servants

Year	Federal civil servants	State civil servants	Municipal civil servants
2015	1,128,614	3,780,436	6,436,192
2016	1,171,346	3,716,562	6,371,685
2017	1,181,893	3,673,909	6,516,673
2018	1,101,196	3,598,790	6,475,114

Source: Atlas do Estado Brasileiro (Ipea, n.d.).

The participation of State Justice in labour matters is quantitatively higher than that of Federal Justice, considering that "of every 10 civil servants, 6 are in municipalities, 3 in states and only 1 is a federal civil servant" (Ipea 2021). Labour relations that reach State Justice involve, in most cases, workers from the fields of education, health care and public security—adding up to 40 per cent in municipalities and 60 per cent in states.

Federal Justice, on the other hand, deals with higher-value disputes. The average salary of a federal civil servant is of BRL9,186,29, followed by state civil servants (BRL5,040.59) and municipal civil servants (BRL2,865.51) (ibid.).

According to data from Justice in Numbers (2016-2020), between 2015 and 2019 the number of cases per civil servant in Labour Justice varied as follows:

TABLE 6.40 Caseload of Labour Justice civil servants, per court

	2015	2016	2017	2018	2019
Labour courts	391	387	398	358	351
TRTs	150	182	236	282	300

Source: Authors' elaboration based on data from Justice in Numbers (2016-2020).

The Justice in Numbers (2016-2020) reports estimate the values spent monthly with civil servants of TRTs and the TST, whose salaries are higher than those estimated for civil servants of labour courts.

TABLE 6.41 Average monthly remuneration of TRT and TST civil servants, in BRL, 2015–2019

	2015	2016	2017	2018	2019
TRTs	16,281	17,989	19,932	20,777	22,956
TST	-	16,760	18,299	18,661	22,074

Source: Authors' elaboration based on data from Justice in Numbers (2016–2020).

TABLE 6.42 Number of Analysts, Technicians and Assistants in Labour Justice[107]

	2015	2016	2017	2018	2019
Analysts	16.953	16.418	16.119	15.992	14.832
Technicians	26.114	25.406	24.721	24.495	22.712
Assistants	221	87	91	89	86

Source: Authors' elaboration based on data from TST reports (2016–2019).

The evolution of the number of servers in Labour Justice between 2015 and 2019 also points to a downsizing of the structure, which is confirmed when compared with data across the entire Judiciary.

The caseload attributed to each category of civil servants in Labour Justice, according to data from 2019, points to an inverse distribution: magistrates of second instance have more cases under their responsibility than those of first instance; conversely, civil servants of first instance have a higher caseload than those of second instance. It is worth observing that the processing of disputes in the first instance is far more complex than in the second instance.[108]

TABLE 6.43 Number of administrative civil servants (judicial analysts and technicians) and assistants in the Judiciary and Labour Justice in Brazil, 2015–2019

Years	Personnel		Assistants[109]	
	Judicial Power	Labour Justice	Years	Judicial Power
2015	278,515	40,712	155,644	14,946
2016	279,013	41,942	145,321	10,701
2017	272,093	40,712	158,703	12,343
2018	272,138	40,338	159,896	12,052
2019	276,331	38,517	159,876	11,483

Source: Authors' elaboration based on data from TST reports (2016-2019) and Justice in Numbers (2015–2019).

107. Provided positions.

108. The caseload of first instance judges is of 2,794 lawsuits per judge, on average, while that of second instance judges is of 3,583, an average of 2,927 lawsuits per first and second instance judge. Civil servants in Labour Justice have an average caseload of 339 lawsuits each, and this average can be broken down into 351 for first-instance jurisdiction and 300 for second-instance jurisdiction (CNJ 2020).

109. Including conciliators, interns, lay judges, outsourced workers, and volunteers.

6.3.3 Recruitment, selection, training and continuous education

Entry into labour magistrature occurs through a public examination featuring tests of knowledge and an analysis of titles. It is carried out by the respective TRT, and as with all of Brazilian magistrature, career progression follows the principles of seniority and merit. (Art. 115, II of the Constitution).

The admission criteria are listed in Art. 93 of the Federal Constitution and in Resolution No. 75/2009 of the CNJ. To be approved, the candidate must participate in a public examination featuring four eliminatory stages (preliminary, dissertation, sentencing and oral test) and a classificatory stage, in which titles will be analysed. The candidate must be a Law graduate, with at least three years of legal practice.

It is worth highlighting that, in 2017, the examination took on a nationwide scope and started being organised by the TST. However, in 2018 the TST itself decided to return to the previous system, whereby each TRT carries out its own examinations.

The study by Cunha and Campos (2020) about the first unified national examination of labour magistrature highlighted that the racial profile of candidates comprised 17 per cent black candidates and 83 per cent non-black candidates. The low racial diversity in labour magistrature is confirmed by other studies. Table 6.44, for example, features data from the CNJ[110] regarding the colour/racial profile of Brazilian magistrates.

TABLE 6.44 Distribution of magistrates by colour or race, according to sex and branch of Justice, 2018

	Labour Justice	State Justice	Federal Justice
Black	Female: 2%	Female: 1%	Female: 2%
	Male: 1%	Male: 2%	Male: 1%
Maroon (*Parda*)	Female: 17%	Female: 15%	Female: 10%
	Male: 20%	Male: 17%	Male: 17%
White	Female: 79%	Female: 82%	Female:86%
	Male: 77%	Male: 80%	Male: 81%
Yellow (oriental)	Female: 2%	Female: 1%	Female: 1%
	Male: 2%	Male: 2%	Male: 1%

Source: Author's elaboration based on CNJ data.

Additionally, a study by the Association of Brazilian Magistrates (Vianna, Carvalho, and Burgos 2018) points to the following representative rates by race/colour per degree of jurisdiction in Brazilian Federal and State Justice. Data also reveal a reduction in the number of magistrates

110. See: <https://bit.ly/3ua9UDw>.

of first instance by worker in the last few years, probably due to the increased vacancy of positions, in addition to population growth.

TABLE 6.45 Number of positions (provided, vacant and total) in Brazilian Labour magistrature

Labour Justice		2015	2016	2017	2018	2019
Magistrates	STF[111]	11	11	11	11	11
	TST	27	27	27	27	27
	2nd instance	543	559	556	556	559
	1st instance	3,057	3,109	3,102	3,043	3077
First-instance magistrates per 100,000 workers[112]		0.036	0.036	0.035	0.034	0.034

Source: Authors' elaboration based on Vianna, Carvalho and Burgos (2018).

The Constitutional Amendment that promoted the Judiciary Reform (No. 45/2004) created the obligation for Brazilian courts to build schools for the formation and educational improvement of judges. In Labour Justice, at the national level, ENAMAT was created in 2006[113] to promote the selection formation and educational improvement of labour magistrates, as well as the preparation of public examinations for career entry. Regionally, the education of magistrates is provided by the schools of the 24 TRTs. Jointly, ENAMAT and the regional schools comprise the Integrated System for the Formation of Labour Magistrates (*Sistema Integrado de Formação da Magistratura do Trabalho*—SIFMT).

Regarding education, ENAMAT promotes the following activities:

- Initial formation courses: carried out at its headquarters (Brasília-DF) and geared at deputy labour judges who have recently taken office.
- Continuous education courses: with various formats and geared at every currently active lifelong labour judge, across all jurisdictional levels.
- Training of trainers: geared at judges who provide training at regional magistrature schools and other teaching professionals, with the goal of professionalising schools at the national level.

111. As previously stated, the STF, as the constitutional court, has the competence to judge over labour matters and, therefore, STF Justices can be considered part of the labour magistrature hierarchy.

112. We considered 'workers' as the sum of employed and unemployed individuals that comprise the Brazilian workforce, according to data from the Continuous PNAD.

113. TST Administrative Resolution No.1140, 1 June 2006.

The initial formation of labour magistrates is carried out during the swearing-in period for deputy labour judges, both nationally by ENAMAT, and regionally through initial training courses carried out by the TRTs. Participation in the initial national and regional training courses is a requirement for magistrates to be sworn in for life.

Throughout their careers, labour magistrates must participate in continuous educational activities, carried out both by ENAMAT and by regional schools. This has the objective of "providing technically adequate and ethically humanised training, geared towards the defence of the principles of the Democratic Rule of Law and committed to equitable conflict resolution" (ENAMAT 2018, 57). Continuous education is a requirement for removal and exchange; promotion in the career due to merit; licenses for study and technical improvement; summons to the respective court; and participation in the court's administrative positions.

6.4 LABOUR JUSTICE PERFORMANCE IN BRAZIL

Labour justice presents a remarkable performance among other spheres in Brazilian Justice: the highest rate of demand compliance (125.8 per cent); one of the lowest bottlenecking rates of the Judiciary (52.8 per cent); the highest rates of conciliation; and, additionally, the highest internal and external appealability (CNJ 2019).

The productivity of Labour Justice has increased considerably from 2015 to 2019, considering the lawsuits judged per year (CNJ 2016-2019).

TABLE 6.46 Number of lawsuits judged per sphere of Labour Justice in Brazil, 2015–2019

Labour Justice	2015[114]	2016	2017	2018	2019
Labour courts	2,556,801	2,687,198	2,774,280	2,825,897	2,582,930
TRTs	769,300	830,844	964,434	1,027,573	1,093,228
TST	305,231	270,130	285,743	319,727	331,040

Source: Authors' elaboration based on general Labour Justice reports (2016–2019).

A. Flow of Labour Justice lawsuits

For over a decade, the Brazilian Judicial Power has been involved in a broad effort to reduce the acquis, with a view to minimising system saturation and bottlenecking, which reached almost

114. There were no data for 2015. However, in 2016 the total number of decided lawsuits in labour courts was 2,687,198, which represents a 5.1 increase over 2015. In TRTs, in 2016, 830,844 lawsuits were decided, 8 per cent more than in 2015, and in the TST, that same year, 270,130 lawsuits were decided, 11.5 per cent less than in 2015. With these data, it was possible to estimate values for 2015 by employing reverse percentages.

90 per cent and is currently at around 70 per cent (CNJ, historic series). Labour Justice has always recorded lower bottlenecking rates than the average—currently at around 52 per cent.

The data seem to indicate that the drop in the quantity of pending cases is associated with the drop in the number of filed lawsuits over the last few years—probably more because of the restriction on mobilisation for rights than a drop in the occurrence of conflicts per se—as discussed previously regarding access to justice.

TABLE 6.47 Consolidated data for procedural expedition, productivity, structure and workload in Labour Justice compared to the Brazilian Judicial Power, 2015–2019

Litigiousness		2015	2016	2017	2018	2019
New cases[115]	LJ	4,058,477	4,262,444	4,321,842	3,460,875	3.530.197
	Total	**27,280,287**	**29,351,145**	**29,113,579**	**28,052,965**	**30.214.346**
Decided[116]	LJ	4,193,051	4,320,302	4,622,529	4,367,437	4.026.010
	Total	**27,238,863**	**30,763,044**	**31,440,038**	**32,399,651**	**31.713.638**
Archived[117]	LJ	4,259,725	4,205,359	4,482,008	4,354,226	4.185.708
	Total	**28,479,058**	**29,427,540**	**31,017,900**	**31,883,392**	**35.384.976**
Pending[118]	LJ	5,139,433	5,394,421	5,517,328	4,861,352	4.533.771
	Total	**73,936,309**	**79,662,896**	**80,069,305**	**78,691,031**	**77.096.939**
Bottlenecking	LJ	54%	56%	55%	53%	52%
	Total	**72%**	**73%**	**72%**	**71%**	**69%**
IAD (archived/cn)	LJ	105%	98%	104%	126%	119%
	Total	**104%**	**100%**	**107%**	**114%**	**117%**
Conciliation rates	LJ	25%	26%	25%	24%	24%
	Total	**11%**	**12%**	**12%**	**12%**	**13%**
Electronic lawsuits	LJ	77%	92%	96%	98%	99%
	Total	**56%**	**70%**	**80%**	**84%**	**90%**
New cases per magistrate	LJ	993	1,055	1,033	809	821
	Total	**1,509**	**1,581**	**1,525**	**1,448**	**1.520**
New cases per server	LJ	108	115	116	90	95
	Total	**-**	**126**	**127**	**119**	**126**

Source: Authors' elaboration based on data from Justice by Numbers reports (2016–2019).

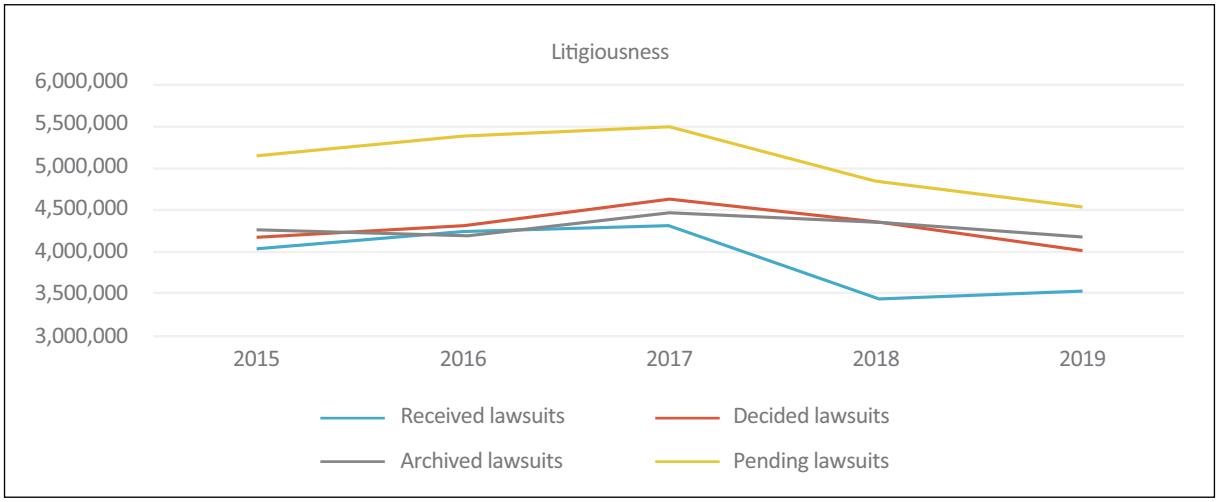
115. Received lawsuits ('new cases', according to Justice in Numbers) are entries counted once per phase (acknowledgement or execution) and per instance.

116. Regarding decided lawsuits, they are presumably those in which a final decision was uttered, however the lawsuit continues to proceed—even if transit in res judicata did not occur (the end of the proceedings, after which there can be no appeal to review the case). This assumption can be corroborated by the criteria used to count archived lawsuits.

117. The report considered as 'archived' the lawsuits which: were forwarded to other competent judicial bodies, as long as they were bound to different courts; were forwarded to upper or lower instances; archived definitively; and those where *res judicata* decisions were issued and liquidation, compliance or execution were initiated.

118. 'Pending' lawsuits are those which had no archival motion in any of the phases analysed, did not have a decision, have been suspended or reactivated.

FIGURE 6.8 Evolution in received, archived, decided and pending lawsuits in Brazilian Labour Justice, 2015–2019 lawsuits



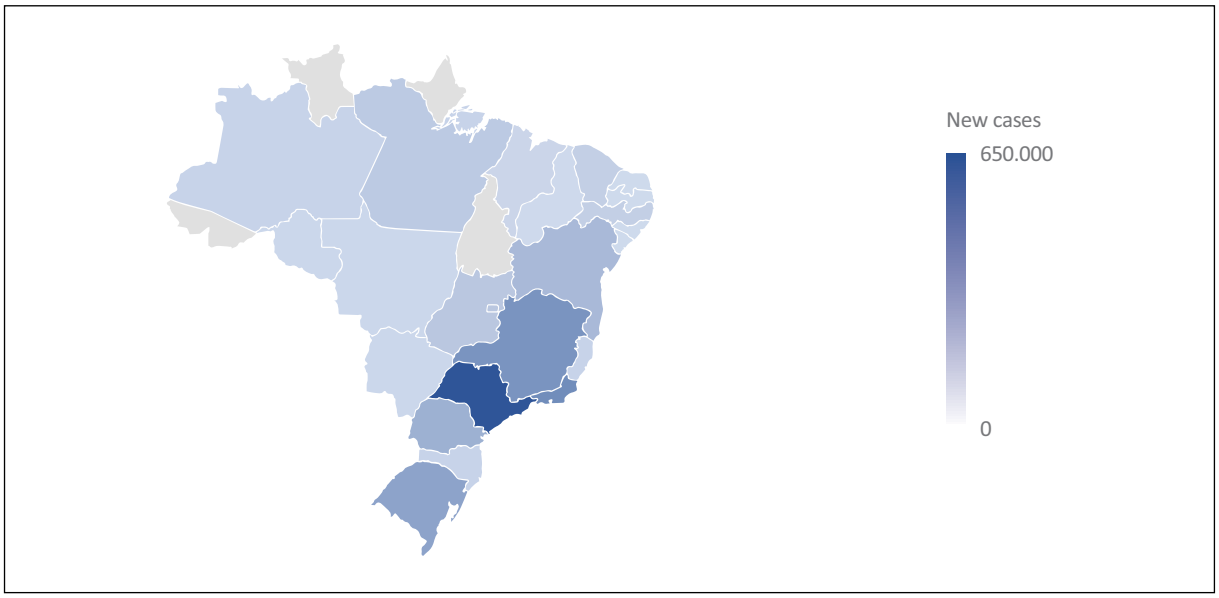
Source: Authors' elaboration, based on data from Justice in Numbers 2016–2020 (CNJ).

B. Spatial distribution of labour litigiousness

In general, the filing of new cases in the TRTs decreased between 2017 and 2018, which reinforces the hypothesis that the Labour Reform reduced litigiousness.

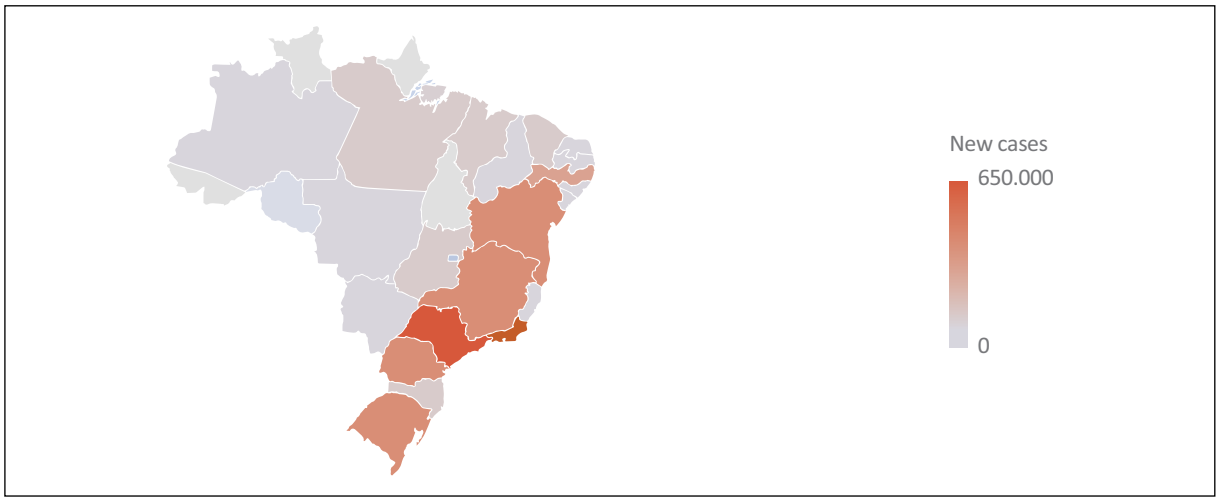
Regarding spatial distribution, it is possible to determine the received and the pending lawsuits of each court to analyse the workload of each region.

FIGURE 6.9 Average new cases by Labour Justice region in Brazil, 2015–2019



Source: Authors' elaboration based on data from Justice in Numbers 2016–2020 (CNJ).

FIGURE 6.10 Average pending cases by Labour Justice region in Brazil, 2015–2019



Source: Authors' elaboration based on data from Justice in Numbers 2016–2020 (CNJ).

C. Litigiousness and labour judicialisation

The evolution of new cases in Justice reinforces the idea of judicial demobilisation. The increase observed in previous years was suddenly reversed in 2018—which seems strongly associated with the entry into force of Law No. 13,467/2017, the Labour Reform. In the following year, there was an increase in new cases again, which suggests that the effects of the Reform would be merely formal, with little impact on the litigiousness that still affects labour relations.

TABLE 6.48 Received, decided, archived and pending lawsuits

Year	Received lawsuits	Decided lawsuits	Archived lawsuits	Pending lawsuits
2015	4,058,477	4,193,051	4,259,725	5,139,433
2016	4,262,444	4,320,302	4,205,359	5,394,421
2017	4,321,842	4,622,529	4,482,008	5,517,328
2018	3,460,875	4,367,437	4,354,226	4,861,352
2019	3,530,197	4,026,010	4,185,708	4,533,771

Source: Justice in Numbers 2016–2020 (CNJ).

The procedural instruments made available to labour litigants have been used in the proportions indicated in Table 6.49. Available data show a decrease in the use of acknowledgement and execution lawsuits, as well as an increase in the use of ordinary appeals.[119]

119. It is important to note that, for these data, the received lawsuits are not equivalent to the number of new cases presented earlier. This is because some classes are excluded in the total tally of new cases, such as writs of payment, low value requisitions, etc., while all are considered when describing procedural classes. In addition, it is common for a lawsuit to have more than one registered subject, and thus the total tally does not directly correspond to the total number of new cases.

According to a national survey based on labour lawsuits decided in 2018, which systematised indicators for access to justice (Cunha 2021), the judicialisation of labour disputes is strongly associated with the termination of labour contracts—most of which are of average-long duration, unwittingly terminated. In addition, there was no termination of the contract in 14 per cent of the cases and in only 2.6 per cent did the termination occur after agreement by[120] both parties.

TABLE 6.49 Most common procedural classes in Labour Justice

Class	2015	2016	2017	2018	2019
Acknowledgement lawsuit/procedure	2,659,206	2,738,482	2,607,426	1,787,603	1,892,638
Appeals/labour appeals	666,343	856,752	793,517	884,466	844,378
Execution lawsuits	-	-	41,632	36,478	39,747
Appeals/motions	97,065	75,945	24,390	24,977	24,513
Execution lawsuit/labour execution lawsuits	-	-	-	-	22,438
Other procedures/incidents	-	-	-	30,534	-
Other procedures/letters	80,033	59,331	19,843	-	-
Execution lawsuits/motions	27,773	18,608	-	-	-

Source: Justice in Numbers (Digital).[121]

TABLE 6.50 Most common subjects in Labour Justice

Subject	2015	2016	2017	2018	2019
Labour contract termination/ severance pay	4,958,427	5,848,557	5,365,578	3,750,967	3,093,582
Civil responsibility of the employer/ Compensation for moral damages/ mental distress	704,345	833,643	813,733	461,823	390,571
Compensation, severance pay and compensation/salary/wage deficiency	539,047	636,381	652,150	396,521	326,640
Compensation, severance pay and benefits/additional	-	375,194	436,861	263,627	324,429
Termination of employment contract/ unemployment insurance	488,274	538,801	466,396	296,616	229,727
Vacation/compensation/ Constitutional one-third premium	300,835	-	-	-	-

Source: Justice in Numbers (Digital).

120. This figure is low but might indicate a rising trend if we consider the rule introduced by the Labour Reform that allows parties to terminate the contract if they are both in agreement, and also require legal homologation of rescissory contracts (Arts. 484-A and 855-B, C, D and E of the CLT).

121. The digital version of Justice in Numbers has interactive panels, in which it is possible to select specific data from their database to export to spreadsheets. Available at: <https://bit.ly/3idu7m9>.

The most frequently discussed subjects in labour lawsuits include: contract termination with severance funds (13.1 per cent); remuneration, severance pay and wage benefits/differences (1.7 per cent); contract termination/unemployment insurance (1.6 per cent) and civil responsibility of the employer/moral damages (1.5 per cent).

D. Outcomes and values for claims and decisions issued in labour lawsuits

A third understanding of access to justice can be associated with outcomes. According to a survey of labour lawsuits decided in 2018 (Cunha 2021), in 38.9 per cent of cases, lawsuits were terminated after homologation of established agreements; 36 per cent were terminated by partial adequacy of the claims; in 10.4 per cent of lawsuits, claims were entirely rejected; 4.3 per cent were fully accepted; and in 15.1 per cent of cases, the merit was not appraised.

The acceptance rate for the most common claims (FGTS and fines of 40 per cent of the value of the FGTS) remained around 55 and 52 per cent, respectively. Acceptance rates for these same claims in agreement homologations varied from 48 per cent for FGTS to 53 per cent for FGTS fines.[122]

Legal labour disputes observed in lawsuits decided in 2018 involve claims of, on average, BRL42,631.96 (Cunha 2021). Interestingly, claims made in lawsuits that ended up resolved through mutual agreement had lower median values, of BRL40,709.26 (ibid.).

The median value of sentences, corresponding to effectively accepted claims, was of BRL6,493.30, equivalent to 15.23 per cent of the updated mean of values attributed to causes, considering guilty verdicts and/or those homologating agreements, as well as the value of labour credits[123] and the values specified in the decisions.[124]

The accepted claims that were awarded the highest value were those related to the payment of overtime (BRL24,831.07), FGTS (BRL6,891.38), vacations (BRL5,653.47), rescissory funds and fines for 40 per cent of FGTS (BRL4,392.99), and fine described in Art. 467 of the CLT (BRL4,334.88).

Specifically in guilty verdicts, the average value of net labour credits was calculated at BRL5,411.08, equal to 12.8 per cent of the median value of these lawsuits. In homologated agreements, the median value is higher—BRL6,493.30, or 15.95 per cent of the median value of these lawsuits.[125]

122. Except for the case of the FGTS fine, agreed claims relative to requested ones are below 50 per cent. This suggests the possibility that, depending on the analysis of the nature of generally agreed-on funds, the agreements can be established via the abdication of a considerable part of the initial claims (Ipea 2020). Additionally, funds of a salary nature led to less agreements than indemnifying funds.

123. Excluding loss fees (attorney, expert and procedural fees), sentences of bad-faith litigations, fines issued by labour inspection, among others.

124. Excluding eventual revisions in the values due to appeals or recalculations during sentencing.

125. Ipea (2020, 74) concludes, according to empiric findings, that litigants tend to reach an agreement in cases where they have a high probability of defeat.

E. Processing time for claims under Labour Law

The average time from entry of the lawsuit into the legal system until it is archived is an important factor that might affect an individual's decision to resort to Justice or not.

Cunha (2021) found that the average time it took between filing a lawsuit and reaching a first instance decision was of 281 days. The average time from filing a lawsuit to the first hearing was of 104 days; 123 days between the first and the last hearing; 45 days between the last hearing and the decision (in cases where the decision was not issued during the last hearing); and 130 days between sentencing and archival.

Procedures using the expedited rite (*rito sumaríssimo*) were considerably faster than those using the ordinary rite. From hearing to decision, the ordinary rite has an average duration of 60 days; the average duration of expedited rites is 24 days (ibid., 76).

In general, lawsuits decided in 2018 and in which there were appeals took an average of 980 days, and those where there was an execution reached an average of 1,136 days.

The CNJ also has information regarding average processing times, and the data reveal additional delay for all procedural classes, except for Judicial Execution, which became gradually faster.

TABLE 6.51 Average lawsuit processing time (until archival) in Labour Justice branches, 2015–2019

Year/Labour Justice branch	TST	TRTs	Courts (acknowledgement)	Courts (execution)
2015	1 year, 3 months and 12 days	7 months and 23 days	7 months and 9 days	3 years, 7 months and 9 days
2016	1 year, 6 months and 12 days	8 months and 3 days	6 months and 15 days	2 years, 8 months and 6 days
2017	1 year, 7 months and 26 days	8 months and 24 days	7 months and 28 days	2 years, 9 months and 22 days
2018	1 year, 7 months and 1 day	9 months and 22 days	8 months and 24 days	3 years, 6 months and 13 days
2019	1 year, 5 months and 26 days	10 months and 7 days	7 months and 28 days	4 years, 2 months and 23 days

Source: Authors' elaboration based on statistics and reports from Labour Justice.

Finally, the Justice in Numbers report does not address the average sentencing values or the compliance rates. However, the survey analyses bottlenecks in first instance execution lawsuits, which are the slowest in Brazilian justice and which directly regard compliance with decisions.

In this context, two indicators are relevant: the percentage of pending executions relative to the total number of pending lawsuits; and the bottlenecking rate, which measures the

percentage of cases that remained pending compared to those that were processed (the sum of pending and decided lawsuits).

Considering Labour Justice as a whole, bottlenecking was slightly reduced in recent years, which means less pending first-instance executions. However, the reduction in bottlenecking was even more pronounced in lawsuits in the acknowledgement phase.
In addition, the percentage of pending executions relative to the total stock of pending lawsuits has increased. Table 6.52 presents these data.

TABLE 6.52 First-instance bottlenecking rates and percentage of pending executions relative to the total stock of pending lawsuits

Year	Acknowledgement	Execution	
	Bottlenecking rate	Bottlenecking rate	Percentual do acervo (pendentes)
2015	48%	70%	2015
2016	46%	77%	2016
2017	44%	75%	2017
2018	38%	73%	2018
2019	35%	73%	2019

Source: Database from Justice in Numbers (CNJ 2020).

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CHAPTER 7. CASE STUDY: MEXICO

7.1 EMPLOYMENT PROTECTION

7.1.1 Origins of labour protection, union organisation and labour conflict resolution system

During Mexico's independence war (1810-1824), slavery and the system of tributes paid by indigenous people and *castas* were abolished as a result of the 1810 Decree issued by Miguel Hidalgo y Costilla. After the country's independence from Spain, a period of severe instability marked its politics for over 60 years, coming to an end only in 1876, when Porfirio Díaz came to power. This fact marked beginning of the so-called 'Porfiriato' era, which lasted until the beginning of the Mexican revolution in 1911.

The 1857 Constitution of the Republic of Mexico, which came into force during Porfirio's authoritarian government, was characterised by a liberal model inspired by the 1789 French Declaration of the Rights of Man and of the Citizen. As pointed out by Moreno (2019), this formal model did not fit Mexico's society, which was marked by inequality, predominantly based on agriculture of indigenous extraction. Moreno also highlighted that the 1870 Civil Code regulated for the first time the modalities of service provision, working hours and salaries based on the customs of each state. However, while the government's focus was on favouring investments and attracting capital, peasants and labourers were working in inhumane conditions, for salaries that were often insufficient to cover even their basic needs. This was one of the factors that led, amid strong social tensions, to the Mexican revolution of 1911.

The 1917 Constitution, itself a product of the revolution, marked a shift from a liberal model (mainly focused on individual freedoms) to a legally positivist one, in which wage labour is finally afforded protection at the constitutional level (ibid.). In accordance with the new Constitution and notwithstanding the freedom of private economic enterprise, the State would adopt a proactive stance in the regulation of the conflicting interests of capital and the working class through the establishment, at the constitutional level, of a detailed set of rights, limitations, prohibitions, etc., considering the asymmetrical nature of the power dynamics between the two. In this sense, 'work' was fundamentally defined, based on the German and Belgian legal traditions, as a social right. Therefore, several features are contextually guaranteed, as analysed in the following paragraphs.

When characterising work as 'free', Art. 5 of the 1917 Constitution specifies that it must not be subjected to any kind of coercion: even in case of non-compliance by the worker regarding the employment contract, they are only subject to civil liability. Another guarantee detailed in the same article is that the employment contract can never result in the waiver, loss

or impairment of any of the worker's political or civil rights. In turn, Art. 123 provides a constitutional basis generally applicable to all forms of employment, to be complemented by the legislation of the Congress of the Union and state legislatures.

From a constitutional perspective, two observations are necessary. First, Art. 5 of the Constitution is in Chapter 1 of Title I, which regulates 'Individual Guarantees', whereas Art. 123 can be found in Title VI, dealing with 'Labour and Social Security'. This setting determines the separation of labour regulation from civil law, as can also be inferred from the wording of Art. 123. Second, the 1917 Constitution also allowed states to legislate on the matter. However, the article was amended in 1929 to eliminate this possibility (i.e., the federalisation of labour law—Congress of the Union).

Art. 123 of the 1917 Constitution is the core norm that affords protection to workers through its 30 sections. It:

1. Limits the working day to 8 hours (7 for night work).

2. Introduces a mandatory rest day for every 6 working days.

3. Affords specific protection to working women and minors. The 1917 Constitution already provided for maternity protection, guaranteeing a month of paid rest after childbirth, among other elements.

4. Provides for a minimum wage sufficient to cover the 'usual needs' of workers and their dependents, as well as their education; and workers' participation in the profits of private enterprises.

5. Introduces the principle of 'equal pay for equal work', regardless of gender or nationality.

6. Requires the employer to observe safety and health norms and adopt measures to prevent accidents at work; in addition, it provides for the liability of the employer for work-related accidents and occupational diseases.

7. Enshrines the freedom of association for workers and employers to defend their respective interests.

8. Establishes the rights of workers and employers to industrial action and directly enumerates the parameters to determine whether such action is lawful or not.

9. Provides for the reinstatement of the worker or economic compensation in case of dismissal without just cause.

10. Identifies null and void clauses in the employment contract.

Although this list comprises only part of Art. 123's scope, which analysed in detail in Section 2B, it is already possible to note a radical shift compared to the previous constitutional setting. Regarding labour justice, whose evolution over time is analysed in Section 3, the Constitution also provided for the creation of Arbitration and Conciliation Boards (*Juntas de Conciliación y Arbitraje)* as tripartite bodies dedicated to the resolution of labour disputes.

Building on this constitutional basis, the first Federal Labour Law (*Ley Federal del Trabajo*—LFT) was unanimously approved in 1931 and remained in force for almost 4 decades. It regulated individual and collective labour relations, as well as procedural and administrative matters. From the perspective of substantive law, in addition to regulating the aforementioned constitutional provisions, the LFT also (Ortiz Porras 2019):

1. Defines workers' rights as 'inalienable'.

2. Introduces the presumption of the existence of the employment contract in correspondence of the provision of a service.

3. Requires the employer to establish a collective agreement when employing workers affiliated with a trade union.

4. Allows closed-shop clauses in collective agreements.

Significant changes occurred in Mexico while this legislation was in place. In addition to experiencing strong economic growth, the country became predominantly industrial. Therefore, the working class grew considerably, migrating from rural to urban areas, as well as the number of trade unions and collective agreements (Marquet Guerreiro 2014). On 1 May 1970, a new version of the LFT replaced the previous legislation.

The Constitution—more precisely, Art. 123—was amended several times before 1970. Perhaps the most significant modifications were produced by the 1960 and 1962 amendments, through which Section B was added to Art. 123, recognising and regulating as separate the employment relationship between the Federal State and civil servants.

Similarly to the previous Labour Code, the 1970 LFT combines the regulation of labour and some aspects of social security in a single piece of legislation. In addition to establishing the fundamental principles of labour law and determining its scope of application, it regulates the individual employment relationship (including suspension/termination), as well as collective labour relations (such as trade unions and collective agreements). It also provides mandatory standards related to working conditions (e.g., duration of working days, rest, wages, etc.). In addition, the LFT also establishes norms inherent to the actions of public

bodies involved in labour and employment, including administrative and jurisdictional authorities. From the perspective of substantive law, the novelties introduced by the 1970 LFT comprised (Ortiz Porras 2019):

1. The principle of '*in dubio pro operarium*'.

2. Bonuses (including seniority bonus) and the figure of 'trusted employee' (*trabajadores de confianza*).

3. Establishment of joint and several liability of the beneficiary firm in the event of insolvency of the service-providing firm.

4. The non-requirement of an employment contract is instituted to demonstrate the existence of a subordinate employment relationship.

5. The concept of integrated salary is established for the payment of compensation.

In 2011, a constitutional amendment on human rights also affected labour and employment. The reform, in addition to strengthening the mechanisms through which the state must protect, respect and fulfil human rights, elevates human rights treaties (and the rights enshrined therein) ratified by Mexico to a constitutional level. In a break with the past, it also attributed to the National Human Rights Commission the competence to deal with grievances related to administrative actions or omissions in the context of labour (Art 102, Let. B). The same also applies to individual states' Human Rights Commissions (Kurczyn Villalobos 2012).

From a legal perspective, despite several modifications to the LFT (e.g., 1977, 1980, 1982, 1983, 1986, etc.), the system remained in place for over 40 years without any major changes in the underlying approach, until the 2012 reform. During this period, Mexico underwent significant political, social and economic changes. Rising inflation led to a considerable decrease in the purchasing power of the working class, while the country's gradual opening to international trade implied a loss of competitivity of Mexican companies, leading to a subsequent increase in unemployment (ibid.).

The main objective of the 2012 LFT reform was to foster employment and productivity, to be achieved through new forms of contracting that allowed for more flexibility and a reduction in layoff costs, among other mechanisms. While the main directive of the 2012 reform was the overall flexibilisation of employment, some modifications introduced during discussions at Congress strengthened the position of workers. Among these, Marquet Guerreiro (2014, 276–277) highlights the recognition that labour norms aim to reach a balance between productivity and social justice, and the explicit incorporation (and definition) of the concept of 'decent

work'. According to Guerreiro, the reform aims (from an ideological perspective) to substitute the contrast of class struggle with a "mutual understanding of respective needs and technical cooperation", considering the increased relative weight of productivity and competitiveness.

Another goal of the 2012 reform was the improvement of collective labour relations, especially freedom of association and the right to collective bargaining. In this respect, these modifications compelled Conciliation and Arbitration Boards to make publicly available the information required by the LFT for trade union registration (Art. 365-Bis), trade unions' statutes (Art. 424 -Bis) as well as collective agreements (Art. 391-Bis). In addition, the reformed LFT grants workers the right to request information concerning the management of trade unions' funds and assets to the managing boards (Art. 373). In parallel, the reformed LFT, through Art. 132, requires employers to affix and circulate in the workplace a full copy of collective agreements. This set of obligations was introduced to address the long-standing problems of the so-called 'protection trade unions' and 'employer protection agreements' ('*sindicatos de protección*' and *'contratos de protección patronal'*), addressed in detail in Section 2C. The International Labour Organization (ILO)'s 2015 Committee on the Application of Standards noted that the legal obligation to publish the registration of trade unions remained largely unfulfilled (ILO 2015), and requested the government to:

1. Fulfil without delay its obligation to publish the registration and by-laws of trade unions in the local boards of the 31 states in the country, not just in the Federal District and San Luis de Potosí, in a period of three years as established in the Federal Labour Law.

2. Identify, in consultation with social partners, additional legislative reforms to the 2012 Labour Law necessary to comply with ILO's Convention No. 87 (Freedom of Association and Protection of the Right to Organise Convention, 1948). This should include reforms that would prevent the registration of trade unions that cannot demonstrate the support of the majority of the workers they intend to represent, by means of a democratic election—known as 'protection unions'.

An additional request with similar contents to the one detailed above followed in 2016—see Individual Case (CAS)—Discussion: 2016, Publication: 105th ILC session (2016).

A watershed moment in the evolution of Mexico's labour legislation was the 2017 constitutional reform of Art. 123 and the subsequent LFT amendments in 2019. Prior to analysing the contents of the reform, two observations are required from an international perspective. First, it is important to note that the long negotiations underlying the United States-Mexico-Canada Agreement (USMCA), and subsequently the commitments undertaken under its Art. 23 and Annex 23-A, had a considerable impact in the reform of the national legislation and its implementation. Second, in 2018 Mexico ratified ILO's Convention No. 98 (Right to Organise and Collective Bargaining), finally becoming party to all Fundamental Conventions.

The reform introduced significant changes to the labour justice system, guaranteeing to a broader extent the freedom of association and collective bargaining. Regarding labour justice, first with the amendment of the Constitution and then with that of the LFT, as analysed in detail in Section 3, Arbitration and Conciliation Boards at both federal and local levels were replaced with labour courts, under the aegis of the Judiciary. In addition, prior to resorting to labour courts, the reform also provided for a mandatory conciliation phase through newly established (local or federal) conciliation centres. This resulted from the need to increase the effectiveness of labour dispute resolution and guarantee broader access to justice, considering that the excessive workload of the previous Arbitration and Conciliation Boards in some cases resulted in the non-observance of the procedural *iter* provided for in the LFT, further increasing the duration of disputes.[1]

The reform also modified key aspects of substantive labour law, especially regarding freedom of association and collective bargaining. Table 7.1 reports the main changes resulting from the reform regarding these two issues to ensure the implementation of obligations stemming from recent international commitments.

TABLE 7.1 Main innovations of the 2017 constitutional reform

Issue	Main changes
Freedom of association	Freedom of association is bolstered through: • Wider protection afforded by the choice of belonging or not to a trade union; on the other hand, closed-shop clauses are still legitimate. • Election of union officials/board members through democratic processes (personal, free and secret vote). • Reinforced workers' right to information concerning finances and administration of trade unions. • Non-interference of the employer: employers must not intervene, through payment or other kinds of support, in trade union activities in the interest of controlling them. • Registration of trade unions carried out by the newly established Federal Centre for Conciliation and Labour Registry: transfer of the jurisdiction concerning union matters and collective bargaining agreements from the local to the federal sphere. • Publication of (registered) union documents in a dedicated web page. • Judicial dissolution of trade unions participating in acts of extorsion against employers (demanding money/benefits to withdraw calls for strikes or not participate in union certification processes).
Collective bargaining	The right to collective bargaining is ensured more broadly through: • The personal, free and secret vote of workers for: the initial establishment of the collective bargaining agreement; the ratification of the contents of a) collective bargaining or b) the convention to review/modify the collective agreement (every two years); the legitimisation—i.e., eventual approval of the contents of existing collective agreements within a 4-year term (2023), as per transitory provisions. • The requirement of a 'Certificate of Representation' for trade unions, issued by the Federal Centre for Conciliation and Labour Registry, for the establishment of an initial collective agreement; this document avails that the trade union has the support of at least 30 per cent of the workers covered by the agreement.

Source: Authors' elaboration based on Gobierno de Mexico (2021) and de la Vega (2019).

1. For example, hearing dates are often fixed in excess of the terms established in the LFT. This allows for parties to resort to 'indirect protection' (*amparo indirecto*) before the district judge, who will then determine a new hearing date within the terms provided by law.

In addition, the reform strengthens mechanisms against discriminatory practices, mobbing and harassment while promoting gender equality; maternity protection is also reinforced.

Moreover, it is important to highlight the establishment of the Federal Centre for Conciliation and Labour Registry, regulated by the homonymous organic legislation and by-law. This body undertakes the following key functions: registration of trade unions and deposit of collective agreements at the national level; verification of the democratic processes of trade unions (i.e., workers' votes to elect trade unions officials and the approval of collective agreements); and issuance of the 'Certificate of Representation. The Centre also plays a role in conciliation at the federal level, analysed in Section 3.

However, this reform will not come in force all at once. Transitory provisions determine that:

1. The Federal Centre will start carrying out its registration functions within two years after the legislation comes into force; until these operations begin, Arbitration and Conciliation Boards and the Secretariat for Employment and Social Security will continue performing the relevant functions as established by the LFT prior to the reform.

2. Conciliation centres and local courts must commence operation within 3 years from the legislation's entry into force.

3. The Federal Centre will undertake its conciliation function within four years after the legislation enters into force. Federal labour courts will begin their operations in the respective judicial circuit; each judicial circuit will begin its functions in the order and sequence determined by the Senate of the Republic, upon request by the Federal Judicial Council. The first states to implement the legislation are Campeche, Chiapas, Durango, Estado de México, Hidalgo, San Luis Potosí, Tabasco and Zacatecas.

4. The individual and collective proceedings before the Conciliation and Arbitration Boards prior to the law's entry into force, as well as those filed afterwards but before the labour courts are operational, will continue until their conclusion under the current Federal Labour Law.

5. As already mentioned, existing collective bargaining agreements must be revised at least once within four years after the law comes into force.

7.1.2 Constitutional protection for employment

As mentioned earlier, Articles 5 and 123 stand at the core of Mexico's constitutional labour law. Prior to analysing the normative contents of these provisions, some observations are required.

Since its introduction in the 1917 Constitution, Art. 123 has been amended 27 times, whereas Art. 5 only had 5 amendments—the last in 2016. According to Rivera León (2017), there is no single cause for the constant amendments to the Mexican Constitution, as these rather follow a complex structural framework.[2] A possible consequence is the non-consolidation of institutions enshrined therein. Another aspect that distinguishes Mexico's Constitution from that of the other countries analysed in this study is the level of detail of its provisions: for example, Art. 123 comprises over 40 paragraphs. Finally, Mexico's Constitution is also the only one that includes several detailed provisions dedicated to the resolution of controversies and disputes between employers and workers—which were object of substantial modification with the 2017 reform.

Article 5 deals with the human right to free choice of occupation. No person can be prevented from performing the profession, industry, business, or work of his choice, if it is within the confines of the law. This right can be voided by judicial resolution when the rights of third parties are infringed, or by government order, issued according to the law, when the rights of society in general are infringed. On the other hand, it is up to states' legislatures to determine the professions which require a degree to be practiced, as well as the associated requirements and the authorities responsible for issuing these degrees.

Work must also be 'free', in the sense that no one can be compelled to work or render personal services without their full consent and in correspondence of fair compensation, except for work imposed as a penalty by a judicial authority. Accordingly, any contract, pact or agreement whose purpose is the demerit, loss or irrevocable sacrifice of a person's liberty is prohibited. In parallel, the employment contract cannot include the waiver, loss or impairment of any political or civil right of the worker.

Art. 123 enshrines in its first paragraph every person's right to a decent and socially useful job. It consists of 2 sections: Section A governs labour relations between workers, day laborers, domestic employees, artisans and, in general, all employment contracts. The basic principles set therein are incorporated and further regulated by the LFT. Section B refers to the labour relations between the powers of the Union and its workers. At the statutory level, the Federal Law of Civil Servants (*Ley Federal de los Trabajadores al Servicio del Estado*) is the main legal framework.

Section A of Art. 123 includes the following basic principles:

a) Concerning working conditions: the organisation of work and work activities—e.g., limitations to the work of minors and pregnant women; workers' training and capacitation; health and safety—i.e., employers' obligation to observe legal regulations and adopt adequate measures for the prevention of accidents, as well as employers'

2. Including the hegemonic position of certain political parties, politicisation of the fundamental law, regulatory nature of its provisions and an ongoing process of centralisation.

liability for workers' accidents at the workplace and occupational diseases—and well-being—e.g., the provision of housing; and, working time and work-life balance—i.e., the maximum duration of working days and nights, overtime and mandatory rest.

b) Concerning remuneration: principle of equal pay for equal work; compensation of overtime; wage payment in legal tender; and the minimum wage. The Constitution makes a distinction between the general minimum wage—which must be sufficient to satisfy the 'usual' material, social and cultural needs of a family and provide compulsory education to children—and professional minimum wages, applicable to specific industries, professions, trades or special work. The Constitution also provides for the creation of a national commission (The National Minimum Wage Commission) responsible for determining the value of the minimum wage.

c) Concerning dispute resolution: establishment of labour courts to replace Arbitration and Conciliation Boards; mandatory conciliation phase prior to resorting to the courts; establishment of local Conciliation Centres as well as the Federal Centre for Conciliation and Labour Registry. All these elements were introduced after the 2017 constitutional reform.

d) Concerning collective labour relations, unfolding into:

    1. Workers' and employers' right to organise (trade unions, professional associations, etc.).

    2. Workers' and employers' rights to strike and lockout, as well as respective limits. Regarding the enactment of a strike to reach a collective agreement, the 2017 reform requires the proof of workers' representation (i.e., the Certificate of Representation)

    3. Right to collective bargaining.

    4. Ensuring the representativeness of trade unions and validating the signature, registration and deposit of collective agreements.

Reinforcing the position of workers through:

1. Social security.
2. Identification of null and void clauses in employment contracts.
3. Protection against unfair dismissal and dismissal of those who joined a trade union or a (licit) strike, culminating in either the reinstatement or the compensation of the worker.
4. Priority over all other obligations, in correspondence of receivership or bankruptcy,

afforded to credits in favour of workers for wages earned within the last year and for compensations. Protection of the 'family wealth' which is inalienable, not subject to taxes or attachments. Limitation of worker's liability for debts payable to the employer (or its associates, relatives or dependents): the payment cannot be exacted from the members of the worker's family under any circumstances, nor are these debts chargeable for an amount exceeding one month's salary.

5. Maternity protection and banning minors under 15 years of age from working.

In addition, Section A of Art. 123 establishes that, in principle, the enforcement of labour law lies under the purview of state authorities within their respective jurisdictions. On the other hand, several industrial sectors and services, certain corporations as well as certain matters (including, after the 2017 reform, the registration of all collective agreements and trade unions) are reserved to the exclusive jurisdiction of federal authorities.

While we cannot fully analyse Section B of Art. 123—regulating the relations between the Powers of the Union, the Federal District Government and their employees—in the present study, it is nevertheless important to highlight three significant differences in relation to Section A. First, the wages of civil servants are fixed in the respective budgets, rather than negotiated. Another difference is that striking is subject to more stringent limits. Civil servants can only resort to this instrument in correspondence of a general and systematic violation of the rights enshrined by Art. 123.

Conversely, Section A regards strikes as legal when their purpose is to attain a balance between factors of production, harmonising labour rights and the purposes of capital. Third, Section B provides that there shall be a system for the appointment of personnel which revolves around knowledge and skills, and correspondingly establishes the State's obligation to organise public administration schools.

7.1.3 Substantive labour law

A. Contextualisation and features of labour law

In Mexico's legal system, labour is an autonomous branch of law, despite the historic linkages with civil law explained further in Section 2A. Therefore, it is governed by specific principles, rules and institutes.

Art. 73 of the Constitution attributes to the Congress of the Union the power to enact labour legislation, thus implementing Art. 123. On the other hand, Section A of Art. 123 determines that the enforcement of labour legislation belongs to the authorities of the states, within

their respective jurisdictions. However, as briefly mentioned above, certain industrial sectors, services, corporations and matters fall under the exclusive jurisdiction of federal authorities, as represented in Table 7.2.

TABLE 7.2 Matters that fall exclusively under Congress

Industrial sector and services	• Textile industry; electricity; movie industry; rubber; sugar; mining; metallurgical, iron and steel industries; hydrocarbons; petrochemistry; cement, lime kilns; automotive industry; chemical industry (including the pharmaceutical and drug industry); cellulose and paper; oils and vegetable fat; food production (only industries producing packed, canned or bottled products); railroad workers; basic lumber industry; manufacture of glass bottles and flat glass; tobacco industry; and, bank and credit institutions
Corporations	• Corporations administered directly or in a decentralised form by the federal government • Corporations that have a contract or licence granted by the federal government; and, • Corporations working in federal zones or under federal jurisdiction, in territorial waters or inside Mexico's exclusive economic zone
Matters	• Registration of all collective agreements and trade unions (and associated administrative processes) • Labour disputes affecting two or more states • Collective agreements that have been declared mandatory in more than one state • Employer's obligations regarding educational matters • Employer's liabilities regarding training for workers, and safety and hygiene at work centres (with the assistance of state authorities)

Source: Authors' elaboration based on Art. 123, Section A of the Mexican Constitution.

The main regulatory sources of labour law are:

1. The Constitution and International Treaties (e.g., human rights instruments, ILO's Conventions, multi and bilateral treaties, etc.).

2. The law (LFT and Federal Law of Civil Servants, as well as associated implementing regulations).

3. General principles of law.

4. Jurisprudence.

5. Customs.

6. Equity.

7. Collective agreements and the so-called *contrato ley*.

8. Labour norms.

In this respect, Art. 17 of the LFT provides that in the absence of an express provision (in the Constitution, the LFT itself or its regulations, or international treaties), provisions that regulate similar cases will be considered, as well as the general principles enshrined therein, the general principles of law, the general principles of social justice derived from Art. 123, jurisprudence, customs, and equity. On the other hand, Art. 18 LFT disposes that in case of doubt in interpreting labour norms, the interpretation that is most favourable to the worker shall prevail (principle of *favor laboratoris*).

The LFT establishes that labour norms must seek a balance between the factors of production and social justice, as well as promote decent work in all employment relationships (Art. 2). 'Decent work' is defined as those in which the human dignity of the worker is fully respected; there is no discrimination based on ethnicity or nationality, gender, age, disability, social status, health conditions, religion, immigration status, opinions, sexual preferences or marital status; there is access to social security and a remunerative salary is received; in which workers receive continuous training to increase productivity with shared benefits, and optimal safety and hygiene conditions are guaranteed to prevent risks. The concept of decent work also includes the full application of workers' collective rights, such as freedom of association, autonomy, the right to strike and the right to collective bargaining.

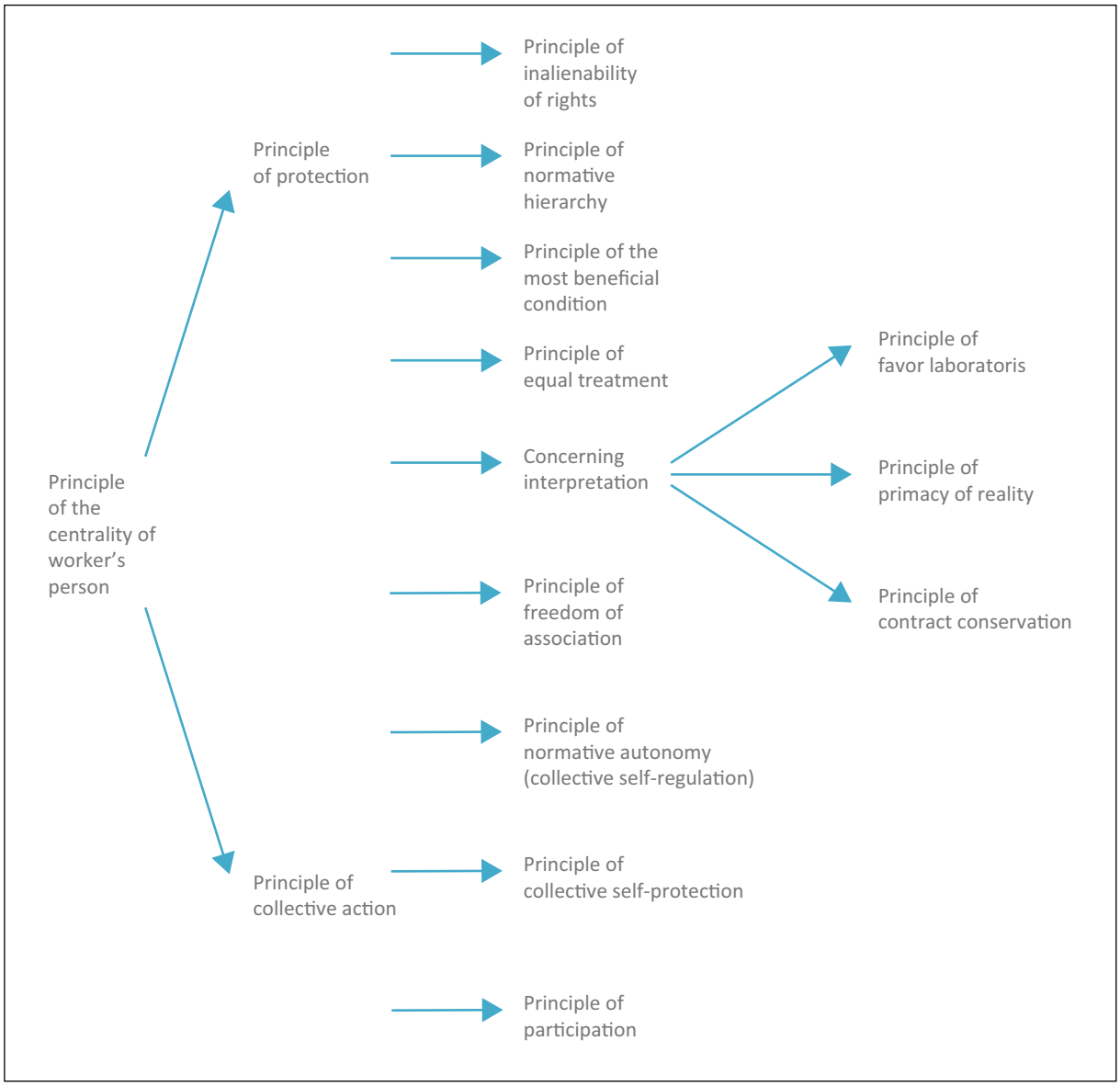
In addition, with a view to eliminate gender discrimination, the same article provides for the protection of substantive (or *de facto*) equality of male and female workers before employers, which entails access to the same opportunities, accounting for the biological, social and cultural differences between the sexes.

Art. 3 characterises work as a social right and duty, which requires the respect of the freedoms and dignity of those who provide it. It also explicitly prohibits discrimination on the grounds of ethnicity, gender, age, disability, social condition, health, religion, migratory status, opinion, sexual preferences, marital status or any other condition that goes against human dignity.

Art. 5 sheds some light on the nature of labour norms, classifying the LFT provisions as belonging to the public order and correspondingly identifying several clauses that will not produce any legal effect, despite their presence in an employment contract. In this sense, as already stated, the LFT (following the Constitution) defines workers' rights as inalienable. The Art. concludes that if one or more of the clauses listed therein are present in an employment contract, these will be null and void and the law will replace them. Moreover, Art. 19 of the LFT also specifies that all acts and activities related to the application of labour norms will not be subject to any form of taxation.

Figure 7.1 illustrates the principles that govern Mexico's labour law, according to the classification proposed by Podetti (1997, 139).

FIGURE 7.1 Principles of Mexico's labour law



Source: Authors' elaboration.

As depicted in the figure, the core principle underlying the country's labour legislation is the centrality of the worker's person: the provision of work cannot be intended as a mere item of commerce (Art. 3 of the LFT). On the contrary, 'decent work' implies the "full respect of the human dignity of the worker" (Art. 2 LFT). Two basic principles stem from this core principle: protection and collective action. The principle of protection stands at the core of labour law, as it fundamentally aims to address the existing social, economic and cultural inequalities between the employer and the employee. The principle of collective action is central in collective labour relations: through it, socio-professional groups exercise their powers of self-organisation according to freedom of association, collective autonomy or collective labour self-regulation, collective labour self-supervision, and participation.

To conclude, according to Dávalos (2016, 59), Mexican labour law can be characterised as follows:

1. It fundamentally aims to protect the worker/person, considering the asymmetries of power between them and the employer.

2. It is a branch of law in constant expansion and evolution.

3. It entails social guarantees for workers: labour legislation provides a minimum set of standards which cannot be derogated *in peius*.

4. It provides inalienable rights for workers, considering that labour norms belong to the public order (Art. 5 of the LFT).

B. The employment contract

Art. 20 of the LFT defines the individual employment contract, regardless of its form or denomination, as that by virtue of which a person assumes an obligation to provide subordinate personal work to another entity, in correspondence of the payment of a salary.

The LFT's definition of individual employment contract relies on four fundamental elements. First, there must be a personal (i.e., made by an individual) and voluntary (i.e., without coercion) provision of service. Second, the service must be directed towards another entity (or entities)—i.e., the employer, who takes advantage of the result of the work and, at the same time, bears the risk of potential losses. Third, to the provision of service there must correspond remuneration as a result of the bilateral nature of the employment contract. Finally, there must be legal subordination: the employer, within the scope of the organisation of the company, is entitled to exercise (directly or through delegation) command, supervisory and disciplinary powers within the limits set by the law and applicable contractual agreements.

Although the question of whether an employment contract is necessary or not to determine the existence of an employment relationship has been long debated among scholars without reaching a definitive consensus, the current view is that while the employment relationship usually originates from an agreement of the parties, this can also be tacitly determined ("the execution proves the contract") (Córdova 1997). In this respect, Art. 20 of the LFT clarifies that the provision of a service and the employment contract produce the same effects.

It is also important to point out that the negotiating autonomy of the parties is subject to limitations. The LFT provides minimum standards which cannot be derogated. Also, as already mentioned, workers' rights are inalienable. Art. 5 lists a set of null and void clauses, including:

1. Work for minors aged 14 years or less.

2. Working days exceeding the limits set in the LFT.

3. Wages inferior to the minimum wage.

4. Lower salaries than those paid to another worker in the same company or establishment for work of equal efficiency, in the same kind of work or the same day, due to age, sex or nationality.

5. The worker's renunciation of any of the rights or prerogatives afforded by labour laws.

6. Covering up an employment relationship through legal devices to avoid compliance with labour and/or social security obligations.

7. Logging a work with a lower pay than the one received.

The latter two cases were added due to the 2019 reform. A contractual clause which falls under one of the cases detailed in Art. 5 does not produce any effect or prevent the enjoyment or exercise of rights and is replaced by the law or supplementary norms. Thus, such clauses do not determine the annulment of the whole contract. The LFT, in addition to determining several obligations and prohibitions incumbent on workers and employers, is analysed in the next subsection.

From a formal perspective, while the LFT does not impose a particular form for individual employment contracts in principle, Art. 24 requires stating the working conditions in writing when there is no applicable collective agreement. Art. 25 goes on to identify working conditions, including: personal information of both employer and employee; the duration of the employment relationship (i.e. fixed-term, seasonal, initial training or for an indefinite period); the service(s) to be provided; the place of service provision; the duration of the working day; form and amount of salary; date and place of payment; training and qualification elements; and other working conditions, such as rest days and holidays, as agreed upon by the parties. Finally, Art. 26 determines that the lack of this statement does not deprive the worker of the rights originating from labour norms and services provided, imputing to the employer the lack of that formality.

C. The employment relationship

We introduce some relevant definitions to begin our analysis of the employment relationship.[3] Art. 8 of the LFT defines 'employment' as all human activity, intellectual or material, regardless of the degree of technical preparation required by each profession or trade. The same norm

3. Although not covered in this study, it is also important to mention the growing debate on issues related to outsourcing and the rights of domestic workers in Mexico.

defines the 'employee' as the person who provides to another physical person or legal entity personal, subordinate work.

According to Art. 10, the 'employer' is defined as the person or legal entity that uses the services of one or more employees. Finally, the (individual) 'employment relationship' is defined in Art. 20 as the provision of personal subordinate work to a subject, through the payment of a salary.

A contract and employment relationship are presumed to exist between the one who provides a personal subordinate work and the one who receives it (Art. 21). In labour disputes, it is often sufficient to demonstrate the registration of the parties as employer and employee to presume the employment relationship, without needing to prove the remaining elements (Pérez Chávez 2015). Art. 35 provides that employment relationships can involve a specific job or timeframe (seasonal or for an undetermined duration) and, where appropriate, may be subject to testing or initial training. In the absence of express stipulations, the relationship is considered as established for an unspecified amount of time.

As stated above, the LFT sets several obligations and restrictions both for employers and workers, reported in Table 7.3.

TABLE 7.3 Obligations and restrictions for employers and workers

Employer's obligations (Art. 132 of the LFT)
• Visibly set, disseminate, install, and operate workplaces in accordance with Mexico's official regulations and standards on safety, health and working environment to prevent accidents and occupational diseases.
• Workplaces with more than fifty workers must have adequate facilities for people with disabilities.
• Visibly affix and disseminate at the workplace the full text of the collective bargaining agreement(s) that govern the company.
• Disseminate information to workers about the risks and dangers to which they are exposed.
• Comply with the provisions established by authorities in the event of a health emergency and provide workers with the elements indicated by authorities to prevent illnesses in the event of a health emergency.
• Carry out deductions and payments corresponding to pensions and collaborate to that effect with the competent jurisdictional authority.
• Affiliate the workplace with the Institute of the National Fund for the Consumption of Workers.
• Grant a paternity leave of five working days with pay to working men upon the birth of their children, and likewise in case of adoption.
• Comply with the labour norms applicable to the companies or establishments.
• Pay wages and compensation in accordance with regulations in place.
• Provide the workers with good quality tools, instruments and materials necessary for the execution of the work in a timely manner, replacing them as soon as they are no longer efficient, provided that workers have not committed to using their own tools. The employer cannot demand any compensation for the natural wear borne by said instruments and work materials.
• Provide a safe place for the storage of instruments and work tools belonging to the workers. They must remain in the place where workers provide their services. It is illegal for employers to retain them as compensation, guarantee, etc.
• Maintain enough seats or chairs available to workers depending on the nature of the work; keep the workers in due consideration, abstaining from bad treatment (of word or deed); upon request of the workers, issue a written record every fifteen days of the number of days worked and the salaries received.
• Issue to the worker who requests it or separates from the company, within a period of three days, a written certificate regarding their services; grant workers the time necessary to exercise their votes in popular elections and to carry out jury, electoral and census duties.

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Employer's obligations (Art. 132 of the LFT)

- Allow workers to skip work to carry out an accidental or permanent commission of their union or the state, provided that this is duly notified and that the number of commissioned workers does not hinder the proper running of the establishment. Lost time may be discounted unless the worker compensates it with equal time of effective work. When the commission is permanent, the worker may return to the position previously held, retaining all their rights, if they return to work within six years. The employer must inform the union that is party to the collective agreement and the workers in the immediate lower category of newly created positions as well as permanent and temporary vacancies that must be filled.
- Establish and maintain the schools' "*Artículo 123 Constitucional*".
- Collaborate with the labour and education authorities to achieve worker literacy.
- When the company employs more than 100 and less than 1,000 workers, it must pay the expenses necessary to sustain in a decent way the technical, industrial or practical studies, in special centres, national or foreign, of one of their workers or one of their worker's children, so appointed due to their aptitudes, qualities and dedication by the workers themselves and the employer. If employing over 1,000 workers, employers must support three employees according to these conditions. The employer can only cancel the scholarship when the beneficiary fails the course or due to bad conduct; however, in these cases the beneficiary will be replaced by another. Employees who have completed their studies must render their service to the employer who has granted them the scholarship for at least one year. The obligation of employers to provide qualification and training to their workers remains standing.
- Install, comply with and disseminate good hygiene and safety measures in visible places to prevent risks at the workplace.
- Provide workers with prophylactic medications specified by the health authorities in places where there are tropical or endemic diseases, or when there is danger of an epidemic.
- When the number of employees of a rural workplace exceeds 200, a space of not less than 5,000 square meters should be reserved to set up public markets, buildings for municipal services and recreational centres, provided that the work centre is not less than five km away from the nearest town; upon request, in rural work centres, provide unions with an unoccupied space so that they may install their offices, levying the corresponding rent. If there is no space available for this purpose, any space assigned for workers' accommodation may be used instead.
- Carry out the deductions requested by the unions from regular union dues and carry out other deductions provided by law.
- Carry out the deductions from fees for the establishment and promotion of cooperative societies and savings banks.
- Allow for labour authorities to inspect and survey the establishment.
- Contribute to the promotion of cultural activities and sports among workers and provide them with the necessary equipment and supplies.
- Provide pregnant women with the protection established by regulations and participate in the integration and operation of the commissions that must be formed in each workplace, in accordance with the provisions of the LFT.

- **Worker's obligations** (Art. 134 of the LFT)

- Observe labour norms.
- Observe the provisions contained in the regulation and the official Mexican standards (NOMs) in matters of safety, health and the working environment, as well as those indicated by the employers for safety and personal protection.
- Carry out the work under the direction of the employer or its representative, subordinated to their authority.
- Give immediate notice to the employer, except in the case of force majeure, of the justified reasons that prevent the employee from attending work.
- Return unused materials to the employer and keep the instruments and supplies that were given for work purposes in good condition. Employees are not responsible for deterioration caused by the use of these objects, nor that caused by fortuitous event, force majeure, poor quality or faulty construction.
- Observe decency during the provision of work.
- Provide aid at any time it is needed, due to imminent risk that the employees or the interests of the employer or their co-workers are in danger.
- Integrate the institutions determined by the LFT.
- Submit to the medical examinations provided for in the internal regulations and other regulations in force in the company or establishment, to verify that the worker does not suffer from any incapacitation or illness from work that is contagious or incurable.
- Inform the employer of the contagious diseases they suffer from as soon as they become aware of them.
- Communicate any shortcomings or flaws they notice to the employer, so as to avoid damage or harm to the interests and lives of their co-workers or employer.
- Scrupulously hold the technical, commercial and manufacturing know-how of the products they contribute to build, directly or indirectly, or of which they have knowledge due to the work they carry out, as well as of reserved administrative matters whose disclosure may cause damage to the company.

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Employer's restrictions (Art. 133 of the LFT)
• Refuse to accept workers based on ethnic or national origin, gender, age, disability, social condition, health conditions, religion, opinions, sexual preferences, marital status, or any other criteria that may give rise to a discriminatory act. • Require that workers buy their consumer items at a specific store or location. • Demand or accept money from workers as payment to be admitted to the job or for any other reason that refers to employment conditions. • Forcing workers by any means to join or withdraw from the union or group to which they belong, or to vote for on behalf of any given candidate. • Intervene in any way in the internal regime of the union, prevent its constitution or the development of union activity, through implicit or explicit reprisals against workers. • Carry out or authorise collections or subscriptions in commercial establishments or workplaces. • Carry out any action that restricts workers' rights under the law. • Disseminate political or religious propaganda within the establishment. • Employ the system of indexing workers who separate or are separated from work so that they are not reoccupied. • Carry weapons inside establishments located in towns. • Show up in establishments while intoxicated and/or under the influence of a narcotic or unnerving drug. • Perform acts of harassment and/or sexual harassment in the workplace. • Allow or tolerate acts of harassment and/or sexual harassment in the workplace. • Require the presentation of non-pregnancy medical certificates for entry, stay or promotion in employment. • Dismiss a worker or coerce her, directly or indirectly, to resign because she is pregnant, because of a change in marital status, or because she is caring for minors.
Workers' restrictions (Art. 135 LFT)
• Carry out any act that may jeopardise their own safety, that of co-workers or of third parties, as well as of the establishments or places where the work is done. • Missing work without just cause or without the employer's permission. • Subtract useful or raw materials from the company or establishment. • Working while under the influence of alcohol. • Working under the influence of any narcotic or unnerving drug, unless there is a medical prescription for its use. If this is the case, before starting employment, the worker must inform the employer and present a prescription signed by a doctor. • Carry weapons of any kind during working hours unless the nature of the work requires it. Sharp and puncturing tools that are part of the job are excluded from this provision. • Suspend work without authorisation from the employer. • Collect at the establishment or workplace. • Use the supplies and tools provided by the employer for purposes other than originally intended. • Disseminate any kind of propaganda during working hours inside the establishment. • Sexually harass any person or perform immoral acts in the workplace.

Source: Authors' elaboration.

Two points must be raised within this context. First, additional obligations incumbent on the employer were introduced by the 2019 LFT reform. The employer must: give a copy of the collective work contracts and their revisions to the Federal Centre for Conciliation and Labour Registry within 15 days; implement a protocol to prevent gender discrimination, give special attention to cases of violence and sexual harassment in the workplace and eradicate forced and child labour; post and disseminate documents in the workplace relating to the consultation procedure for signing a collective agreement, its comprehensive review, its termination, and proof of union representation (issued by the Federal Centre for Conciliation and Labour Registry).

Second, the LFT establishes a further series of obligations for special forms of employment (*'trabajos especiales')* and in the area of occupational risk prevention.

The LFT includes 'trusted workers' (*trabajadores de confianza*): according to Art. 9, functions of trust are those of direction, inspection, surveillance, and supervision, when general in nature, and those related to the employer's personal work within the company or establishment.[4] The LFT identifies several 'special works' (*trabajos especiales*), which involve a series of activities regulated by specific norms which set specific working conditions, including security measures, working hours, and the rights and obligations of employers and their subordinates. In case of conflict, special norms will prevail over the general ones disseminated in the LFT (Art. 181 of the LFT). (Suprema Corte de Justicia de la Nación 2005). The sixth title of the LTF regulates the matter and additionally includes ships; aeronautical crews; railways and auto transportation of the public service workforce in areas under federal jurisdiction; rural and trade agents; professional sportsmen, actors and musicians; home-based work; domestic work; work in mines; work in hotels, restaurants and bars; family businesses; resident doctors undergoing specialty training; and in universities and autonomous higher education institutions. The figure of 'domestic worker' appeared as a result of the latest labour reform, entailing a corresponding obligation by the employer to provide social security and a special break schedule, especially for overnight workers, an intermediate break of at least three hours between morning and evening shifts and a night break of at least 9 hours. Finally, as per Art. 123, let. b) of the Federal Constitution, civil servants are subject to a different regulation.

D. Non-standard forms of employment

As mentioned by Bensusán (2016, 7), one of the concerns in the world of work is the expansion of atypical (non-standard) forms of employment, a concept that includes various modalities which are intended as full-time, permanent, regularly providing service to a clearly identified employer under their direction and at their behest.

The global rise of atypical employment can be ascribed to various factors, such as highly competitive labour markets, technological advancements and the digital economy, as well as globalisation.

As mentioned in Section 2A, the main objective of the 2012 LFT reform was to foster employment, productivity and competitiveness through the introduction of several flexible forms of employment. On the other hand, the core principle of labour legislation is that of the centrality of the person/worker, whereas employment security is enshrined in the Constitution.

4.The LFT also specifies that the category of 'trusted workers' depends on the nature of the duties performed and not on the designation given to the position.

While labour flexibility does not automatically translate into precarious employment, the implementation of flexible forms of employment can nevertheless produce negative effects for workers. In addition, the 1970 version of the LFT remained in force for over forty years: in the meantime, the elements mentioned above contributed to a radical shift in the organisation of the factors of production and company administration.

The 2012 reform introduced several new flexible forms of contract, such as probationary contracts, initial training contracts, contractual relations for discontinuous employment (e.g., seasonal work), and subcontracting or outsourcing, which add up to fixed-term contracts. It also touched on part-time employment.

Art. 39-A of the LFT provides for the possibility, within permanent employment relationships or those exceeding 180 days, to establish a 30-day probationary period to verify that the worker meets the requirements of the position. This period can be extended to 180 days for certain functions (direction or administration of a general nature), or specialised technical jobs.
In turn, Art. 39-B defines the 'initial training relationship' the period when the worker renders his subordinate services, under the direction and command of the employer, to acquire the knowledge or skills necessary for the position. The maximum duration is of 3 months, except for the cases just mentioned (6 months).

In both instances, the worker is entitled to the wage, social security and benefits associated with the position. Once the period expires, it is up to the discretion of the employer (who should consider the opinion of the Commission for Productivity, Qualification and Training) the possibility to terminate the employment relationship without any liability. It is important to note that the LFT does not specify the role of this Commission, or the parameters to issue such an opinion. Conversely, if the employment relationship remains after the probationary period, it will be considered permanent (Art. 39-E), notwithstanding Art. 39-A admitting probationary periods in employment relationships with a definite duration ('exceeding 180 days').

In addition to specifying that these probationary periods are non-extendable and can only be applied once to a worker in the same company or establishment (Art. 39-D), the LFT also requires the relationship to be established in writing, guaranteeing the social security of the worker. If this requirement is not observed, the relationship will be considered permanent, and the worker's social security rights must be contextually guaranteed (Art. 39-C).

Art. 39-F allows for the establishment of agreements for discontinuous employment when the services required are for fixed and periodic jobs of a discontinuous nature, such as for seasonal activities or those that do not require the constant provision of services for the entire week, month, or year. These workers have the same rights and obligations of permanent workers, proportionally to time worked. Art. 42, paragraph VIII provides that the end of the season is cause for temporal suspension of the obligations to provide a service and the corresponding salary, without any responsibility for the employer and worker. Art. 43, paragraph V provides

that the suspension lasts from the end of the season to the start of the next one. It is important to note that Art. 45—which regulates the moment when the worker must return to work in the cases provided in Art. 42 (suspension of the employment relationship)—does not address when the seasonal worker must return, nor obliges the employer to inform the worker in that respect. This entails the risk of worker dismissal for not showing up on a date discretionally chosen by the employer (Quiñones Tinoco 2015).

Outsourcing is regulated by Articles 15-A, 15-B, 15-C, and 15-D of the LFT. The first norm defines an outsourcing regime as 'that by which a contractor (*contratista*) carries out a given work or service through workers under his agency to the benefit of an employer (*contratante*)—whether an individual or legal entity, who establishes the tasks/duties incumbent on the former and supervises the execution of the agreed activities. Outsourcing must comply with the following conditions:

1. It cannot encompass the totality of the activities carried out in the workplace.

2. It must be of a specialised nature.

3. It cannot include the same or similar tasks to those carried out by employees at the service of the contractor.

In case of non-compliance, the contractor is considered an employer under the LFT, including social security obligations. Conversely, it is possible to deduce from the same norm that if the conditions are met, the contractor cannot be considered an employer under the LFT and is consequently not subject to the associated obligations.

Moreover, the LFT requires for the agreement between the employer and the contractor to be established in writing. It also entails the duty of the contractor, prior to the conclusion of the agreement, "to ensure that the contractor has sufficient documentation and own elements to comply with the obligations arising from the relationships with its workers" (15-B). Further, the contractor must permanently ensure the employer's compliance with safety, health and environment regulations at the workplace. This verification may be carried out through a duly accredited unit terms of the applicable legal provisions (Art. 15-C). When the transfer of workers from the employer to the contractor has the deliberate purpose of hindering labour rights, the LFT imposes a monetary sanction in the terms prescribed in Art. 1004-C (Art. 15-D).

The following critiques have been raised regarding Mexico's outsourcing regime, introduced in 2021:

1. It does not specify the mechanisms to be used by companies to provide the benefits and insurance to contracted workers.

2. There is no formal guarantee that outsourced workers have the same labour rights as workers hired directly by the contractor.

3. There is no obligation to create an accredited verification unit to supervise the employer's compliance with their labour obligations.

Prior to the 2012 reform, Mexico's labour law allowed for part-time employment, although not expressly regulated and provided that it did not go against the general working conditions established in the LFT (Barajas Montes de Oca 1998). The reform did not introduce a detailed regulation on the matter. It simply allows to calculate wages on an hourly basis (rather than daily), provided that the limit on maximum working hours per day (8) is respected and that the amount received is not inferior to a working day (Art. 83 of the LFT).

Against this background, two observations are required. First, the rights and obligations of part-time workers—i.e., those working less than 40 hours per week—are the same as those of permanent workers: the only difference is remuneration.

Second, Mexico is not party to ILO's Part-Time Work Convention, (No. 175): therefore, the convention's provisions do not apply domestically.

Finally, fixed-term employment is allowed exclusively in three cases (Art. 37 of the LFT): when required by the nature of the work; when temporarily substituting another worker; and, in the other cases provided for in the LFT (e.g., Art. 193, 195, V; Art. 293; Art. 305). Art. 39 also provides that if the object of the work remains after expiration of the contract term, the relationship will be extended for as long as this circumstance lasts.

E. Termination of the employment contract

The LFT provides that the employment relationship can be either rescinded or terminated. Art. 46 provides that either employee or employer can rescind the employment relationship at any time in correspondence of a just cause, without incurring any liability. Art. 47 identifies the causes of rescission exempting the employer from any responsibility:

I. If the employer is deceived by the worker or, where applicable, the union that proposed or recommended the worker, with certificates or references that falsely attribute skills, attitudes, or abilities to the worker. This cause for termination will not have any effect after thirty days of the worker rendering his services.

II. If, while carrying out his work, the worker acts dishonestly, or performs acts of violence, threats or insults against the employer, their relatives or the managers or administrative personnel, or against the employer's clients and suppliers, unless provoked or in self-defence.

III. If the worker commits any of the acts listed in II) against any of his work colleagues, if they result in the disruption of the workplace.

IV. If, outside of work, the worker commits any of the acts listed in II) against the employer, his relatives, management and administrative personnel, and if their severity makes it impossible to fulfil the employment relationship.

V. If the worker intentionally causes material damage while carrying out the work or causes damage to buildings, machinery, instruments, raw materials and other objects related to his work.

VI. If the worker causes the damages mentioned in V) unintentionally, but through gross negligence.

VII. If the worker, due to his recklessness or inexcusable carelessness, compromises the safety of the establishment or the people who are in it.

VIII. If the worker commits immoral acts of (sexual) harassment against any person in the establishment or workplace.

IX. If the worker reveals manufacturing secrets or discloses matters of a confidential nature, to the detriment of the company.

X. If the worker has more than three absences in a period of thirty days, without express permission of the employer or just cause.

XI. If the worker disobeys the employer or his representatives without just cause, regarding the contracted work.

XII. If the worker refuses to adopt preventive measures or follow the procedures indicated to avoid workplace accidents or illnesses.

XIII. If the worker shows up for work in a drunken state or under the influence of any unprescribed drugs. Before starting his shift, the employee must inform the employer regarding the matter and provide the medical prescription for any drugs, if applicable.

XIV. If the worker is sentenced to prison, which prevents him from fulfilling the employment relationship.

XV. Bis. If the worker fails to provide the documents required by laws and regulations for the provision of the service after the period referred to in section IV of Art. 43.

XVI. Factors analogous to those established in the previous sections, in the same serious way and with similar consequences regarding work.

The same norm requires the employer who intends to dismiss a worker to inform them through a written notice, clearly stating the conduct(s) that led to the rescission, as well as their dates. This notice must be delivered to the worker in person upon dismissal. Alternatively, the dismissal may be communicated to the competent court within 5 days. In this case, the court will send a notification to the worker.

It is crucial to note that the time limit to carry out these actions resulting from the dismissal will not begin to run until the worker personally receives the notice. The lack of notice implies unjustified rescission, unless otherwise proven. The 2012 reform added section XIV-Bis to Art. 47 and amended subsections II, VIII and XIV.

Art. 51 identifies as causes for rescission without responsibility of the worker:

I. If the worker is deceived by the employer, or where appropriate, the employer's association, regarding the conditions of the job. This cause for termination will not have any effect after thirty days of the worker rendering his services.

II. If the employer, his family members or any of his representatives, during work, acts dishonestly, engages in acts of violence, threats, insults, harassment and/or sexual harassment, bad treatment or other similar acts against the worker, his spouse, parents, children or brothers.

III. If the employer, his relatives or workers, outside of work, carries out the acts referred to in II), if due to their severity they make it impossible to comply with the working relationship.

IV. If the employer reduces the worker's salary.

V. If the worker does not receive the corresponding salary on the previously agreed or customary date or place.

VI. If the worker suffers damage to his tools or work caused intentionally by the employer.

VII. If there is a serious danger to the safety or health of the worker or his family, either because the establishment lacks hygienic conditions or because the employer did not implement preventive and security measures provided by the law.

VIII. If the employer compromises, through inexcusable recklessness or carelessness, the safety of the establishment or the people who are in it.

IX. If the employer demands the performance of acts, conducts or behaviours that undermine or threaten the dignity of the worker.

X. Factors analogous to those established in the previous items, in the same serious way and with similar consequences, as far as work is concerned.

Section II was amended by the 2012 reform, which also added IX of Art. 51. The worker can rescind the employment relationship within 30 days of any of occurrence of the above-identified causes and is entitled to an economic reparation in the terms of Art. 50 (Art. 52). In accordance with Art. 48, the worker can ask the conciliatory authority or the court (if a conciliation cannot be reached) for his reinstatement or for compensation amounting to 3 months' salary. If the employer cannot prove one of the causes for dismissal listed in Art. 47 (i.e., dismissal without just cause), the worker is entitled to the payment of past wages calculated from the date of dismissal up to a maximum of 12 months. This 12-month ceiling was introduced in the 2012 reform to avoid unnecessary procedural delays caused by unfair practices of either party, their lawyers, other representatives or even civil servants, to which corresponds a monetary fine of variable amount.

Art. 48-bis contains a list with examples of such behaviours. Lawsuits before Arbitration and Conciliation Boards are often particularly lengthy, and the 12-month limit might result in a considerable compression of the worker's salary. On the other hand, the same article specifies that if the lawsuit is not finished or the sentence executed within 12 months of the dismissal, the worker is entitled to the payment of interest, up to 15 months' salary at a rate of 2.0 per cent per month, withdrawable upon payment.

Art. 53 identifies the following causes for the termination of the employment relationship:

1. Mutual agreement of the parties.

2. Death of the worker.

3. Completion of the work (for specific work contracts, see Art. 35 and 36 LFT), expiration of the term (for fixed-term contracts) or capital investment (see Art. 38).

4. The manifest physical or mental inability of the worker, which renders the provision of work impossible.

5. The cases referred to in Art. 434—i.e., termination of collective labour relations, which can occur due to:

    I. Force majeure or fortuitous event not attributable to the employer, his physical or mental incapacity or his death, which produces as a necessary, immediate and direct consequence: the termination of jobs.

    II. The notorious and manifest inability to pay.

    III. The depletion of the subject matter of an extractive industry.

    IV. The cases detailed in Article 38.

    V. Liquidation or legally declared bankruptcy if the competent authority or creditors propose the definitive closure of the company or the definitive downsizing of its positions.

If the employer does not prove one of the causes for termination at the trial, the worker will have their rights (set forth in Art. 48 of the LFT) fulfilled.

F. Collective labour relations

Title Seven of the LFT is dedicated to collective labour relations. Mexico's collective labour relations have been seriously hampered by long-standing phenomena such as 'protection trade unions' (*sindicatos de protección*) and 'employer protection agreements' (*contratos de protección patronal*). Protection trade unions can be understood as 'fake' trade unions, in the sense that these are not representative of workers. In turn, protection agreements are collective agreements established between the employer and a (protection) trade union without the knowledge of (or consent from) the workers, exchanging money and various perks to achieve discretion in the management of labour relations. According to Bouzas Ortíz (2009), the existence of protection contracts can be inferred by a series of indicators, including:

1. The agreement contains exclusively basic information.

2. The 'agreed' contractual conditions reproduce the minimum standards provided by the LFT.

3. When there are multiple establishments for a same company, multiple protection agreements (with the same contents) are made for each establishment with a different union: this ensures the containment of an eventual dispute to a particular establishment without it spilling over to the company.

4. The protective agreement is often established before the company starts its activities (i.e., without any worker hired).

5. Presence of the exclusion clause by expulsion, which fundamentally affords the trade union the prerogative to ask and oblige the company to dismiss a worker who, due to serious violations of the union by-law, deserves to be expelled in the opinion of the union assembly. This mechanism allows to control 'dissident' workers. However, this clause has been declared unconstitutional by Mexico's Supreme Court in various rulings within the context of the 'amparo trial' (*juicio de amparo*) and subsequently eliminated in the 2012 reform. Nevertheless, some stakeholders observe that it is still applied in practice—see in this respect ILO (2015).

6. Presence of an admission clause (Art. 395), by which the employer assumes the obligation to exclusively admit workers who are members of the contracting trade union.

In addition to stating that workers are often not even aware of the existence of a protection contract, Bouzas Ortíz (ibid.) estimates that 9 out of 10 collective agreements in Mexico are protection contracts. It is important to point out that this estimate has been firmly rejected by the Government of Mexico in various occasions.

The 2012 reform of the LFT tried to more broadly guarantee workers' freedom of association and collective bargaining. However, as indicated in Section 7.1.1, this purpose remained largely unfulfilled. The 2017 amendment to the Constitution and the 2019 LFT reform led to significant changes on both issues. Likewise, the ratification of ILO's Convention No. 98 in 2018 was key, considering that it established the foundations to achieve the full freedom of collective bargaining and the elimination of any sanctions on workers for belonging, not belonging or no longer belonging to a trade union. Additionally, the State assumed the obligation of guaranteeing the independence of trade unions, without interfering in their formation, functioning and administration.

To conclude this important premise, it is worth recalling a quote from the "Statement of Reasons" of the 2019 reform (Cámara de Diputados del Congreso de la Unión 2019):

> "It should not go unnoticed that the constitutional reform had as its immediate forerunners the international questioning of the Mexican labour model, due to the recurrent violations of freedom of association and collective bargaining."

The questioning of tripartism was due mainly to the lack of representation of trade union organisations[5] and leaderships, as well as a lack of democracy and transparency in the exercise of collective rights. Rather than leading to authentic social dialogue, tripartism led to a system based on simulations, thus squandering a powerful instrument to resolve worker-employer and inter-union conflicts. By favouring the inhibition or repression of these conflicts through control of the unions, unilateral solutions were generally imposed, leading to significant social costs.

> "Over the past four decades in which wage control was favoured to combat inflation and later to attract investment, especially in the most important sectors of the new economy, many workers lost their jobs defending their rights and aspiring to authentic representation."

Trade unions. As mentioned, the Constitution guarantees both workers' and employers' freedom to organise in trade unions and employers' associations. In turn, the LFT provides that both workers and employers, without any distinction or previous authorisation, have the right to form organisations they deem convenient, as well as the right to join them as long as they observe their respective by-laws (Art. 357). Only workers aged 15 years and up can be part of a trade union (Art. 362), while 'workers of confidence' cannot join the unions of other workers (Art. 363).

The same Art. 357 requires 'adequate protection' from acts of interference between employers' and workers' organisations and determines the application of sanctions in case of undue interference. 'Acts of interference' are defined as actions or measures which tend to foster the constitution of workers' organisations dominated by an employer (or a group of employers), or support in any form to workers' organisations with the purpose of controlling them. On the other hand, the agreed provisions relative to collective agreements cannot be regarded as acts of interference.

Relatedly, the LFT establishes through Art. 358 the following guarantees stemming from the rights to freely join a trade union and to participate in it for the members of trade unions, federations and confederations:

5. It is extremely relevant to mention the importance of gender equality in union representations. The gender gap is also reflected in the low number of women involved in strikes, as will be demonstrated further on in this study.

1. No one can be forced to join or abstain from joining a trade union, federation or confederation. Contrary provisions are considered as not set.

2. The procedures for the election of union directors must guarantee the full exercise of the personal, free, direct and secret vote of the members; the term of office must be definite and must ensure the democratic participation of members, thereby not harming the right to vote and to be voted for.

3. The sanctions imposed by trade unions, federations or confederations to their members must adhere to the law and by-laws, fulfilling the rights of hearing and due process of the person involved.

4. The directorate of trade unions, federations and confederations must render a full and complete account concerning asset management.

Any stipulation imposing a conventional sanction in case of separation from the union or in any way contradicting these guarantees is regarded as not set. However, the first guarantee of Art. 358 contradicts Art. 395 by virtue of which, as mentioned above, it is possible to convene in a collective agreement that the employer will exclusively employ workers who are members of the trade union party to the contract, although this clause cannot be applied to workers that are not members of the union and who had already been providing services to the company/establishment prior to the conclusion of the agreement (or the inclusion of such a clause during the revision of the agreement).

In turn, Art. 359 recognises the rights of trade unions to write their respective by-laws and regulations, freely elect their representatives, organise their administration and activities and formulate their action plans. On the other hand, Art. 357-bis, added in the 2019 reform, clarifies that the recognition of the legal personality of trade unions (and employers' associations), federations and confederations cannot be subject to conditions which impose restrictions on the guarantees and rights to: redact their respective by-laws and regulations; freely elect their representatives; organise their administration and activities; formulate their action plans; constitute organisations as deemed convenient; and, not being subject to administrative dissolution, suspension or cancellation.

Various obligations and restrictions are contextually set by the LFT, as presented in Table 7.4.

TABLE 7.4 Union obligations and restrictions

Obligations (Art. 377)	• Provide the information required by labour authorities, provided that it exclusively refers to the trade union's activities • Communicate to the Registral Authority, within 10 days, the changes in the directorate and modification of by-laws, attaching an authorised copy of the acts • Inform the same authority, at least every three months, of new members and those who have left the union
Restrictions (Art. 378)	• Intervening in religious affairs • Being professional traders aiming at making a profit • Participating in tax evasion schemes or implying the non-compliance with employers' obligations towards workers • Exercising acts of violence, discrimination, harassment or sexual harassment against members, the employer, his representatives, or against third parties • Recording or using records stating that voting or consultation has been carried out together with the workers, without these having occurred • Obstructing the participation of workers in the election of the directorate, interposing unlawful conditions or any kind of undue obstacle in the exercise of the right to vote (active and passive) • Committing acts of extorsion or obtaining gifts (*dádivas*) from the employer not covered by collective agreements

Source: Authors' elaboration.

The restrictions detailed in IV, VI and VII are considered violations of the fundamental rights to union freedom and collective bargaining.

The LFT allows for various types of employers' and workers' organisations, as reported in Table 7.5. Art. 360 specifies that this classification are just examples and therefore workers are free to decide their own form of organisation.

TABLE 7.5 Types of employers' and workers' organisations

Workers' organisations (Art. 360)	• Professional trade unions: formed by workers of a same profession, trade or specialisation • Company trade unions: formed by workers who provide services to the same company • Industry trade unions: formed by workers who provide services in two or more companies of the same industry • Nation-wide industry trade union: formed by workers who provide services to one or more companies of the same industry, established in one or more federal entities, • Trades formed by workers of various professions. These unions may only be formed when there are less than 20 workers of the same profession in the municipality
Employers' organisations (Art. 361)	• Branch of activity employers' organisation: those formed by employers in one or more branch of activities • Nation-wide employers' organisation: those formed by employers in one or more branch of activities across different federal entities

Source: Authors' elaboration.

In addition, Art. 381 establishes the possibility of forming federations and confederations. To form a trade union or an employers' organisation, Art. 364 requires at least 20 workers and 3 employers, respectively. Further, to establish a federation or confederation it requires the presence of at least

two representative organisations. The members of federations or confederations can retire from them at any time, despite the presence of a contrary agreement (Art. 382).

The LFT establishes various norms concerning the registration of these representative organisations. Trade unions, federations and confederations must be registered (Art. 365 and 384). The authority in charge of registration is, as a result of the 2019 reform, the newly established Federal Centre for Conciliation and Labour Registry, which in accordance with the transitory provisions of the LFT should start its activities within two years from the reform's entry into force (2 May 2021). In turn, the Centre must make public the information concerning registration, as disposed by Art. 365-Bis.

Art. 364-Bis requires, for the registration of trade unions (as well as for the actualisation of the union directorate), the observance of the principles of autonomy, equity, democracy, legality, transparency, certainty, gratuity, immediacy, impartiality and respect for union freedom and the associated guarantees. In both cases, the will of the workers and the collective interest will prevail over formal aspects.

The necessary documents for registering trade unions are the following (Art. 365):

1. Acts of the constitutive assembly.

2. A list including the number, names, CURP and address of the members, additionally containing: the name and residence of employers, companies or establishments to which the trade union provides services; and, in case of an employers' association, the name and residence of the enterprises which employ workers.

3. By-laws, covering the requisites of Art. 371.

4. Acts of the assembly in which the directorate was elected.

The same applies, pursuant to Art. 385, for the registration of federations and confederations.

Registration can be denied for the cases established in Art. 366:

1. When the organisation does not pursue the purpose set in Art. 356 (i.e., analysis, improvement and defence of their respective interests).

2. If the organisation does not contain the minimum number of workers required by Art. 364 for its constitution.

3. If the organisation does not produce the documents required by Art. 365.

The same norm specifies that if one or more requirements are not met, the authority must, to protect the right to organise, request that they are satisfied. Once the requirements are met, the authority cannot deny registration. Further, if the Registration Authority does not resolve the matter within 20 days, the applicants may require it to issue a resolution, and if it does not do so within the 3 days after the request, the registration will be considered granted for all legal purposes, and authorities are compelled to issue the respective certificate within 3 days.

Moreover, the registration of trade unions, federations and confederations can be cancelled in the following two cases (Art. 369): dissolution for no longer fulfilling legal requirements, and when the union breaches its object or purpose. A union will be considered to be in breach of its object or purpose when its leaders, attorneys or legal representatives incur in acts of extortion against employers, demanding a payment in cash or in kind to withdraw from a strike or refrain from initiating or continuing a claim of ownership of the collective bargaining agreement. Consequently, this proven criminal conduct may serve as a basis for a lawsuit demanding the cancellation of the union registration, to be pursued through the courts, regardless of the responsibilities that may be derived from the commitment of the crime.

In accordance with Art. 379, syndicates will dissolve as a result of a vote of two thirds of their members or after the expiration of the term provided for in the union's by-laws.

Additionally, trade unions must conform their by-laws to the rules contained in Art. 371 of the LFT within 240 days from the reform's entry into force. So too regarding the election of trade unions' directorates through the workers' personal, free, direct, and secret vote. Art. 371-Bis correspondingly provides a system of verification of the requisites demanded by paragraph. IX of Art. 371 within the context of the election of trade unions' directorates. While Art. 371 contains a set of detailed rules which touch on numerous matters to be addressed by union's by-laws, these must also incorporate provisions concerning the revision of wages and of collective agreements.

Finally, Art. 373 LFT requires the directorate of trade unions to provide to the assembly, at least every 6 months, a complete and detailed picture concerning the administration of the union's assets, to foster transparency regarding its activity. The acts of the union's assembly are submitted within 10 days to the Federal Centre for Conciliation and Labour Registry.

Collective bargaining and agreements. The exercise of the right to collective bargaining has been largely hampered in Mexico due to the various phenomena mentioned previously. The 2019 reform implements the constitutional precepts introduced by the 2017 amendment to the fundamental law, which requires ensuring freedom in collective bargaining:

a) the representativeness of trade unions; and b) the certainty in the signing, registration and deposit of collective agreements. In accordance with the ILO, collective bargaining is a key

means through which employers and their organisations and trade unions can establish fair wages and working conditions. It also provides the basis for sound labour relations. Enhancing the inclusiveness of collective bargaining and collective agreements is key to reducing inequality and expanding labour protection.

To fully implement collective bargaining, Hernández (2019, 15)—paraphrasing ILO's 1998 '*Guía Didáctica para la Negociación Colectiva: Una herramienta sindical*'—deems necessary that:

1. The demands raised by workers must be closely linked to development efficiency of the company and propose improvements to the productivity, quality and competitiveness of the company, considering the collective contract as an indispensable work instrument in their daily relationships, so that both parties (employer and employee) should aim to find the most equitable solution to the problems that might arise. They must not fall into unrealistic or unsubstantiated requests.

2. The new collective agreements and the thousands of collective agreements held before the reform in question (without the participation of workers), must be legitimised in order to build mutual trust between the parties (especially previously excluded workers). Therefore, unions and employers must eliminate fraudulent and undemocratic practices and ensure the democratic resolution of disagreements.

3. Union leaders should fully grasp the economic implications of collective bargaining and understand the impact of their demands on the company, striving for the rights of workers to be reflected in terms of the productivity, quality and competitiveness of companies.

4. In this sense, to sustain their demands, union leaders must train and qualify employees to carry out high-quality, responsible and productive work.

In accordance with Art. 386 of the LFT, the 'collective employment contract' can be defined as an agreement established between one or more workers' unions and one or more employers, or one or more employers' associations, to establish the conditions under which work must be provided in one or more companies or establishments.

The collective employment contract must be set in writing, under penalty of being nullified (Art. 390). Further in accordance with Art. 389, the employer who employs workers who are members of a union will be required to establish, when requested, a collective contract and comply with the principles of representativeness in union organisations. To provide guarantees regarding the signing, registering and depositing collective labour contracts, the applicant

union must possess the Proof of Representation issued by the Federal Centre for Conciliation and Labour Registry, referred to in Article 390 Bis. If the employer refuses to sign the contract, the workers may exercise their right to strike, enshrined in Art. 450. The Proof of Representation proves that the union does in fact represent the workers, so they must be accompanied to the strike call as requirement in terms of Article 920 of this Law. The collective contract must contain (according to Art. 391):

1. The names and addresses of the parties.
2. The companies and establishments it covers.
3. Its duration or the recognition of lasting an indefinite period, or for the duration of a specific work.
4. Working days.
5. Rest and vacation days.
6. The value of wages.
7. The clauses related to the training or training of workers in the company or establishments.
8. Arrangements for initial training or training to be given to those who work in the company or establishment.
9. The bases on the integration and operation of the Commissions that must be integrated in accordance with the LFT.
10. The other stipulations agreed upon by the parties.

An important principle is that the collective contract may not be concluded under less favourable conditions for the workers than those contained in current contracts at the company or establishment (Art. 394). Art. 396 establishes that the provisions of the collective agreement extend to all workers who work in the company or establishment, even if they are not members of the union party to the agreement.

The *contrato ley* is regulated by Art. 404 to 421 of the LFT. It is defined as an agreement between one or more workers' unions and several employers, or one or more employers' associations, to establish the conditions according to which work must be provided in a given industry, and declared mandatory in one or more Federal Entities, in one or more economic

zones that cover one or more of said Entities, or throughout the national territory. Unions representing two-thirds of workers, at least, from one branch of industry in one or several Federal Entities, in one or more economic zones, including one or more of said Entities or throughout the national territory may request the conclusion of this agreement (Art. 406) before the Federal Centre for Conciliation and Labour Registry (Art. 407).

The Proof of Representation (*Constancia de Representatividad*), regulated by Art. 390-bis of the LFT, must be filed together with this request. The Centre, after verifying representation, if it deems the conclusion of the agreement as timely and beneficial for the industry, will convene the workers' unions and employers that may be affected (Art. 409). In accordance with Art. 412 of the LFT, the agreement must contain:

1. The names and addresses of the workers' unions and employers who participate in the Convention.

2. The Federal Entity or Entities, the zone or zones that it covers or its applicability to the entire national territory.

3. Its duration, which may not exceed two years.

4. The working conditions indicated in Article 391, sections IV, V, VI, and IX.

5. The rules according to which the training and education plans and programmes are to be implemented in the respective industry.

6. Other provisions agreed upon by the parties.

According to Art. 414, the agreement must be approved by a majority of workers who are represented in the Convention, as well as by a majority of employers who employ them. Once this agreement is approved in these terms, the President of the Republic, the State Governor or the Head of Government of Mexico City, will publish it in the Official Gazette of the Federation or in the official newspaper of the Federal Entity, characterising it as a contract-law (*contrato-ley*) in the respective industry branch, for all companies or establishments that exist or are established in the future in the Federal Entity or Entities, in the zone or zones that it covers or across the entire national territory.

Finally, regarding the fulfilment of certain requirements established by Art. 415 and if the collective agreement has been concluded by a two-thirds majority of unionised workers of a given industry branch, in one or several Federal Entities, in one or several economic zones, or throughout the national territory, may be elevated to the category of *contrato-ley* (Art. 415).

To conclude, the LFT, through Section 11 of its transitory provisions, requires the review of existing collective agreements at least once within four years from the reform's entry into force (i.e., May 2023). The process through which workers are consulted is set in Art. 390-Ter, implying both a new collective agreement and the revision of an existing one, a verification of the effective support of a majority of workers, expressed through their personal, free and secret vote, by the Federal Centre for Conciliation and Labour Registry. In case the reviewed agreement does not have the support of the majority of workers (or the process of consultation is omitted), it is deemed as terminated. This provision adds to Art. 400-Bis, which requires the approval of the workers (at least every two years) of the contractual reviews demanded by Art. 399 through the procedure established in Art. 390-Ter.

Strikes. As analysed in detail in Section 2D, there have been remarkably few strikes over the past few years. This fact has been 'officially' interpreted as a consequence of the 'labour peace' (*paz laboral*) between the labour force and management (Reforma Laboral para Todos 2019). On the other and, this interpretation has been widely criticised by those alleging that the previous system also hampered the right to strike. In this respect, the following passage is especially illustrative (ILO—Committee on the Application of Standards 2015, 14 Part II/72-73):

> "[…] conciliation and arbitration boards systematically declared strikes illegal, often on technical grounds (even though the courts had revoked such decisions by the boards, it nevertheless entailed costs and considerable delays for workers), the right to strike was also severely restricted by the possibility for the employer to declare the collective agreements null and void on grounds of force majeure. Further, protection agreements also hindered the right to strike, since labour legislation provided that if a collective agreement has been concluded and registered, strikes were not permitted in support of a demand to conclude a different collective agreement."

At this point it is important to analyse the developments introduced by the most recent reform:

1. For the approval of the collective agreement (or revised agreement): if the majority of the workers does not approve the outcomes of the negotiation, the trade union can enter into a strike or extend the pre-strike period to negotiate a new agreement.

2. It is not possible to declare a strike to foster the establishment of a new collective agreement without a Certificate of Representation.

3. The union may extend the period before the strike only once for a period of up to 30 days without the agreement of the employer.

4. The registration of the trade union can be judicially cancelled when the directors or representatives practice acts of extorsion against the employer to obtain money or other benefits in exchange of not declaring a strike.

5. Limitation of strike duration: after 60 days from the beginning of the strike, both the trade union and the employer can resort to Labour Justice. The employer may argue before the court that the causes are not attributable to him and therefore there is no reason to suspend work. The judge will contextually determine if the strike is to continue or be terminated. Prior to the 2019 reform, the LFT attributed this prerogative exclusively to trade unions and not to the employer.

TABLE 7.6 Characterisation of strike in the LFT

Article	Contents
442—Scope	The strike may cover a company or one or more of its establishments
443—Limit	The strike must be limited to the mere act of suspension of work
444—Lawful strike	A lawful strike is one that satisfies the requirements and pursues the objectives indicated in article 450 Art. 450: the strike must have as object: I. Achieving a balance between the various factors of production, harmonising labour rights with those of capital; II. Obtain from the employer or employers the conclusion of the collective labour contract and demand its revision at the end of the period of its validity, in accordance with the provisions of Chapter 3 of the Seventh Title; III. Obtain from the employers the conclusion of the *contrato-ley* and demand its revision at the end of the period of its validity, in accordance with the provisions of Chapter 4 of the Seventh Title; IV. Require compliance with the collective labour contract or *contrato-ley* in companies or establishments in which he had been violated; V. Require compliance with the legal provisions on profit sharing; VI. Support striking for any reason listed in the preceding sections; and VII. Demand the revision of contractual wages referred to in articles 399-Bis and 419-Bis
Art. 446—justified strike	A 'justified strike' is one whose motives are attributable to the employer
Art. 445—Unlawful strike	The strike is unlawful: I. When the **majority** of strikers carry out violent acts against people or properties II. In case of war, when workers belong to establishments or services that the government depends on
Art. 448—Suspension of collective disputes of an economic nature	The exercise of the right to strike suspends the processing of collective conflicts of an economic nature pending before the Court, and of the applications submitted, except for workers that submit the conflict to the Court's decision

Source: Authors' elaboration.

Regarding the current regulatory framework for strikes, the LFT institutes the trade union's right to strike, establishing its conditions, requirements, and limitations. More specifically Title Eight regulates strikes, and its first chapter sets several general provisions. First, Art. 440 defines a 'strike' as a temporal suspension of work undertaken by a coalition of workers

(Art. 441 understands workers' unions as permanent coalitions), whereas Art. 447 specifies that strikes constitute a legal cause for suspension of the effects of employment relations during the validity of the strike. Art. 449 ascribes to the courts and civil authorities the duty to fully implement the right to strike through the provision of the necessary guarantees and support to workers to suspend work. Table 7.6 lists the remaining norms of Chapter 1.

Art. 451 sets the following requirements to suspend work:

1. That the strike has as its object one or more of those indicated in Art. 450.

2. That the suspension is carried out by the majority of the workers of the company or establishment. The determination of the majority referred to in this fraction, may only be promoted as a cause to request the declaration of non-existence of the strike, pursuant to the provisions of Art. 930, and in no case as a matter prior to suspension of work.

Finally, the same article requires the observance of the dispositions contained in Art. 920, regulating the procedure to request the strike, which starts with the 'request sheet' (*pliego de peticiones*). This document, addressed to the employer and transmitted to the court, contains the requests that motivate the strike and its object, as well as the day and hour of the strike (or the pre-strike period). The law requires at least 6-day notice, and a 10-day notice in case of public services identified in Art. 925. The Court, after having notified the employer (Art. 921) and the Conciliation Centre (Art. 921-Bis), will summon the parties to a conciliation hearing—regulated by Art. 927—to be held within the pre-strike period, in which the conciliator of the competent Conciliation Centre may intervene. At this hearing, no statement will be made that prejudges the existence or absence, justification or non-justification of the strike. This hearing may be deferred at the request of the union or both parties.

Pursuant to Art. 929 of the LFT, workers, the employer or interested third parties can resort to the court within 72 hours from the suspension of work to request for the strike to be cancelled in accordance with the causes listed in Art. 459, or for not having observed the requisites set by Art. 920. If the court declares the strike as legally inconsistent (inexistent), it will (Art. 932):

1. Determine that workers should return to work within 24 hours.

2. Notify the foregoing through the union's representation, warning the workers that non-compliance with the resolution entails the termination of the employment relationship (except for just cause).

3. Declare that the employer has not incurred in any responsibility and, if the workers do not return to work within 24 hours, he will be free to hire others.

7.1.4 Indicators on labour force participation and labour relationships, number of unions, labour conflicts and strikes (2015–2019)

A. Population and labour force

Population projections

Mexico's population has increased by about 1.5 million inhabitants per year between 2015 and 2019, with a predominance of women. According to INEGI (2015), the female population is larger in the country due to factors including: 1) the large migration of men to the United States; 2) the life expectancy of women being slightly higher; and 3) the average annual growth rate being about 0.1 per cent higher for women.

TABLE 7.7 Total population of Mexico, the states of Guanajuato and Mexico City, disaggregated by gender, 2010–2020[6]

Federative entity	2010			2020		
	Total	Male	Female	Total	Male	Female
Mexico	112,336,538	54,855,231	57,481,307	126,014,024	61,473,390	64,540,634
Mexico City	8,851,080	4,233,783	4,617,297	9,209,944	4,404,927	4,805,017
Guanajuato	5,486,372	2,639,425	2,846,947	6,166,934	2,996,454	3,170,480

Source: INEGI.

TABLE 7.8 Total population of Mexico by sex, 2015–2019 (thousands)

Category	2015	2016	2017	2018	2019
Total	121,858	123,333	124,777	126,191	127,576
Male	59,594	60,315	61,025	61,721	62,403
Female	62,264	63,018	63,753	64,470	65,172

Source: Authors' elaboration based on United Nations Department of Economic and Social Affairs, Population Division (2021).

Table 7.9 displays the numbers of residents of urban and rural areas within the same time frame. The rural population slowly dropped by about 300,000 inhabitants over the period. Conversely, the population of urban areas increased at a much faster rate—about 6 million people in the same period.

Table 7.10 shows the average age of the population in Mexico and in the states of Guanajuato and Mexico City in 2015 and 2020. Following the trend observed in several countries in Latin America, the population has been getting older. However, there are some differences between

6. These data are not published annually by the Mexican government, so the clipping here was from 2010–2020.

Mexican regions: the state of Guanajuato is between one and two years below the national average, while Mexico City maintained an average of 6 years above the national average.

TABLE 7.9 Total population in Mexico and residents of urban and rural areas, 2015–2019 (thousands)

Year	2015	2016	2017	2018	2019
National	121,858.3	123,333.4	124,777.3	126,190.8	127,575.5
Rural	25,242.9	25,189	25,121.5	25,041.1	24,948.4
Urban	96,615.4	98,144.4	99,655.8	101,149.7	102,627.1

Source: ILOSTAT.

TABLE 7.10 Average age at the national and state levels in Mexico City and Guanajuato, 2015–2020[7]

Year	2015	2020
Mexico	27	29
Mexico City	33	35
Guanajuato	25	28

Source: INEGI.

Working-age population and labour force

There has been a continuous growth in the working-age population at the national level and in the state of Guanajuato. In Mexico City, the trend is similar except for 2016, which saw a decrease. The data provided by INEGI shows a faster growth than the ILO data, which considers a different age range. While INEGI states that the working-age population increased by almost 6 million between 2015 and 2019, the ILO data shows an increase of just over 4 million.

TABLE 7.11 Working-age population (15 years and older) nationwide in Mexico, in Mexico City and Guanajuato, 2015–2019[8]

Year	2015	2016	2017	2018	2019
Total	88,456,045	89,927,756	91,330,032	93,266,539	94,808,132
Guanajuato	4,173,693	4,244,253	4,265,432	4,336,813	4,379,332
Mexico City	7,144,316	7,115,691	7,163,246	7,197,855	7,244,010
Total working-age population (ILO)	52,892,100	53,665,700	54,194,000	55,544,700	56,978,000

Source: INEGI and ILO.

According to the National Population Council (*Consejo Nacional de Población*—CONAPO 2016), Mexicans work an average of 42.5 hours a week. About 28 per cent of the worker population

7. These data are not published annually by the Mexican government, so the cut was from 2015-2020.

8. INEGI does not set an age limit for the working age population, unlike the ILO and the OECD, which classify those between 15 and 64 years old as being of 'working age'. For international comparison purposes, an extra row was added to the table with ILO data.

with a labour contract works more than 48 hours a week. The ILO figures portray a slightly larger population than the working-age population presented in the previous table. This is explained by the fact that part of the active population considered by ILO is younger than 15 years and older than 64 years.

The increase in the active workforce between 2015 and 2019 was around 300,000 people, despite an oscillation in 2016-2017. Since 2015, there has been a continuous drop in the male workforce, while the female workforce increased between 2015 and 2019. Despite these increases in the participation of women in the labour force, there is still significant gender inequality.

Labour force participation rate

TABLE 7.12 Percentage of people in the active workforce (15 years or older) in Mexico by gender, 2015–2019

Year	2015	2016	2017	2018	2019
Total	59.8	59.7	59.3	59.5	60.1
Male	78	77.7	77.6	77.4	77.2
Female	43.3	43.4	43	43.5	44.7

Source: ILOSTAT Explorer (according to Encuesta Nacional de Ocupación y Empleo).

B. Employment

Table 7.13 shows the percentage of the Mexican population that is employed. Between 2015 and 2019, the population over 15 years old increased slightly.

TABLE 7.13 Employment-to-population ratio (aged 15 years or older)

Year	2015	2016	2017	2018	2019
Total	57.22%	57.37%	57.31%	57.6%	58.01%

Source: World Bank.

Regarding the distribution of jobs by occupation in Mexico, workers in areas such as management, craft and related trades varied between 2015-2019, indicating an unclear clear trend. Other occupational areas had a constant increase in the number of employees.

Table 7.15 presents the percentage of jobs distributed by economic activity, from 2015 to 2019. It appears that several segments remained stable. Some of the economic activities that saw a decrease in the number of employees include: the educational sector, activities of households as employers, public administration, agriculture, forestry and fishing, among others.

TABLE 7.14 Employment by occupation in Mexico (thousands)

Year	2015	2016	2017	2018	2019
Total	51,264.4	52,296.9	53,246.3	54,406.7	55,824
Managers	1,599.4	1,638.7	1,730.9	1,758.8	1,700.2
Professionals	4,684.5	4,798.1	4,979.2	5,270.2	5,320.9
Technicians and associate professionals	3,733.1	3,807.4	3,807.7	3,914.2	3,981.7
Clerical support workers	3,364.1	3,447.8	3,515.3	3,637.8	3,836.4
Service and sales workers	11,312.6	11,564.1	11,623	11,809.2	12,640.2
Crafts and related trade workers	6,282.8	6,618.1	6,896.5	7,151.6	6,962.8
Plant and machine operators and assemblers	5,010.5	5,173.6	5,323.1	5,487.8	5,589.1
Elementary occupations and skilled agricultural, forestry and fishery workers	15,277.3	15,248.9	15,370.5	15,377	15,792.7

Source: ILOSTAT Explorer.

TABLE 7.15 Employment distribution by economic activity (as a percentage)

Year	2015	2016	2017	2018	2019
A. Agriculture; forestry and fishing	13.3	13	13	12.7	12.4
B. Mining and quarrying	0.4	0.4	0.4	0.4	0.4
C. Manufacturing	16	16.3	16.6	16.6	16.6
D. Electricity; gas, steam and air conditioning supply	0.2	0.2	0.2	0.2	0.2
E. Water supply; sewerage, waste management and remediation activities	0.4	0.4	0.4	0.5	0.4
F. Construction	7.8	8.2	8.2	8.2	7.8
G. Wholesale and retail trade; repair of motor vehicles and motorcycles	21.1	20.9	20.4	20.6	21.2
H. Transportation and storage	4.2	4.3	4.3	4.5	4.4
I. Accommodation and food service activities	7.2	7.4	7.5	7.6	8
J. Information and communication	0.7	0.8	0.8	0.8	0.7
K. Financial and insurance activities	1	1	1	1	1
L. Real estate activities	0.4	0.3	0.4	0.4	0.4
M. Professional, scientific and technical activities	2.6	2.6	2.6	2.8	2.7
N. Administrative and support service activities	2.7	2.8	2.8	2.8	2.7
O. Public administration and defence; compulsory social security	4.5	4.4	4.2	4.2	4.2
P. Education	5	5	5.1	5	4.8
Q. Human health and social work activities	2.8	2.8	2.9	2.9	2.8
R. Arts, entertainment and recreation	0.9	0.9	0.9	0.9	0.9
S. Other service activities	3.1	3	3.1	3.1	3.2
T. Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use	4.7	4.6	4.5	4.3	4.3
U. Activities of extraterritorial organizations and bodies	0	0	0	0	0
X. Not elsewhere classified	0.8	0.8	0.8	0.8	0.8

Source: ILOSTAT (LFS—Encuesta Nacional de Ocupación y Empleo).

Employment distribution by employment status

Between 2015 and 2019, employment status improved across several jobs, except for self-employed workers and contributing family workers—these groups are employees of family businesses. In general, all data in Table 7.16 have no significant fluctuation, and even the drop in jobs in the areas mentioned above represent a very small percentage.

TABLE 7.16 Employment distribution by employment status (as a percentage)

Status in employment	2015	2016	2017	2018	2019
ICSE-93: 1. Employees	67.9	68.3	68.6	68.4	68
ICSE-93: 2. Employers	4.3	4.4	4.6	4.8	4.8
ICSE-93: 3. Own-account workers	22.4	22.3	22.2	22.3	22.6
ICSE-93: 5. Contributing family workers	5.3	4.9	4.7	4.5	4.6
Aggregate: Employees	67.9	68.3	68.6	68.4	68
Aggregate: Self-employed	32.1	31.7	31.4	31.6	32

Source: ILOSTAT (LFS—Encuesta Nacional de Ocupación y Empleo).

Share of temporary employees

The share of temporary jobs in Mexico decreased between 2015 and 2019. Although this decrease was not continuous, it occurred for both women and men, with a slightly higher rate for men. The share of temporary jobs represents most jobs in the country, illustrating the instability of work and income for a large part of the population.

TABLE 7.17 Share of temporary employees[9] by sex (as a percentage)

Year	2015	2016	2017	2018	2019
Total	55	55	54.5	53.7	53.4
Male	56.2	56.4	55.9	55.3	54.6
Female	53	52.6	52	51.2	51.5

Source: ILOSTAT Explorer (according to Encuesta Nacional de Ocupación y Empleo).

Incidence of part-time work

Women are more likely to occupy part-time work positions in Mexico. In 2015 and 2019, women held nearly twice as many part-time jobs as men. The incidence of women in part-time jobs is above the national average, while the incidence of men is below the national average,

9. According to the ILO, 'temporary jobs' are those in which employees have a fixed-term employment contract, which implies the delivery of some project or task to fulfil the contract, or which occurs according to seasonality or occasion, such as summer jobs. However, it is possible to find different definitions across various countries, which must be kept in mind during comparisons.

which ranged between 25 per cent and 26 per cent during the period. Even so, we can see a decrease in part-time jobs across all divisions of Table 7.18, although in 2019 these figures started increasing again.

TABLE 7.18 Incidence of part-time employment by sex (as a percentage)

Year	2015	2016	2017	2018	2019
Total	26.9%	26.1%	25.4%	25.2%	26.1%
Male	20.4%	19.6%	19%	18.7%	19.3%
Female	37.5%	36.6%	35.9%	35.7%	36.7%

Source: ILOSTAT Explorer (according to the Encuesta Nacional de Ocupación y Empleo).

Informal employment

Table 7.19 depicts the share of informality in the states of Guanajuato and Mexico City (Federal District) between 2015 and 2018. It decreased in both states, with increases in informal employment in 2017 in Guanajuato and in 2018 in Mexico City. The informality share also drops at the national level, with data covering 2019.

TABLE 7.19 Share of labour informality (among those aged 15 years or older) nationwide and in the states of Guanajuato and Federal District, 2015–2019

Year	2015	2016	2017	2018	2019
Total	57.8	57.3	57.0	56.6	56.4
Guanajuato	57.9	56.1	56.4	54.0	ND
Federal District	50.3	47.8	47.7	48.9	ND

Source: INEGI.

Mexico's records show a declining trend in informal jobs even during declining economic growth. Normally, informal work increases as a result of economic crises. This had been the rule until the 2009 crisis, when high shares of formal jobs have been reported until now (ILO 2014).

According to INEGI:

> "[…] The concept of informality has two dimensions. The first dimension refers to the type or nature of the economic unit, that is, when it is dedicated to the production of goods and/or services for the market and operates from the resources of a household and without keeping basic accounting records. In this case, it is an informal sector or unregistered small-scale businesses and employment linked to that sector.

> The second dimension starts from a labour perspective and refers to all work that is carried out without the protection of the legal or institutional framework, regardless of whether the economic unit that uses its services are companies, unregistered household businesses or formalised companies. In this case, it is informal employment. (ILO 2014, p.4, authors' own translation)."

According to Medina-Gómez and López-Arellano (2019), the precariousness of work in Mexico is the result of a deregulation and flexibilisation. In the same vein, Yañez and Alvarado (2016) highlight two causes for informality rates in Mexico: "excessive tax burdens, as well as their regulations, and the inability of the capitalist state to generate sufficient formal jobs" (p. 128, authors' own translation).

C. Labour productivity

According to the ILO, the annual growth rate of production per worker considers the number of people employed in the country, the productivity rate, and the total volume of production measured through gross domestic product (GDP). This data is also directly related to the efficiency of human capital in the production of goods or services. Table 7.20 shows that there was a reduction in Mexico's growth rate of production per worker for the period 2015-2019.

TABLE 7.20 Annual growth rate of output per worker (GDP constant 2011 international USD PPP) (as a percentage)

Year	2015	2016	2017	2018	2019
Share	0.8%	0.9%	0.3%	0%	-2.7%

Source: ILOSTAT.

The country experienced a large decrease in labour productivity between 2015 and 2019. Considering the Organisation for Economic Co-operation and Development (OECD) average, Mexico's labour productivity rate decreased while the OECD average followed an ascending trend in 2018 and 2019. For the analysed period, Mexico presented an average labour productivity 2 to 3 times below the OECD average.

According to Díaz and González (2019), the low Mexican labour productivity over the past three decades is directly related to the high number of informal jobs in the country. As in other countries, the formalisation of jobs would help increase productivity and economic growth. The OECD (2018) posits that although there is a low level of insecurity for workers in the Mexican formal labour market due to low risk of unemployment, this does not reflect the reality of informal jobs, which account for more than half of the jobs in the country. In addition, low wages and wage inequalities are also directly related to low labour productivity.

On the other hand, labour utilisation is measured by the number of hours worked per person. Table 7.21 illustrates that Mexico has shown higher rates than the OECD average, except for 2017. Despite this growth not being linear, it demonstrates a significant increase in hours worked by the country's population.

TABLE 7.21 Labour productivity and utilisation—annual growth rate, 2015–2019 (as a percentage)

Labour Productivity					
Year	**2015**	**2016**	**2017**	**2018**	**2019**
Mexico—Labour Productivity	0,57%	0,39%	0,56%	-0,48%	-1,82%
OECD—Labour Productivity	1,17%	0,36%	1,51%	0,96%	1,07%
Labour Productivity Utilisation					
Year	**2015**	**2016**	**2017**	**2018**	**2019**
Mexico—Labour utilisation	1,61%	1,16%	0,51%	1,68%	0,83%
OECD—Labour utilisation	0,84%	0,85%	0,58%	0,81%	-0,02%

Source: OECD.

D. Earnings and labour income

Mexican wages are just over a third of the OECD average. While the OECD average increased continuously between 2015 and 2019, the Mexican average increased at a lower rate, with a setback in 2016. This is a concern for Mexicans, as low wages are directly linked to vulnerable populations. For this reason, the government of Andrés Manuel López Obrador updated the minimum wage in 2019.

TABLE 7.22 Average annual wages, measured in 2019 constant prices

Average annual wages						
Country	**Series**	**2015**	**2016**	**2017**	**2018**	**2019**
Mexico	In 2019 constant prices at 2019 USD PPP	17 102	16 981	16 984	17 181	17 594
OECD		46 562	46 897	47 277	47 748	48 587

Source: OECD Stat.

According to Corella (2019), the low average wages in the country "are due to a policy of the Mexican State to compete in the international market using low wages as the main competitive advantage. […] As a result of this policy, Mexico has the lowest average wages in the entire OECD and the lowest in Latin America" (p.3, own translation).

Although not depicted in Table 7.23, the wage gap between men and women is a reality in the country and Corella argues that: "of all workers earning up to a minimum wage, 47 per cent are men and 53 per cent are women. The most dramatic result is among workers who earn more

than 10 minimum wages—only 24.8 per cent are women. In other words, gender inequality is much higher for the upper income strata" (Corella, 2019, 14, own translation).

E. Unemployment

There was a reduction in unemployment rates nationwide between 2015 and 2019 for both women and men. During the period analysed, the number of unemployed women was higher than unemployed men, except for 2019, when the rate was the same for both groups. An unemployment rate of 3.5 per cent is not considered high, according to the OECD average, which during the same period ranged between 5.6 per cent and 7.1 per cent.

TABLE 7.23 National unemployment rate by gender, 2015–2019 (people aged 15 and older, as a percentage)

Year	2015	2016	2017	2018	2019
Total	4.3%	3.9%	3.4%	3.3%	3.5%
Male	4.2%	3.8%	3.3%	3.2%	3.5%
Female	4.4%	3.9%	3.6%	3.4%	3.5%

Source: ILOSTAT Explorer (according to Encuesta Nacional de Ocupación y Empleo).

An analysis of state-level the data shows that Mexico City had a higher unemployment rate than Guanajuato. Both had higher rates than the national average, as shown in Table 7.24, and these rates decreased between 2015 and 2019.

TABLE 7.24 Unemployment rates in the states of Guanajuato and Mexico City, 2015–2018[10] (people aged 15 or older, as a percentage)

Year	2015	2016	2017	2018
Guanajuato	4.7%	4.0%	3.5%	3.7%
Federal District[11]	5.3%	5.0%	4.6%	4.6%

Source: INEGI.

The percentage of inactive women in the country (i.e., the working-age population outside the workforce) is almost three times higher than inactive men. Although the national data did not change much, there was a slight increase in inactive men and a decrease in inactive women.

The exclusion of women from the Mexican workforce reflects the country's gender inequality. Various factors make it more difficult for women to be a part of the workforce: in addition to

10. At the time of writing this paper, the Government of Mexico had not published the complete 2019 data.

11. Due to a change made in 2016 by the Government of Mexico, the Federal District was renamed Mexico City *(Ciudad de México)*, but in 2015 data still referred to Mexico City as the Federal District.

the wage gap and the high burden imposed by domestic care and housework, they work in part-time jobs (more than a third of women only work part-time). Rodríguez Garcés, Padilla Fuentes and Valenzuela Orrego (2019) state that inactivity among women is directly linked to the invisibility of their contribution and is aggravated by the local culture. The main reason preventing these women from engaging in the labour market is family care, which falls almost exclusively on them.

Inactivity rates

TABLE 7.25 Annual inactivity rates in Mexico, ages 15-64, 2015–2019 (as a percentage)

Year	2015	2016	2017	2018	2019
Total	36.4%	36.4%	36.6%	36.3%	35.4%
Men	18%	18.2%	18.2%	18.2%	18.2%
Women	53.2%	53%	53.3%	52.7%	51.2%

Source: OECD.

During the same period, the inactivity rate of OECD countries varied between 27.8 per cent and 28.6 per cent, lower than the Mexican average.

F. Trade Union Density

According to the OECD, union density is the share of wage workers affiliated to unions. Our analysis considers the proportion of wage workers that are members of unions in relation to the total number of workers. As in other countries, Mexico also saw a decrease in the number of union members. The unionisation rate decreased over the years, according to both ILO and OECD data. Mexico has discontinued the reporting of this sort of data.

TABLE 7.26 Trade union density, 2015–2018 (as a percentage)[12]

Year	2015	2016[13]	2017	2018
Trade union density rate-ILOSTAT	12.9%	12.5%	N.D.	N.D.
Trade union density rate-OECDSTAT	13.1%	12.7%	12.5%	12%

Source: OECDSTAT and ILOSTAT (Encuesta Nacional de Ocupación y Empleo).

12. As the Government of Mexico no longer makes these data available, there is no breakdown by state.

13. As the *Encuesta Nacional de Ocupación y Empleo* no longer addresses the union issue, the last year for which these data are available is 2016.

Table 7.27 shows the collective bargaining coverage rate, which is composed of the percentage of workers who reach a collective agreement that changes their wage issues and working conditions. This rate increased between 2015 and 2016 in Mexico. In 2016, the collective bargaining coverage rates for OECD countries was at an average of 32 per cent, highlighting the low Mexican average.

TABLE 7.27 Annual collective bargaining coverage rates (as a percentage)

Year	2015	2016
Total	9.8%	9.9%

Source: MexicoADM—Registros Administrativos de la Secretaría del Trabajo y Previsión Social—ILO.

To provide a better understanding of these low rates, we further discuss union issues and strikes in Mexico in the following subsection.

G. Strikes

Mexico has a low approval rate for strikes. Ratified strikes are translated into the number of strikes shown in the tables below. A significant amount of bureaucracy in the country leads to less than 1 per cent of all strikes[14] resulting in legitimate stoppages, thus not presenting any risk of employee dismissal. According to Campos (2017), the low unionisation rate is due to the adoption of the neoliberal model by unions and the country as a whole, which resulted in jobs being made more flexible and the employee-employer negotiation taking place directly, without the need for State intermediation.

In Mexico, there are unions known as *blancos* or *charros*, referring to the fact that they are aligned with companies and/or with some government representative, instead of acting on behalf of workers. Regarding a certain aversion to strikes, Corella (2019) argues:

> "[…] In Mexico there is a belief that labour conflict causes unemployment, since many of the companies in the country are export *maquiladoras*[15] and can migrate if working conditions change. On several occasions, leaders of unions called *charros,* which are part of the Confederation of Mexican Workers (CTM), proposed that it is better to have low wages than no job. (p.10, own translation)."

14. For more information, see: <https://www.gob.mx/cms/uploads/attachment/file/590120/SEGUNDO_INFORME-videos-MODIFICACION_OCTUBRE_2020-DIGITAL_compressed.pdf>.

15. The term *maquiladora* refers to a factory or manufacturing plant in Mexico.

Despite this conflict of interests, there is a discourse supported mainly by the Mexican government that there is a state of 'labour peace' between workers and employers. Corella (ibid.) argues that

> "[…] Productivity in Mexico increased in general and in various sectors of the economy. This leads me to reflect on the possible causes for wages having increased so little in Mexico. Among the possible causes I identify federal government policies to maintain a cheap labour force in order to compete internationally and to maintain low inflation and protect 'labour peace' at any cost, that is, avoid any type of conflict between workers and businesses.
>
> 'Labour peace' has been promoted at the expense of workers, who lost their ability to negotiate their wages with companies, exacerbating a lack of upwards mobility and the growth of monopsony power in the business sector. (p.3, own translation)."

Bearing this in mind when analysing the data on striking presented in this section, we see that Guanajuato has not had any strikes in recent years. Mexico City, on the other hand, has had a large number of homologated strikes (when compared to national figures)—over half of the strikes that occurred nationwide. However, the number of strikes in Mexico City has fallen drastically over the years, while the national average has remained relatively stable. This demonstrates that a large part of new strikes are emerging in other areas, which is a new trend.

Women are a minority among striking workers, both nationally and in Mexico City. In fact, Mexico City stands out for not having women participating in any strikes in 2016 and 2018. Additionally, their participation is much lower when compared to the number of men in other years. This low participation rate is also reflected in Table 7.28, which illustrates the number of resolved strikes. The data on women and strikes can be associated with female labour inactivity, as previously discussed.

Strikes

The number of strike resolutions in the country does not follow the number of strikes in Table 7.29 linearly but leads us to reflect on the delay in resolving strikes in the country since 2017. For example, in that year there were 17 strikes and 40 were resolved—that is, these 40 resolved strikes include those that started in previous years and had not previously led to an agreement between workers and employers. This is directly linked to Table 7.26 (collective bargaining coverage rates), and to the fact that sometimes there are workers who end stoppages and return to work even without having reached an agreement with their employer.

TABLE 7.28 National and state-level strikes (Mexico City and Guanajuato), by gender, 2015–2019

Year		2015	2016	2017	2018	2019
National	Total strikes	59	46	17	32	76
	Total workers	4,541	2,147	2,205	8,528	33,789
	Male	2,703	2,045	1,498	3,989	19,161
	Female	1,838	102	690	3,329	14,432
	Unspecified Sex	0	0	17	1,210	196
Mexico City	Total strikes	41	31	10	6	7
	Total workers	659	559	460	1 318	356
	Male	584	559	435	108	154
	Female	75	0	8	0	6
	Unspecified Sex	0	0	17	1,210	196
Guanajuato	Total strikes	0	0	0	0	0
	Total workers	0	0	0	0	0
	Male	0	0	0	0	0
	Female	0	0	0	0	0
	Unspecified Sex	0	0	0	0	0

Source: INEGI.

TABLE 7.29 Strikes resolved at the national and state levels (Mexico City and Guanajuato), by gender, 2015–2019

Year		2015	2016	2017	2018	2019
National	Total strikes	63	34	40	35	67
	Total workers	4,271	1,990	1,804	4,349	27,703
	Male	2,472	1,802	1,039	1,737	15,786
	Female	1,651	18	688	1,412	11,551
	Unspecified Sex	148	170	77	1,200	366
Mexico City	Total strikes	26	23	32	21	16
	Total workers	558	488	100	1,523	282
	Male	488	478	77	323	266
	Female	70	10	21	0	0
	Unspecified Sex	0	0	2	1,200	16
Guanajuato[16]	Total strikes	0	0	0	0	0
	Total workers	0	0	0	0	0
	Male	0	0	0	0	0
	Female	0	0	0	0	0
	Unspecified Sex	0	0	0	0	0

Source: INEGI.

16. According to the sources consulted, 1999 was the last year when strikes were reported in Guanajuato.

7.2 LABOUR DISPUTE RESOLUTION SYSTEM

7.2.1 Organisation of the dispute resolution system, jurisdiction and territorial distribution

The legal framework of the organisation of the federal justice system in Mexico is the *ley orgánica del poder judicial de la federación* (LOPJF, as last amended in 2018). Art. 1 of the LOPJF identifies as public bodies which exercise the Judicial Power of the Federation:

1. The Supreme Court.
2. The Electoral Court.
3. The Collegiate Circuit Courts.
4. The Unitary Circuit Courts.
5. The District Courts.
6. The Council of the Federal Judiciary.
7. The Federal Jury Of Citizens.
8. The state courts and the Federal District court in the cases provided for in Art. 107, section XII of the Constitution and others which, by provision of the law, must act in support of Federal Justice.

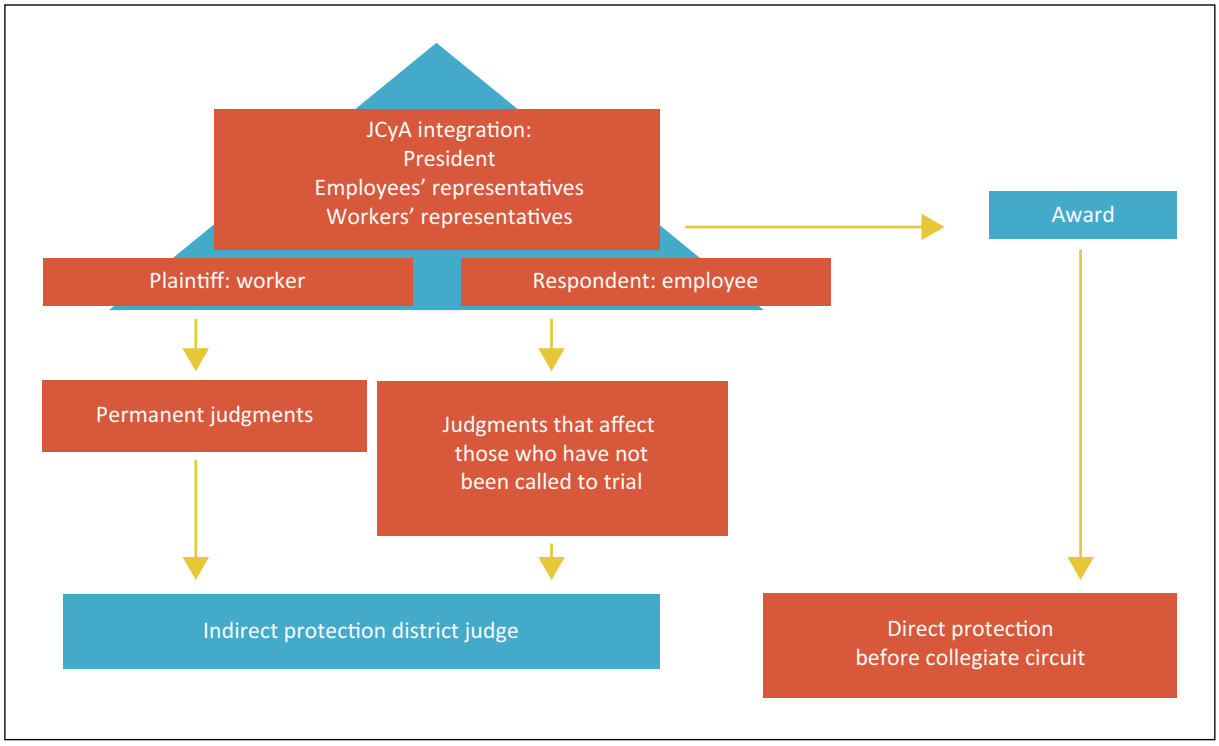
The Mexican Federal Judiciary is based on a three-tiered system. There is a Supreme Court (*Suprema Corte de Justicia de la Nación*), which has final appellate jurisdiction over all state and federal courts. Then there are circuit courts (*Tribunales de Circuito*), which are the federal appellate courts. Circuit courts are divided into single judge courts (*Tribunales Unitarios de Circuito*) and collegiate courts (*Tribunales Colegiados de Circuito*). There are also district courts (*Juzgados de Distrito*) and jury courts (*Jurados Populares Federales*), which are the federal courts of first instance.

The Supreme Court is composed of 11 Justices and 1 Chief Justice. The president nominates three finalists for each position for the Supreme Court. The Senate then elects one new justice from the list by a two-thirds vote (Peschard-Sverdrup and Rioff 2005). The Supreme Court is also subdivided and meets in panels (*salas*). There are four panels: criminal, civil, administrative, and labour panels.

The Constitution also provides that for appointing a Justice of the Supreme Court, the President of the Republic shall submit a list of three candidates to the Senate, who should appear before the Senate. Within 30 days, the Senate must choose one of the candidates by a two-thirds vote. This period may not be extended. Should the Senate not decide within this period, the President of the Republic shall appoint one person from the list. If the Senate rejects all the three candidates in the list, the President shall submit a new list of three candidates, considering the provisions established in the previous paragraph. If the Senate rejects this second list, the President of the Republic shall directly appoint one person it.

The **Collegiate Circuit Courts** (*Tribunales Colegiados de Circuito*) are composed of three magistrates, a secretary of agreements, a secretary, clerks, and employees. Each court has a president appointed by its own members, whose mandate lasts for one year and can be extended for another year; the resolutions are adopted by majority or unanimity. The **Federal Court of Conciliation and Arbitration** (*Tribunal Federal de Conciliación y Arbitraje*) is a collegiate body that is composed of a representative from the federal government, one from the Federation of Trade Unions of State Service (FSTSE) and one appointed by both institutions. Articles 94 and 97 of the Constitution provide that the Federal Judicial Council, based on objective criteria and observing the requirements and procedures established by law, shall appoint district and circuit judges. District and circuit judges shall be appointed for a term of six years. At the end of the term, they may be ratified or promoted. In this case, they may be dismissed only in the cases described by the law and following the established procedure. Such provisions are integrated by the LOPJF.

FIGURE 7.2 Mexico's labour justice system



Source: Bensusán and Alcalde (2013).

Within the context of labour, Art. 123, Let. A), Section XX of the Constitution (as amended in 2017) identifies labour courts as jurisdictional bodies. Therefore, labour courts are in charge of exercising the jurisdiction in labour matters. However, the Conciliation and Arbitration Boards, in accordance with Art. 8 of the transitory dispositions of 2019 reform decree, will remain responsible for deciding labour disputes until the functioning of local and federal courts, observing the term of 3 years for local courts and 4 years for federal courts, respectively.

Constitutional reforms affecting the dispute resolution system

In accordance with Art. 94 of the Constitution, the Federal Judicial Council shall deal with matters of administration, supervision, and discipline of Mexican federal judges, except for the Supreme Court, according to the provisions established by law. The same Art. provides that the Federal Judicial Council shall define the number, district division, territorial competence, and subject matter specialisation—including broadcasting, telecommunications, and economic competition—of collegiate and unitary circuit courts, as well as of the district courts. Likewise, it shall have the power to issue general covenants to create circuit courts, according to the number and specialisation of the collegiate courts that belong to each circuit.

It is important to note that in 2020 the federal government presented a proposal for judicial reform developed by the Federal Judicial Branch. As reported by Daen (2020), the reform proposes changes to seven constitutional Articles (94, 97, 99, 100, 103, 105 and 107), as well as the enactment of two new federal laws: the Organic Law of the Federal Judicial Branch, and the Law on the Judicial Career of the Judicial power of the Federation. Key points of the reform include:

1. A new school for judges: the initiative proposes transforming the Federal Judicial Institute into a Federal School for Judicial Training, in charge of conducting tenders for all judicial positions. Further, the Judicial School should provide training to justice providers at the local level.

2. Mandatory evaluation: establishing the obligation to adopt performance evaluation schemes, for permanence in the judicial career, through periodic competency assessments. The results of the assessment will form the basis for obtaining incentives and recognition as well as for decision-making regarding permanence and, where appropriate, termination from the judicial career. The Judicial Council would establish the criteria and mechanisms for evaluating the effectiveness and efficiency of the exercise of jurisdictional functions, the period of application of examinations, the subjects to be evaluated as well as the instances and bodies in charge of evaluating and monitoring the results.

3. Strengthening public defenders: the initiative indicates that the new Judicial School will train public defenders, with a comprehensive and specialised plan, and will hold

tenders for entry into and promotion of the career. "In addition, the reform should entail the possibility for the public defender's office to provide representation and advice in matters of family protection and in any other matter of protection determined by the Federal Judicial Council, in addition to criminal and labour matters."

4. Measures against corruption, nepotism, and sexual harassment. To combat corruption in the Judiciary it is proposed that the Federal Judicial Council have powers to issue precautionary measures while the investigations are under way, and before a resolution is reached regarding the alleged perpetrator. Some of these measures include the change of assignment or temporary suspension. Another proposed measure is the possibility of making extraordinary visits to courts or creating investigative committees on any matter that the Council of the Judiciary considers to be at risk of corruption.

5. The proposal establishes nepotism as a factor influencing the appointment of relatives in the Federal Judiciary, prohibiting it. Appointments made in violation of this prohibition will be considered without effect.

6. To combat sexual harassment, the initiative states that in order to characterise administrative liability, it is sufficient for a conduct of a sexual nature to have been carried out against another person in their work environment, without their consent, without having to prove that this harassment goes against the dignity of the victim. This is intended to make it easier to apply sanctions against this type of conduct.

7. Gender equality. The Judicial Power of the Federation will incorporate the gender perspective, in a cross-cutting, progressive, and equitable manner, in the development of the judicial career, to guarantee the exercise and enjoyment of human rights to all, with a focus on substantive equality. Gender parity will be established as a tiebreaker condition in tenders for the appointment of district judges and magistrates.

8. Modification of the jurisprudence system. The need for the Supreme Court to issue five similar judgments to establish jurisprudence or a mandatory criterion for all the courts in the country is eliminated. It is proposed that the reasons that justify the decisions of the sentence, approved by a qualified majority, are binding on all the jurisdictional bodies of the country, without the need for repetition. In this way, all sentences of the Supreme Court will be relevant, and the defendants can demand that they be observed by all lesser courts.

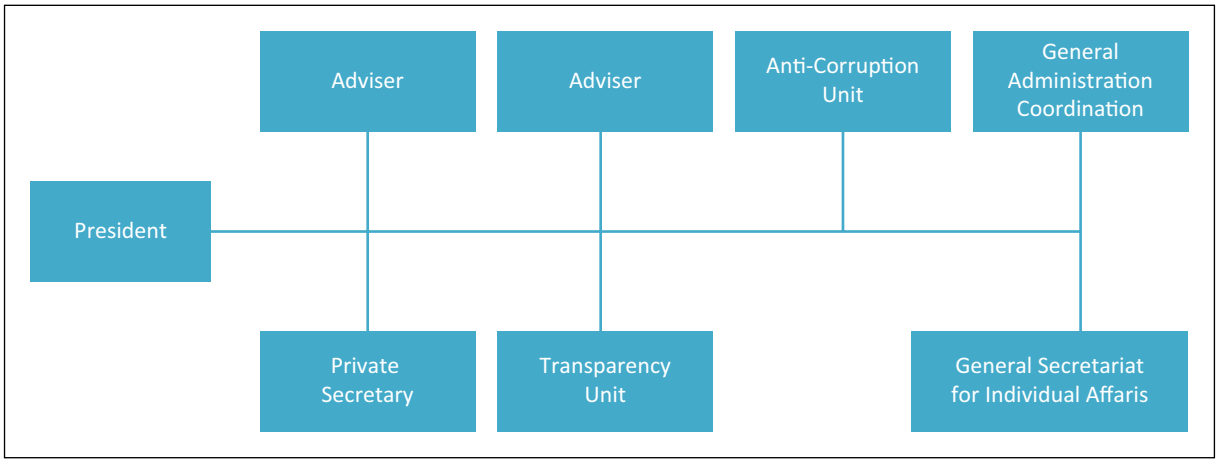
9. A smaller workload for the Supreme Court. As for the remedies of *amparo*, the reform establishes that the Supreme Court should only deal in cases that involve direct violations of the Constitution. Constitutional challenges or controversies, according to the proposal, would apply not only to 'acts' that are considered to be in violation of the Constitution, but also for omissions that someone considers to be contrary to their

fundamental rights. Similarly, in cases of appeals against judgments "that decide on constitutionality", it is proposed that the Plenary of the Supreme Court chooses only those matters that it considers "of exceptional interest" to constitutional or human rights matters. An additional initiative in this regard is the creation of Regional Plenaries as permanent organs of the Judiciary. Their function would be to unify the criteria of the collegiate courts in their region, to afford legal certainty and coherence to the judicial doctrine at the federal level, and thus lessen the workload of the Supreme Court.

10. New courts. The reform establishes the creation of Courts of Appeal, replacing the Unitary Circuit Courts. These Courts of Appeal would be composed of 3 magistrates. In each of the circuits, the Federal Judicial Council will establish, through general agreements, the number of collegiate circuit courts, collegiate appeals and district courts, as well as their specialisation and territorial limits. In each region, a regional plenary will have jurisdiction over its corresponding circuits.

Figure 7.3 illustrates the general organic structure of Mexico City's Local Conciliation and Arbitration Board (*Junta Local de Conciliación y Arbitraje*).

FIGURE 7.3 General organic structure of Mexico City's Local Conciliation and Arbitration Board



Source: Author's elaboration based on Junta Local de Conciliación y Arbitraje de CMDX (2018).

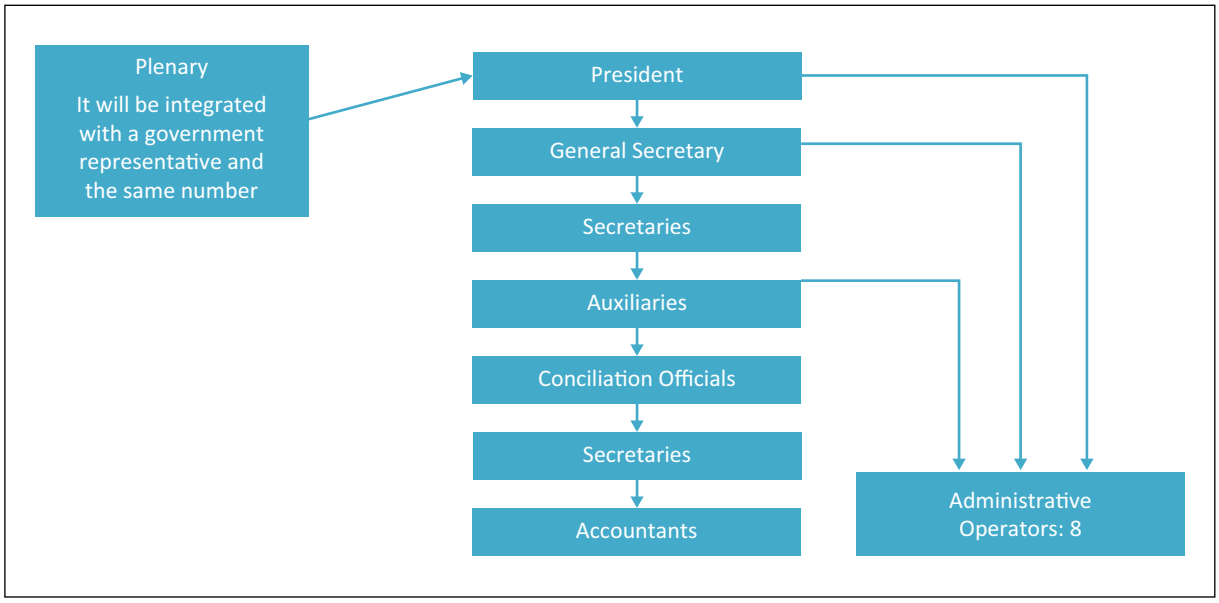
Figure 7.4 illustrates the general organic structure of Guanajuato's Local Conciliation and Arbitration Board.

As stated by the Transparency and Archives Unit of the Executive Power of the State of Guanajuato,[17] the Guanajuato's Local Conciliation and Arbitration Board is a Mexican State body, and its integration is tripartite and democratic, in accordance with the provisions

17.Available at: <http://segob.guanajuato.gob.mx:8088/erpdga/recursoshumanos/organigrama/popOrg.aspx?iduo=193>.

of Art. 623 of the Federal Labour Law (*Lei Federal del Trabajo*) (Cámara de Diputados del H. Congreso de la Unión 2021). In accordance with Art. 2 of the Federal Labour Law, its purpose or object lies in achieving and maintaining the balance between the factors of production, through the functions of conciliation and administration of justice, in labour relations. To this end, various articles of the Law contemplate the personnel who comprise the boards that develop legal activities.

FIGURE 7.4 General organic structure of Guanajuato's Local Conciliation and Arbitration Board



Source: Guanajuato Government (2017).[18]

Before Mexico's labour reform, all Local Conciliation and Arbitration Boards were regulated by the Chapter 13 of the Federal Labour Law, with special attention to Art. 623 and Art. 625 (Cámara de Diputados del H. Congreso de la Unión 2021, 152–153):

> "Article 623. The Plenary will be made up of the President of the Board and the representatives of the workers and employers. The integration and operation of the Local Conciliation and Arbitration Boards shall be governed by the provisions contained in the previous chapter. The powers of the President of the Republic and the Secretary of Labour and Social Welfare [Secretario del Trabajo y Previsión Social] shall be exercised by the Governors of the States and, in the case of the Federal District, by the President of the Republic himself and by the Head of Government of the Federal District, respectively.

18. Available at: <http://segob.guanajuato.gob.mx:8088/erpdga/recursoshumanos/organigrama/popOrg.aspx?iduo=193>.

> Article 625. The staff of the Conciliation and Arbitration Boards will be made up of actuaries, secretaries, conciliating officials, assistants, assistant secretaries, general secretaries, and Presidents of the Special Board. The Ministry of Labour and Social Welfare [Secretario del Trabajo y Previsión Social], the Governors of the Federative Entities and the Head of Government of the Federal District, will determine the number of people that each Board should be made up of."

However, the new Federal Labour Law (Cámara de Diputados del H. Congreso de la Unión 2019) revoked all articles related to the Local Conciliation and Arbitration Boards, which are expected to be extinguished in 2023.

Geographical distribution of courts

Currently the Federal Board of Conciliation and Arbitration is composed of 66 Special Boards (*Juntas Especiales*), 21 of which are located in the Federal District and resolve conflicts of a legal and economic nature in accordance with the industrial branch or branches of their competence, and 45 in the rest of the country, which deal with all branches of industry and federal activities.[19]

The Local Conciliation and Arbitration Boards function in each of the federative entities: 1. Aguascalientes, 2. Baja California, 3. Baja California Sur, 4. Campeche, 5. Chiapas, 6. Chihuahua, 7. Ciudad de México, 8. Coahuila de Zaragoza, 9. Colima, 10. Durango, 11. Guanajuato, 12. Guerrero, 13. Hidalgo, 14. Jalisco, 15. México, 16. Michoacán de Ocampo, 17. Morelos, 18. Nayarit, 19. Nuevo León, 20. Oaxaca, 21. Puebla, 22. Querétaro, 23. Quintana Roo, 24. San Luis Potosí, 25. Sinaloa, 26. Sonora, 27. Tabasco, 28. Tamaulipas, 29. Tlaxcala, 30. Veracruz de Ignacio de la Llave, 31. Yucatán, 32. Zacatecas.[20]

With the enactment of the Labour Reform on 1 May 2019, a series of transformations started to happen in the Mexican labour justice system, as shown in Figure 7.5.

According to the Mexican Ministry of Labour and Social Security, the implementation of the new Labour Justice System is set to be carried out in 4 years, starting in 2019. The first stage began in October 2020, and involved 8 states: Campeche, Chiapas, Durango, Estado de México, Hidalgo, San Luis Potosí, Tabasco, and Zacatecas. The second stage took place in 2021, involving the following states: Aguascalientes, Baja California, Baja California Sur, Colima, Guanajuato, Guerrero, Morelos, Oaxaca, Puebla, Querétaro, Quintana Roo, Tlaxcala,

19. See: <https://www.gob.mx/jfca/documentos/preguntas-frecuentes-jfca>.

20. Available at: <https://archivos.juridicas.unam.mx/www/bjv/libros/9/4319/25.pdf>.

and Veracruz. Finally, the third and last stage is expected to take place in 2022 in the remaining states: Chihuahua, Ciudad de México, Coahuila, Jalisco, Michoacán, Nayarit, Nuevo León, Sinaloa, Sonora, Tamaulipas, and Yucatán.

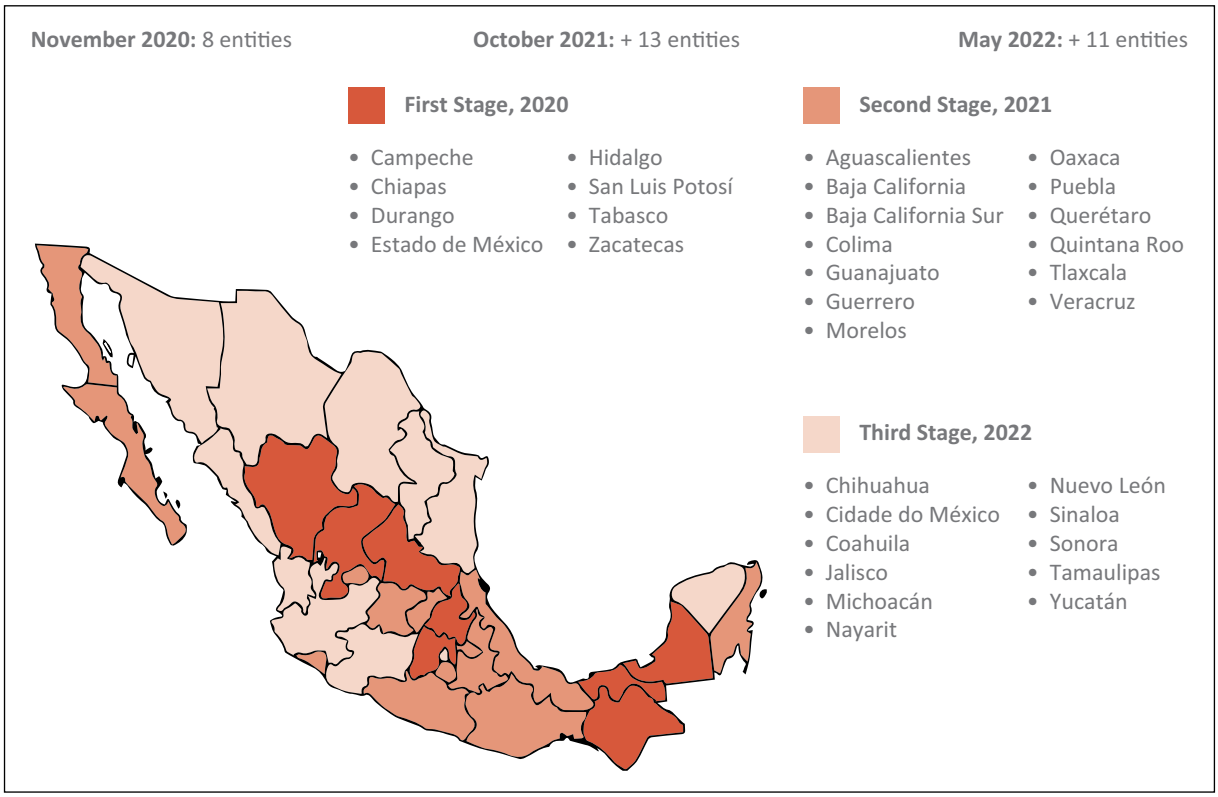
FIGURE 7.5 The path of Mexico's labour reform

Source: Author's elaboration based on Secretaría del Trabajo y Previsión Social (2021).[21]

As seen on the website dedicated to the labour reform and maintained by the Ministry of Labour and Social Security, on 27 May 2021, all states in the first stage have progressed in the reform in terms of legislative harmonisation, but still lack the infrastructure of State Conciliation Centres and local courts, with none of the states having concluded the construction of their Labour Conciliation Centres (*Centros de Conciliación Laboral*).

21. Available at: < https://reformalaboral.stps.gob.mx/difusion>.

FIGURE 7.6 Implementation Plan



Source: Author's elaboration based on Secretaría del Trabajo y Previsión Social (2021).[22]

In any case, the Ministry of Labour and Social Security stated that, except for Hidalgo, **all of the new labour justice institutions are working in all first-stage states**[23] (including the Labour Conciliation Centres and labour courts), although in temporary sites. Also, many of the second-stage states have already completed the legislative harmonisation stage but have not started the operations of the new labour justice institutions.

On 19 May 2021 the Ministry of Labour and Social Security claimed that 1920 unions registered at the federal level (of a total of 2,052 active unions)—93.56 per cent—had adjusted their statutes. On the other hand, only 2,652 locally-registered unions (of 11,605 active unions) had adapted their statutes—only 22.85 per cent. Furthermore, 887 collective bargaining agreements were validated nationwide.

Responsibility to solve labour disputes—only judges or also other authorities?

As already mentioned, the main bodies currently responsible for resolving labour disputes are the Conciliation and Arbitration boards, which in accordance with the 2019 reform of

22. Available at: <https://reformalaboral.stps.gob.mx/rl/doc/AVANCES_DESAFIOS_REFORMA_LABORAL-22JULIO2020.pdf>.

23. As verified on 27 May 2021 at the labour reform website: < https://reformalaboral.stps.gob.mx/>.

the LFT, will be substituted by labour courts. The labour courts are responsible for resolving labour conflicts that take place in their jurisdiction: it has to be considered that the traditional classification of jurisdiction by subject, degree and territory is also applicable to labour disputes. This is because the nature of conflicts determines whether the competence, for example, is federal or local, or even bureaucratic in nature, or whether special regimes are applicable or not.

1. Competence by subject is due to the social nature of this branch of law; the authorities are apt to hear the matter regardless of the value of claimed benefits.

2. Regarding the classification of the jurisdiction corresponding to the degree of judgement, labour lawsuits only have one degree of judgement, which is due to the LFT disallowing contesting the merits of the sentence.

Therefore, the only way to challenge the merits of the decisions of labour courts is filing a direct *amparo* trial.

Regarding competence by subject, the first aspect to be considered is the subject and/or the nature of the work. Art. 527 of the LFT establishes competence by industrial and service branch, and by companies.

Article 527. The application of labour standards corresponds to the federal authorities, in the case of:

1) Industrial and service industries:

    1. Textile;

    2. Electric;

    3. Cinematographic;

    4. Rubber;

    5. Sugar;

    6. Mining;

    7. Metallurgy and iron and steel, covering the exploitation of basic minerals, the improvement and smelting thereof, as well as the obtaining of metallic iron and steel in all its forms and leagues and the laminated products thereof;

8. Hydrocarbons;

9. Petrochemicals;

10. Cement;

11. Limestone quarries;

12. Automotive, including mechanical or electrical auto parts;

13. Chemistry, including pharmaceutical chemistry and drugs;

14. Cellulose and paper;

15. Vegetable oils and fats;

16. Food industry, exclusively covering the manufacture of packaged and canned foods;

17. Packaged or canned beverages;

18. Railroads;

19. Basic lumber, including sawmills and the manufacture of plywood or bonded wood;

20. Stained glass, exclusively for the manufacture of flat, smooth or wrought glass or glass containers;

21. Tobacco, including the benefit or manufacture of tobacco products;

22. Banking and credit services.

2) Companies

a) Those that are administered directly or decentralised by the federal government.

b) Those that act by virtue of a federal contract or concession and the industries that are related to them. For the purposes of this provision, it is considered that those companies whose purpose is the administration and exploitation of public services or State assets on a regular and continuous basis, for the satisfaction of

the collective interest, through any administrative act, are acting under federal concession, issued by the federal government.

c) Those that carry out works in federal zones or that are under federal jurisdiction, in territorial waters or in those included in the exclusive economic zone of the Nation.

The federal authorities will also be responsible for compliance with employer obligations regarding the training of their workers and safety and hygiene in the workplace.

In accordance with the second paragraph of Art. 698 of the LFT, the federal court also has jurisdiction over labour disputes in the case of the industrial branches, companies or matters mentioned in Art. 123, section A, fraction XXXI, of the Constitution. That article identifies the following elements:

1. The registration of all collective agreements and union organisations as well as all administrative processes related thereto.

2. The application of labour provisions on issues related to conflicts affecting two or more federal entities.

3. Collective contracts that have been declared mandatory in more than one federal entity.

4. Employer obligations in matters related to education in the terms of law.

5. Employer obligations concerning qualification and training of workers, as well as safety and hygiene in work centres, for which the federal authorities will have the support of state authorities concerning branches or activities of local jurisdiction, in the terms of the corresponding law.

When the claim involves matters where both federal and local jurisdictions converge, the local court remains competent (Martínez 2019).

Territorial competence is regulated by Art. 700 of the LFT, which establishes the following rules:

1. In individual disputes, the plaintiff can choose between:

   a) the court where the contract was established;

   b) the court where the domicile of any of the defendants is located; or

c) the court where services were provided. If services were provided at various locations, then the court where they were last provided.

2. In collective disputes under federal jurisdiction, the Federal Court shall be competent; in collective disputes of local jurisdiction, the Local Court of the place where the company or establishment is located will resolve the dispute.

3. In the case of cancellation of the registration of a union, the Federal Court whose affiliation is closest to their domicile.

4. In disputes between employers or among workers, the court in the defendant's domicile.

5. When the defendant is a union member, the Federal Court or the Local Court closest to the domicile of the defendant, as appropriate to the nature of the lawsuit.

This makes it possible for the plaintiff to choose between different courts, which is justified by the proper protection of labour law of the party that has traditionally been considered the most vulnerable—the worker.

The Federal Court of Conciliation and Arbitration is a jurisdictional body charged with settling labour disputes that may arise between federal public entities and their workers, in accordance with the disposition contained in Art. 123, let. B) of the Constitution. Its jurisdiction is established in Art. 124 of the Federal Law of Civil Servants. The Federal Court of Conciliation and Arbitration is responsible for:

1. Resolving individual conflicts that may arise between the company owners and the workers.

2. Resolving collective conflicts that arise between the State and workers' organisations.

3. Granting the registration of unions or, where appropriate, determine their cancellation.

4. Resolving union and inter-union conflicts.

5. Carrying out the registration of the General Conditions of Work, Regulations of Scale, Regulations of the Mixed Commissions of Safety and Hygiene and of the Statutes of the Unions.

The CFJ is the body in charge of the administration, surveillance and discipline of the Federal Judicial Branch. Art. 81 of the LOPJF states in its fraction XXV this corresponds to the resolution of labour conflicts emerging between the Judicial Power of the Federation and its civil servants, with the exception of conflicts relating to civil servants of the Supreme Court of Justice, whose resolution is up to that body. Finally, labour conflicts of the civil servants of the Electoral Court of the Judicial Power of the Federation, as well as of the National Electoral Institute, will be resolved by that court.

Lay judges are not involved in in the resolution of labour disputes.

Alternative dispute resolution, mediation and arbitration, and types of labour disputes

The legal competence of each of the aforementioned types of suits will fall to the Federal Court when expressly stated by the Constitution and the LFT (e.g., when concerning an economic field that is exclusively dealt with by federal authorities). When not expressly stated, competence then falls to local authorities.

The Constitution establishes a residual competence system in the country, i.e., all competences that are not expressly granted to the federal powers are reserved to the states (Carbonell 2003). This is mainly based on Article 124 of the Constitution, which states that "the powers that are not expressly granted by this Constitution to federal officials, are understood to be reserved to the States or to Mexico City, in the areas of their respective competences"[24] (Mexico 1917, own translation).

As argued by Quintana, Euler, and Varona (2014, 340–341),

> "The federal constitution allocates the legislative power to either the central government or to the component states. This is achieved by vesting the component states with general and **residual legislative power** and then assigning specific legislative powers to the central government. In other words, the component states' legislative competence is limited only by the legislative power allocated to the federal level. Note that the opposite is true, however, with regard to Mexico City, i.e., the Federal District: here the residual power is given to the centre and local authorities have only the competences expressly assigned to them."

However, they acknowledge that there is "no complete legal unification regarding matters that fall under the residual powers clause established in Article 124 of the federal constitution, i.e.,

24. In the original, "Las facultades que no están expresamente concedidas por esta Constitución a los funcionarios federales, se entienden reservadas a los Estados o a la Ciudad de México, en los ámbitos de sus respectivas competencias."

in areas that are reserved exclusively to the component states because they are not assigned to the federal government" (ibid., 343). This situation demands a case-by-case approach when analysing labour justice in Mexico.

Work-related risks are regulated by the ninth title of the LFT. As reported by Justia Mexico (2020), the employer is required to grant safety and health guarantees to the worker in the performance of their work, preventing work-related risks.

The Mexican Social Security Institute is empowered to provide preventive services to avoid work risks. In addition, the Social Security Law establishes that the Mexican Social Security Institute, in coordination with the Ministry of Labour and Social Security, the dependencies and entities of the Federal Public Administration, the federal entities and the organisations that represent the social and private sector, must carry out programmes for the prevention of workplace accidents and occupational diseases.

In the event that the worker suffers incapacitation or even death due to workplace risks, they (or their beneficiaries) may claim from compensation from the employer as established by the Federal Labour Law, and pensions and economic support from the Mexican Institute of Social Security.

7.2.2 Individual and collective dispute resolution system and procedures

Recent changes in labour justice and the Federal Labour Law

The federal and local Conciliation and Arbitration Boards (*Juntas de Conciliación y Arbitraje*) are the competent bodies to judge labour claims. Until 2017, these bodies were part of the government's executive power. However, the Constitution was reformed on 23 February 2017 and the labour justice system was modernised. To provide greater access to labour justice, the reform separated the two functions previously performed by the Conciliation and Arbitration Boards: resolving deadlocks between workers and employers and issuing sentences for labour conflicts.

This reform implied a major change in the way labour cases are handled and resolved.[25] It resulted in the creation of labour courts (*Centros de Conciliación Laboral*) to replace the Conciliation and Arbitration Boards in the promulgation of sentences. Local and federal labour courts become part of the judiciary, and operate under the principles of "legality, impartiality, transparency, autonomy and independence" (Article 123).

25. See: <https://www.maquilasolidarity.org/sites/default/files/resource/Reforma_Justicia_Laboral_Mexico_RSM-2017_0.pdf>.

Labour conciliation is now carried out by federal and local "specialised and impartial" Conciliation Centres with total technical, operational, budgetary, decision-making and management autonomy. They operate under the principles of "certainty, independence, legality, impartiality, reliability, efficiency, objectivity, professionalism, transparency and publicity" (Article 123). At the federal level, conciliation will be the responsibility of a new decentralised body, yet to be created. All labour claims will be subject to a compulsory conciliation hearing before being referred to the labour courts (Article 123).

The reforms will take effect over a period of 4 years. On 1 May 2019, the Federal Labour Law was also reformed and, according to the transitional articles of the new Law, the local labour courts start their activities within three years and the federal labour courts within four years. Within 2 years from 2 May 2019, the Federal Centres for Conciliation and Labour Registration started their functions of registering unions and union contracts. The State Conciliation Centres and state labour courts will start operating within 3 years. The Conciliation Centres must initiate operations in every state on the same date as the state labour courts.

Implications of the reforms for employers and employees. The new Federal Labour Law strengthens the right of workers to join or form a union of their choice and to bargain collectively. It also expands fundamental rights to domestic workers and prevents gender-based discrimination. The reform garnered support from the independent trade union movement in Mexico, but also led to opposition from major business groups, certain sectors of the judiciary, state governments, local conciliation and arbitration boards, and traditional trade union organisations.[26]

At its core, the spirit of the Federal Labour Law favours the employee and requires the employer to provide evidence of employment conditions and the existence of certain documents, among other requirements.[27] This reform could reduce delays that workers face in accessing the justice system, as requested by professional associations and unions.

The trade union movement is split regarding resisting or supporting the reforms. The central issue is the allegation that the reforms interfere in the internal affairs of trades unions by establishing that direct voting by union members is mandatory in most procedures, and by requiring gender quotas in trade union leadership positions. The Supreme Court will have final say on the matter.

A further challenge to implementing the reform is public funding. Although the Mexican government has promised that all necessary funds will be made available, the current context of extreme austerity and government cutbacks in public spending may affect the priority given to labour reform.

26. See: <https://www.maquilasolidarity.org/sites/default/files/resource/Mexico_Enters_New_era_in_Labour_Relations_October-2019.pdf>.

27. See: <https://thelawreviews.co.uk/edition/the-labour-and-employment-disputes-review-%E2%80%93-edition-3/1215979/mexico>.

The timeline of four years is ambitious for the implementation of a reform of this magnitude, but deadlines have been met so far. Some changes, such as the creation of the Federal Centre for Conciliation and Labour Registration, intended for early 2020, proceeded faster than expected.

Labour justice norms and principles. Title XIV of the LFT regulates procedural labour law, and its first chapter establishes the principles of labour justice. In accordance with Art. 685, labour lawsuits are governed by the principles of immediacy, continuity, celerity, truthfulness, concentration, economy and procedural simplicity. Likewise, the procedures will be public, free, predominantly oral and of a conciliatory nature. These can be defined, based on Molina Martìnez (2020), as follows:

1. Publicity: This implies the possibility for citizens to witness hearings or proceedings during the lawsuit, except for expressly established exceptions. This specific development is found in Article 720 of the LFT.

2. Gratuity: This principle requires that labour lawsuits, as well as certain acts related to them, be gratuitous. It is enshrined in the following provisions of the LFT: Article 19 (labour proceedings will not lead to any taxes); Article 824 (the board shall appoint experts whose fees cannot be covered by the worker), and Article 962 (the registration of property in the Public Registry of the seized real estate, by extension, will be free).

3. Immediacy: This principle constitutes the obligation of the members of the labour authority to be in immediate contact with the parties to the labour lawsuit, as well as intervene at all times during the course of the procedure.

4. Primacy of orality: This principle constitutes a non-exclusive possibility for the parties to appear before the labour authority to enforce their rights in a verbal manner. This does not necessarily imply that there are no written aspects, due to the impossibility of memorising the entire procedure. It is represented in the contents of Article 743 (hearings will require the physical presence of the parties, their representatives or their attorneys).

5. Instance of part (dispositive principle): Applicable only to the presentation of the claim, since it requires the request of the claimant (Article 685). The rest of the procedure has an inquisitive nature, as the labour authorities have the obligation to carry out an informal impulse. This is exemplified by the content of Articles 771 (handling of non- active trials), 772 (avoiding expiration), 784 (requiring the employer to show the evidentiary documents) and 886.

6. Concentration: This principle consists in the conciseness or simplification of the procedure. It can be observed in the following articles of the LFT: 761 (eliminate, if possible, the procedure associated to incidents), 763 (when an incident is processed

within a hearing or proceeding, it will be resolved outright, except for exceptional cases such as nullity, competence, accumulation or excuses, which will be resolved within 24 hours after holding an incidental hearing), and 848 (the impossibility of exercising any remedy, as well as the impossibility of revoking their own determinations).

7. Simplicity: This constitutes the absence of formality within the procedure for the parties, who may specify their points of contention without being required to point out the legal provisions that support their requests (Articles 687 and 878, section II and III of the LFT).

8. Conciliatory principle: Conciliation is another means to resolving labour disputes and may be carried out in court until a decision is issued; once the resolution is issued, the parties may submit it to conciliation.

9. Procedural balance: This includes two distinct obligations for the labour authority: to correct an incomplete claim and clarify any obscurities in irregular claims.

10. Economy: The second paragraph of Art. 685 explicitly states that the Courts are required to guarantee compliance with the aforementioned principles and conditions. The Judge must attend to the reality principle over the formal elements that contradict it. In addition, he should also favour the resolution of the conflict over procedural formalities, without affecting due process and the purposes of labour law.

Art. 685-Bis enshrines the right of the parties to defence and legal representation; therefore, the parties may be assisted by a legal representative who must have a law degree or be a lawyer with a professional licence. When the Court considers that there is a manifest and systematic technical incapacity of the legal representative, they will require the party to name another within 3 days. The workers or their beneficiaries have the right to be assigned a lawyer from the Labour Defence Attorney's Office or the Office of the Public Defender for their legal representation.

Further, the LFT explicitly excludes from having to exhaust the conciliatory instance the case of disputes related to:

1. Discrimination in the workplace due to pregnancy, sex, sexual orientation, race, religion, ethnic origin, social status, harassment or sexual harassment.

2. Designation of beneficiaries in case of death.

3. Social security benefits related to work risks, maternity, illness, disability, life, childcare and in-kind benefits and work accidents.

4. The protection of fundamental rights and public liberties related to the nature of labour, such as:

    a) freedom of association, freedoms inherent to unions and the effective recognition of collective bargaining.

    b) labour trafficking, as well as forced labour, and

    c) child labour.

The court requires signs pointing to reasonable suspicion or presumption that any of these rights (a-c) are being infringed upon.

5. Disputes over the ownership of collective contracts or law contracts.

6. Challenges or modifications of union statutes.

Art. 686 of the LFT clarifies that labour lawsuits and so-called para-procedural suits are to be decided according to the terms set therein. The Courts will order that any irregularity or omission noted in the substantiation of the lawsuits to regularise the procedure, as provided in Article 848 of this Law.

In addition, Art. 687 determines that in personal appearances, writings, promotions or allegations, no form will be required, but the parties must specify the petitionary points (*pontos petitorios*—i.e., the summary of petitions made to the judge regarding the admission of the claim and the procedure to be followed for the continuation of the trial).

Finally, Art. 688 establishes an obligation incumbent on administrative authorities to collaborate, within their respective fields of competence, to support the court.

Prior to proceeding to an analysis of the usual labour lawsuit, we would like to briefly discuss the pre-judicial conciliation procedure, introduced by the latest LFT reform and regulated by Art. 684-A to Art. 684-U. The reform introduced the Federal Centre for Conciliation and Labour Registry, which, as the name suggests, is in charge of the conciliatory function at the federal level and of providing for acts and procedures associated to the registration of all trade unions, collective agreements, *contratos-ley*, and internal employment regulations. In addition, the Conciliation Centres were created, which are mainly responsible for performing the conciliatory function at the state level.

The Federal Centre for Conciliation and Labour Registry is expected to start carrying out conciliatory functions within 4 years of the reform's entry into force, whereas local Centres will start to function within 3 years. Prior to resorting to the labour courts (which will replace the *Juntas de Conciliación y Arbitraje*), the parties must exhaust the conciliatory stage and, if the conciliation is successful, an agreement will be established including features of the *res iudicata*. In case the parties do not reach an agreement during the conciliation stage, the Conciliation Centre will issue a certificate of non-conciliation allowing a suit to be filed before the labour court. The conciliatory phase cannot exceed 45 days. As mentioned, Art. 685-ter lists instances which preclude the need to exhaust the conciliation phase. To guarantee its independence and autonomy, The *Centro Federal de Conciliación y Registro Laboral* will have a governing board composed of the STPS; the Ministry of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público*—SHCP); the National Electoral Institute (*Instituto Nacional Electoral*—INE); the National Institute of Transparency, Access to Information and Protection of Personal Data (*Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales*—INAI); and the National Institute of Statistics and Geography (*Instituto Nacional de Estadística y Geografía*—INEGI).[28]

The usual labour lawsuit is governed by Chapter 17 of Title XIV. These dispositions also apply to special procedures where applicable (Art. 870). In addition, Art. 870 provides that the regular procedure will apply to individual and collective disputes for which the LFT establishes no special procedure. Table 7.30 represents the distinct phases of the regular labour lawsuit.

TABLE 7.30 Phases of labour lawsuits

Written stage for establishing the litigation	Preliminary hearing	Trial hearing
The party files a complaint and evidence, followed upon summons, by answering to the complaint and evidence At this stage, the right of reply and objection to the evidence of the parties will be provided Contrary to current procedure, amplification of the claim will not be admitted, unless the answer indicates facts about which the plaintiff was not aware	A preliminary hearing is provided to simplify the procedure by: (i) dismissing non-controversial facts; (ii) admitting the evidence that conforms to law and is related to the dispute; (iii) resolving procedural exceptions; and (iv) summoning the parties to the trial hearing In addition, the court shall order the preparation of the evidence, to be presented at the trial hearing	Any prepared evidence will be presented at this stage Allegations will be formulated In the interest of celerity, a sentence will be issued at the hearing itself, and in extraordinary cases a sentence will be issued within 5 days

Source: Authors' elaboration based on MGGL (2020).

28. See: <https://reformalaboral.stps.gob.mx/>.

New procedural rules worth highlighting include (MGGL 2020):

1. The reform establishes as notoriously improper the following actions by parties, lawyers, or witnesses:

    a) offering any personal benefit, gift, or bribe to officials, as well as to third parties in the proceedings;

    b) altering a document signed by the worker for a different purpose to integrate the resignation;

    c) requiring the signing of blank papers at the time of hiring or at any time during the employment relationship;

    d) presenting notoriously false facts about the salary or seniority of the employment relationship; and

    e) denying access to documents from an actuary.

Anyone who carries out these actions will be susceptible to further economic sanctions and fines.

1. The hearings will be presided by the Judge. In the event that this obligation is not fulfilled, they will be null and void. Minutes shall be drawn recording a brief account of the hearing and shall be recorded by electronic means. The parties shall have access to the information recorded.

2. The conciliating authority or the court will offer a digital platform for electronic notifications. An e-mail account will be assigned to the parties and subsequent notifications will be sent electronically to those accounts. When so decided by the parties, personal notifications will also be made to the assigned e-mail accounts, and the respective electronic acknowledgement of receipt can be sought. In this case, no actuarial notifications will be made. There are also changes in the rules that apply to locations, in order to avoid nullity.

The labour authorities will establish a voluntary registration system for employers so that they have an e-mail account, through which they can inform them of the existence of some procedure that could not be carried out. This notice is not a substitute for the notifications that must be complied with.

Electronic notifications are subject to the following regulations:

1. The parties are obliged to check the assigned e-mail account daily and obtain proof of that consultation within a maximum period of 2 days. The court will consider the notification as having been made even if one of the parties does not check their account.

2. The parties must notify the court of any technical failings of the system by any other means, in which case the corresponding deadlines will be suspended.

3. They will take effect in two days.

4. In the presentation of confessional evidence, in addition to responding to depositions, the confessor may be asked questions, which implies that free questioning is included in the new law.

5. The presentation of acquittals relating to directors, administrators, managers or persons exercising managerial and administrative functions shall be the responsibility of the attorneys, unless just cause is shown to prevent it.

6. The principle of immediacy is observed via the remote presentation (videoconference) of witnesses who reside outside the location of the court, in which the court will conduct the presentation of evidence.

7. With regard to expert evidence, the reform determines that the court will appoint the official expert or experts it deems necessary, and the parties may be accompanied by an advisor to assist them during the presentation of the evidence. The employee may request the Public Defender's Office to assign an adviser to assist them in the presentation of the evidence. This is an important change because the parties will no longer be able to offer their own experts. Instead, the court will designate the expert who will render the report. This should avoid disagreements among third-party experts.

8. The reform includes electronic receipts as a means of evidence and ascribes evidentiary value to the CFDI (Digital Tax Receipt), subject to the agreement of the parties.

9. The decisions of the courts do not allow for any appeals, which means that a direct appeals trial (*amparo directo*) will remain the only way to challenge the sentences issued.

Special labour lawsuits, regulated by Chapter 17 of Title XIV of the LFT, aim to offer simplicity and celerity. In this type of lawsuit there is also a written stage and an oral stage, omitting the preliminary hearing, but maintaining the formalities of regular suits. The difference is that procedural questions and the unburdening of the procedure will be dealt with in the trial hearing.

This type of lawsuit, in accordance with Art. 892, is applicable to conflicts that arise from:

1. Art. 5, III: A notoriously burdensome ('inhuman') working day, given the nature of the work, as determined by the Court (null and void clause).

2. Art. 28, III: Approval by the Federal Centre for Conciliation and Labour Registry of the employment contracts of Mexican citizens working abroad but hired in Mexico.

3. Art. 151: Rent of apartments to workers.

4. Art. 153-X: Workers' individual and collective actions before the court deriving from the employers' obligation of capacity building and training.

5. Art. 158: Workers' right to seniority determination.

6. Art. 162: Workers' right to seniority bonus

7. Art. 204, IX (re: ship workers): Employers' obligation to repatriate or transfer workers to the agreed place, except in cases of termination by causes not attributable to the employer.

8. Art. 209, V (re: ship workers): when the ship is lost due to seizure or loss, the employment relationship(s) will be terminated, and the shipowner, shipping company or charterer is required to repatriate the workers and cover their wages until their return to the port of destination indicated in the contract, as well as other benefits to which they were entitled. The workers and the employer may agree to provide them with a job of the same category on another of the employer's ships. If an agreement is not reached, the workers must be compensated in accordance with the provisions of Article 436.

9. Art. 210 (re: ship workers): In the cases of section V of the previous article, if the workers agree to carry out work aimed at recovering the remains of a ship or cargo, they will be paid wages proportionate to the days they worked. If the value of the saved objects exceeds the value of the wages, workers will be entitled to an additional bonus, in proportion to the efforts expended and the dangers faced in the recovery, which will be fixed by agreement of the parties or by decision of the court (which will previously hear the opinion of the maritime authority).

10. Art. 236, II and III (re: work of aeronautical crews): The employers are required to pay for the crew's travel expenses, including those of spouses and first-degree relatives who economically depend on them, as well as for the transportation of household items and personal effects, when they are moved from their original location. The value of

these expenses will be fixed through mutual agreement (II); Employers are obliged to repatriate or transfer crew members whose aircraft is destroyed or not used to the place where they were hired, paying their salaries and for their travel expenses.

11. Art. 484: Determination of compensations deriving from work-related risks.

12. Art. 503: Payment of compensation in case of death or disappearance of workers resulting from criminal acts due to work-related risks.

13. Art. 505: Appointment of company doctors.

In addition to these cases, the same article also provides for the application of the special labour lawsuit to: disputes whose object is the collection of benefits not exceeding the value of three months' wages; the designation of the beneficiaries of a worker who died (regardless of the cause of the death) or disappeared due to criminal acts; and social security disputes.

Further, Chapter 19 of Title XIV regulates the Procedures for Collective Conflicts of an Economic Nature. As reported by MGGL (2020), in accordance with the principles of the labour reform, referring to freedom of association and trade union democracy, these procedures are established within special suits, with the purpose of resolving collective conflicts between trade unions through the consultation with the workers. This consultation is non-negotiable, as it relates to democracy and human rights issues. A method has been defined to present voting records, by means of a reliable register being able to request information from the Mexican Social Security Institute (IMSS), the Federal Conciliation and Registration Centre, as well as from the employer itself. Art. 900 defines collective 'conflicts of an economic nature' as those whose purpose is the modification or implementation of new employment conditions, or the suspension or termination of collective labour relations, except for when the LFT indicates another procedure. It is interesting to note that, in these kinds of disputes, Art. 901 explicitly requires that the parties reach an agreement. To this end, they may attempt conciliation in any stage of the lawsuit, provided that the resolution resolves the conflict.

Collective conflicts of an economic nature may be raised by the workers unions holding collective labour contracts, by the majority of the workers of a company or establishment, whenever the professional interest is affected, or by the employer or employers (Art. 903).

Execution processes are governed by Title 15 of the LFT. Chapter 1 (Art. 939 to 949) lays down the applicable general dispositions. As determined by Art. 939, the provisions of this Title govern the execution of the sentences dictated by the courts. They are also applicable to arbitration awards, resolutions issued in collective conflicts of an economic nature, and to agreements concluded through Conciliation Centres. In the case of arbitration awards and agreements concluded before through Conciliation centres, which have not been fulfilled in the terms established therein, the workers—and, where appropriate, the employers—will go to court

to request their execution in accordance with the provisions of Chapter 1. Art. 944 provides that the costs originating from the execution of the sentence are to be borne by the non-compliant party. Court rulings must be fulfilled within 15 days after notification: once this term has expired, the party that obtained a favourable sentence may request its execution (Art. 945).

If workers refuse to accept the sentencing of the court, the LFT determines the termination of the employment relationship (Art. 948). Conversely, if the employer refuses the sentencing, the court will consider the employment relationship terminated; sentence the employer to compensate the worker with a value equal to three months' salary; proceed to determine the responsibility of the employer; sentence the employer to pay due salaries (with added interest) and seniority benefits.

A further 'ad hoc' procedure regulated by the LFT (Chapter 20 of Title XIV) is the one inherent to strikes. The reform introduced a new requirement (Certificate of Representation, Arts. 920-937). As reported by Auren (2019), when the strike is intended in order to reach a collective agreement, the Certificate of Representation issued by the Federal Centre for Conciliation and Labour Registry must be attached to it. In other cases, the union must prove that it is the holder of the collective agreement with the registration certificate issued by the Federal Centre or an acknowledgment of receipt of the document.

Within the following 24 hours, the conciliation centre will be notified to reach the parties and may summon them within the pre-strike period to negotiate and hold conciliatory talks. The court might also nominate conciliators. It will process the summons when there is no collective agreement registered in the centre or when any registered agreements have not been reviewed in the past four years.

The conciliator centre may intervene in the conciliation hearing before the court. The hearing may be deferred at the request of the union or both parties. At the request of the union, the pre-strike period may be extended once, for up to 30 days. In the case of companies or institutions that depend on public resources, it may be extended for a longer period. At the discretion of the court, additional extensions may be accepted.

If the collective agreement or its revision are not approved by the workers, the union may extend the pre-strike period for up to 15 days, although the Court may authorise a further extension of up to 30 days, as long as the union requests so and properly justifies this request. Nevertheless, the parties may extend the pre-strike period through mutual agreement without affecting the rights of third parties. When there is a request for the declaration of the absence of a strike due to a lack of majority support, the recalculation will be mandatory.

The court will set a hearing to qualify the strike, which must be held within 5 days and notified 3 days in advance. Once the evidence is received, the court will resolve the matter within 24 hours. In case of recalculation, it must be accompanied by the list of the workers to be

consulted, which will be notified to the other party, who will in turn provide its own list of workers with the right to participate during the qualification hearing.

The strike rating hearing may only be deferred in exceptional cases. If there are discrepancies in the lists, the parties in the qualification hearing will formulate their objections, presenting the respective evidence within 72 hours. Once the evidence is released, the judge will draft the final list. Within the next 5 days, the court will indicate the date and location of the recount, which must be carried out within a period not exceeding 10 days, though it may be extended for an equal period if the court deems it necessary. The workers will be consulted by personal, free, direct and secret vote, in the presence of the Judge or designated officials. Workers may submit the dispute to the decision of the court at any time. Additionally, the employer may do so when the strike lasts for more than 60 days.

Finally, para-procedural suits are regulated by the third chapter of title 15 of the LFT and can be ascribed to the voluntary jurisdiction, defined by Art. 982 as all those matters that, by mandate of the Law, by their nature or at the request of an interested party, require the intervention of the court, without any jurisdictional conflict being promoted between the parties.
In accordance with Art. 983, in para-procedural suits the interested party (worker, union or employer) may, before the competent court, request its intervention orally or in writing, explicitly indicating the person whose declaration is required, the thing that is intended to be demonstrated, or the proceedings to be undertaken. The Court will decide within 24 hours on what is requested and, where appropriate, will indicate the date and time to carry out the proceedings, ordering, where appropriate, the summons of the persons whose declaration is intended to be received.

The seventh title of the LFT is dedicated to Labour Authorities and Social Services, while its third chapter regulates the Labour Defence Attorney's Office (*Procuradoria de la Defensa del Trabajo*). Art. 530 attributes to the *Procuradoria* the following functions:

1. Represent or advise workers and their unions, whenever they request it, before any authority, in matters related to the application of the rules of job.

2. File the ordinary and extraordinary appeals for the defence of the worker or union.

3. Propose to the interested parties friendly solutions for the settlement of their conflicts and record the results in authorised minutes.

4. Assist the Conciliation Centres in providing information and guidance to workers in said instances.

5. Assist in conciliation hearings to those who request it.

The *Procuradoria* is composed of an Attorney General and any number of Assistant Prosecutors deemed necessary for the defence of workers' interests. The appointments will be made by the Secretary of Labour and Social Security, by the Governors of the states or by the Head of Government of Mexico City (Art. 531).

In accordance with Art. 532, the Attorney General must satisfy the following requirements:

1. be a Mexican national, of legal age and be in full exercise of his/her rights;
2. have a legally issued law degree and no less than three years of professional practice;
3. have distinguished himself/herself in studies of labour law and social security;
4. not be a minister of worship; and
5. not having been convicted of an intentional crime punishable by corporal punishment.

The Assistant Attorneys must satisfy the requirements indicated in sections I, IV and V of the same article and have a law degree or be a lawyer and have obtained the certification to practice the profession.

Two further norms need to be considered. The first is Art. 534, which determines the gratuity of the services afforded by the *procuradores,* while the second is Art. 533-bis, providing that the staff of the Attorney General's Office is prevented from acting as a proxy, advisor or employer lawyer in particular labour matters, as long as they are employed in the *procuradoria*.

Chapter 13 of Title XIV regulates labour resolutions, including court rulings. In it, no norm was found inherent to the faculty of the judge to decide *extra/ultra petitum*. Art. 873 of the LFT allows the tribunal to correct omissions or irregularities in the evidentiary material of the claimant. Once this is completed, the court will admit the claim. The same article admits the ampliation of the claim only if the response indicates new facts about which the claimant was not previously aware of.

Chapter 12 of Title XIV regulates evidence in labour lawsuits. In accordance with Art. 776, all types of evidence that are not contrary to morals and the law are admissible, especially the following:

1. Confessional.
2. Documental.
3. Testimonial.

4. Technical expert opinion (See Art. 821 to 826).

5. Inspective.

6. Presumptive.

7. Instrumental lines of action (*Instrumental de actuaciones*).

8. Photographs, film tapes, fingerprint records, audio and video recordings, or various information and communication technologies, such as optical electronic devices, fax, e-mail, digital documents, electronic signatures or passwords and, in general, new means provided by the advancements of science.

9. The proofs of notification made through the electronic mailbox.

10. Payroll receipts with digital stamps.

Each of these types of evidence is regulated in detail in the same chapter, and accordingly Art. 778 provides that each proof will need to be produced through the procedure regulated by the LFT. In addition, Art. 777 clarifies that pieces of evidence must refer to controversial facts when these have not been confessed to by the parties.

In observance of the abovementioned dispositive principle (which is limited to the claim), Art. 873 of the LFT provides that no additional items of evidence will be received in addition to what was offered in the claim, except evidence referring to facts related to the response to the claim, provided that the claimant was not aware of those facts when filing their lawsuit, as well as those offered to support the other parties' objections to the evidence, or referring to the objection of witnesses. Evidence related to supervening facts can be offered until sentence is used by the court (e.g.: Art. 873 and 778).

It is important to note that Art. 782 explicitly provides the possibility for the court to order, upon request of the parties, the examination of documents, objects and places, their recognition by actuaries or experts and, in general, carry out the procedures that it deems convenient for the clarification of the truth; it will require the parties to produce the documents and objects in question. In addition, the Judge may freely interrogate the parties and all those who intervene in the trial regarding facts and circumstances that are conducive to reaching the truth.

Moreover, Art. 841 establishes that the sentencing will be issued once the truth is known and good faith is maintained, appreciating the facts without the need to abide by rules or formulations regarding the estimation of evidence, but the courts are obliged to study and assess them in detail.

Concerning the role of technical experts in labour justice, the fifth section of Chapter 12 of the LFT states, from Art. 821 to 826, what is expected of these professionals (Cámara de Diputados del H. Congreso de la Unión 2021). First, in Art. 821, is stated that "[t]he expert testimony will only be admissible to prove a controversial fact requiring knowledge of the science, art, profession, technique, trade, or industry in question, and in general when it comes to matters that by their nature are not known by the court" (ibid, 237, own translation). Subsequently, Art. 822 postulates the legal requirements to work as a technical expert: "The experts must prove that they have knowledge on the matter regarding which they should give their opinion; if the profession or art is legally regulated, the experts must prove that they are authorised to practice it in accordance with the Law" (ibid. p. 238, own translation). The following Articles (from 823 to 826) discuss the procedures regarding how and when to request the use of a technical expert during a labour dispute. The main ones include:

> "Article 823—The expert testimony must be offered indicating the matter it must deal with, showing the respective questionnaire, with a copy for each of the parties. The omission of the questionnaire will result in the non-admission of the evidence by the court.
>
> Article 824—When admitting expert evidence, the court will designate the expert or experts it deems necessary, without prejudice to the fact that the parties may be accompanied by an advisor to assist them during the release of the testimony.
>
> The worker may request the Public Defender's Office [*Defensoría Pública*] or the Labour Attorney's Office [*Procuraduría del Trabajo*] to assign them an advisor to assist in taking expert testimony.
>
> Article 825—II. The expert(s), once they accept and protest their position in accordance with the Law and become aware of the penalties[29] incurred by false testimony, will state their name, age, occupation and place where they attend their practice or provide their services. They must also prove that they have the requisite knowledge regarding the matter regarding which they will render their opinion through the respective document (s). They must then render their opinion. (Cámara de Diputados del H. Congreso de la Unión, 2021, 238, own translation)."

The seventh Chapter of Section III of the LFT contains two relevant provisions. As disposed by Art. 113, wages accrued over the past year and compensation due to the workers are preferred

29. According to what is established in Article 815 of the Federal Labour Law (Cámara de Diputados del H. Congreso de la Unión 2021, 235).

over any other form of credit, including those with a real guarantee, and those in favour of the Mexican Social Security Institute, on all the assets of the employer.

Further, in accordance with Art. 114, workers do not need to file for bankruptcy, suspend payments or succession. The Court will proceed to the seizure and auction of the goods necessary for the payment of wages and compensation. Finally, labour lawsuits in principle expire after one year decurrent from the day after the obligation became enforceable. However, Art. 519 foresees a two-year expiration date for workers' labour suits to claim payment of compensation for work-related risks, as well as for labour suits requesting the execution of the labour court's sentence.

7.2.3 Access to labour justice

Conditions to access the justice system

As reported by Morales Saldaña (2020), within the context of the regular labour lawsuit, before going to the courts it is necessary to appear before the Federal Conciliation Centre or Local Conciliation Centres, which must bring the parties closer together through their intervention and eventually find a conciliatory solution. The time limit for conciliation is 45 calendar days, and the relevant authority must take necessary measures that allow it to conform to this period. The mere appearance of the plaintiff is enough to satisfy this stage, but in case of absence their request will be dropped due to lack of interest. The presence of both parties will initiate the possibility of a conciliatory settlement; if no agreement is reached, proof will be issued that this preliminary step was exhausted.

If the agreement is concluded by mutual understanding between the parties, the instrument will acquire the value *of res judicata* with powers for executive action, promoting compliance by the affected party in the enforcement procedure before the court. The conciliation instance does not proceed in cases of discrimination due to pregnancy, sexual, racial, religious, ethnic reasons or orientations, social status, and harassment or sexual harassment. The Federal Judicial Power and the Local Judicial Powers will have absolute competence to resolve labour disputes, once the respective Conciliation Centre issues a certificate of no agreement between the parties.

The prerequisites of the ordinary procedure are:

1. Written request: stating facts, claims and providing evidence.

2. Additional evidence: only related to unknown facts in the response.

3. Expansion of the request: only when the response indicates new facts previously unknown by the plaintiff.

4. Placement: five days after admission.

5. Contestation: deadline of 15 days accrediting personality, offering evidence, objecting those of the counterpart and, where appropriate, counterclaim.

6. *Allanamiento*: will be scheduled for a trial hearing no later than 10 days.

7. Counterclaim: answer, present evidence and objections to those of the opposite party.

8. Reply: the plaintiff has 8 days to object.

9. Counter-reply: 3 days for demonstrations.

10. Third parties: justify the need for the appeal and, if necessary, appear before the preliminary hearing to offer evidence.

In terms of procedural representation, the key norm is Art. 685-bis of the LFT. It enshrines the right of the parties to legal defence and representation; consequently, the parties may be assisted by a legal representative who must have a law degree or be a lawyer with a professional licence. If the court deems the legal representative is manifestly and systematically incapable of dealing with the case, it will allow the party to designate another within 3 days. The workers or their beneficiaries will have the right to be assigned a lawyer from the Labour Defence Attorney's Office or of the Public Defender for their legal representation.

Further, based on Art. 375 of the LFT, unions represent their members in the defence of their individual rights, without prejudice to the right of the workers to act or intervene directly, at which point the union's intervention would cease. In accordance with Art. 692 of the same law, the parties may appear in court directly or through a legally authorised representative. If represented by a third party, personality will be attested according to the following rule for unions: representatives of the unions will prove their personality through a certification issued by the corresponding registration authority, if the union's directive has been registered. They may also appear through a legal representative, who in all cases must be a lawyer (para. IV).

Articles 693 and 694 must also be considered. The former sets an exception to the above rule, establishing that the courts may accredit the personality of the representatives of workers or unions, federations and confederations without being subject to the rules of the previous article, provided that the documents clearly show that the interested party is effectively represented. In turn, Art. 694 provides that workers, employers and union organisations may grant power by simple appearance, upon identification, before the Courts in their place of residence, to represent them before any labour authority.

Two principles should be recalled at this point. As already mentioned, the principle of gratuity follows from the State's obligation to administer justice at no cost. It is deduced from the second paragraph of Article 17 of the Constitution, which states: "[the justice] service will be free, therefore legal costs are prohibited ", mirrored by Art. 19 of the LFT, which indicates that the lawsuits related to labour regulations will not lead to any taxes/costs. Further, the principle of procedural economy is also relevant to this context. This principle is sometimes mistaken for the principles of concentration and simplicity; however, this has material implications and seeks to prevent all unnecessary expenses deriving from the labour lawsuit. Procedural costs are reduced by simplification through orality, the concentration of hearings and procedural incidents. An exception to this principle is the privilege afforded to the worker by providing free technical expert opinions designated by the court.

7.3 ADMINISTRATIVE ORGANISATION OF THE DISPUTE RESOLUTION SYSTEM

7.3.1 Justice system budget

In Mexico, the **Federal Judicial Council** is the body in charge of the administration, oversight, discipline and the judicial career of the Federal Judicial Branch, with the exception of the Supreme Court and the Electoral Court of the Federal Judicial Branch. It was created after the 1994 constitutional reforms, under the same hierarchy as the Supreme Court, but with different functions. Its main objective is to guarantee the independence of federal judges and magistrates.

Regarding Mexico City, Paragraph I of Art. 1 of the Organic Law of the Superior Court of Justice of the Federal District establishes that the Administration and Administration of Justice in the Federal District corresponds to the Superior Court and other judicial bodies, as confirmed by the Political Constitution of the United Mexican States, the Government Statute of the Federal District and other applicable legal regulations. Paragraph II states that the Federal District Judiciary Council is in charge of autonomously managing, administering and carrying out the budget of the Superior Court of Justice of the Federal District. In addition, Paragraph III of Art. 1 informs the principles that regulate the judicial function: swiftness, informal procedural impulse, impartiality, legality, honesty, independence, expiration, administrative sanction, orality, formality, quality in its operative, administrative and accounting processes, excellency in human resources, cutting edge technological systems, judicial career, efficiency, and effectiveness.

Regarding the budgetary and administrative autonomy of the judicial power of the State of Guanajuato, the Council of the Judicial Power is the general administrative body in charge of the judicial career, training and evaluation of the civil servants, in accordance with Article 5 of the Organic Law of the Judicial Power of the State of Guanajuato and the provisions of the Political Constitution for the State of Guanajuato. Art. 102 establishes that the General

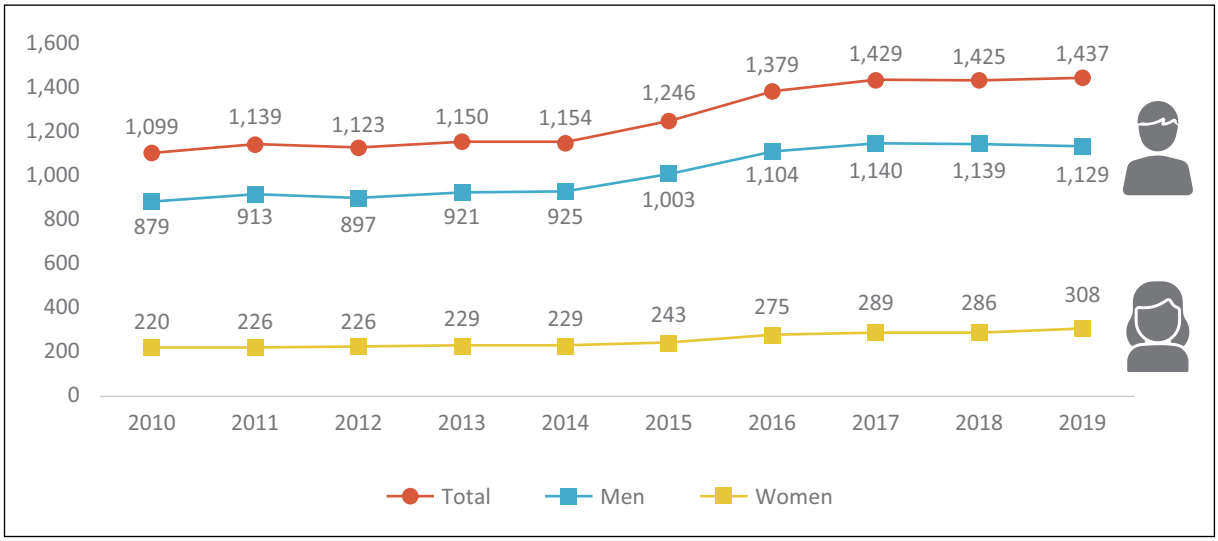
Coordination of the Management System is in charge of the administration of the courts, whose function is to plan, organise, implement, control and direct a multidisciplinary management team. Article 203 establishes the autonomy of the Judicial Power to manage its budget, which will be delivered annually in the form and terms provided by law. In addition, Article 204 determines that the budget of the Judicial Power will be exercised by the Council of the Judicial Power, which must be subject to the provisions set forth in the Law for the Exercise and Control of Public Resources for the State and Municipalities of Guanajuato and other applicable regulations.

Structure and composition of justice personnel in Mexico City and Guanajuato

In Mexico there are 4.19 judges for every 100,000 inhabitants.[30] The 2020 National Census of the Federal Justice Administration aims to produce statistical and geographic information regarding the management and performance of the bodies that comprise the Judicial Power of the Federation, specifically in the administration of justice. This is supposed to be aligned with the government's effort to design, implement, monitor and evaluate public policies of national scope on the aforementioned issues of national interest.

According to the census, there are 41 labour circuit collegiate courts and 9 District Courts. There are 1,437 judges and magistrates, of which 78.6 per cent are men and 21.4 per cent are women. In 2010, the number of men in these positions increased by 28.4 per cent, while women increased by 40 per cent.

FIGURE 7.7 Magistrates and judges by sex, 2010–2019



Source: Authors' elaboration.

30. See: <https://abarloventoinforma.com/2019/07/05/en-numero-de-jueces-mexico-solo-llega-al-25-del-promedio-mundial/#:~:text=En%20M%C3%A9xico%20hay%20apenas%204.19,S%C3%A1nchez%20Cordero%2C%20secretaria%20de%20Gobernaci%C3%B3n>.

Regarding the number of magistrates and judges of the Guanajuato Judicial Power, there are 10 civil magistrates, 10 criminal magistrates and 318 judges.[31]

Remuneration of professionals in the Justice system

Table 7.31 shows the salaries of the justice professionals of the federal and Guanajuato systems in Mexican pesos and dollars.

TABLE 7.31 Remuneration by occupation in the Provincial and Federal Judicial Powers

Judicial branch	Occupation	Mexican Peso	USD[32]
Federal	Minister	276,378,58	14,350
Federal	Magistrate	213,723,67	11,097
Federal	Judge	193,755,58	10,060
Guanajuato	President of the Supreme Court of Justice	151,698,34	7,876
Guanajuato	Adviser	132,948,11	6,903
Guanajuato	Magistrate of the Supreme Court of Justice	132,948,11	6,903
Guanajuato	Secretary General of the Supreme Court of Justice	96,358	5,003
Guanajuato	Secretary General of the Council	96,358	5,003
Guanajuato	Challenge Judge	85,690,69	4,449
Guanajuato	Judge	68,664,21	3,565
Guanajuato	Junior Judge T	30,851,67	1,602

Source: Authors' elaboration.

7.3.2 Human resources

Recruitment and selection of judges

As reported by de la Peña Gutiérrez (2020), in the appointment of the personnel who will compose the labour courts, reference must be made to Art. 123, section A, section XX, first paragraph of the LFT, which categorically states that the requirements established in Art. 94 and 97 of the Constitution must be met; as regards the Judicial Power of the Federation and the local Judicial Powers, see Art. 116, section III.

Therefore, the path to the labour courts is the judicial career—i.e. through open and public tenders. In accordance with Art. 123, Let. A), section XX, first paragraph, the personnel integrating federal and local labour courts must have "capacity and experience in labour matters".

31. See: <https://www.poderjudicialgto.gob.mx/index.php?module=transparencia&func=verfraccion&frac=VII&desc=Directorio%20de%20los%20Servidores%20P%C3%BAblicos>.

32. 2019 Domestic Currency per U.S. Dollar, Period Average. Source: IMF.

Article 94, eighth paragraph: "The law shall establish the form and procedures through open contests for the integration of the courts, observing the principle of gender parity."	Article 97, first paragraph: "Circuit Magistrates and District Judges will be appointed and assigned by the Federal Judicial Council, based on objective criteria and according to the requirements and procedures established by law.
Article 116, section III: "The judges who are members of the Local Judicial Powers must meet the requirements indicated by sections I to V of Article 95 of this Constitution."	Article 95, sections I to V "I. Being a Mexican citizen by birth, in full exercise of political and civil rights. II. Be at least thirty-five years old on the day of the appointment. III. Have at the day of the appointment a professional title of law graduate issued by an authority or institution legally empowered to do so, which must be at least ten years old. IV. Have a good reputation and having not been convicted of a crime for which the combined a punishment entails more than one year in prison; theft, fraud, forgery, breach of trust and other crimes which seriously hurt the good reputation of the candidate will determine non-eligibility for the position, regardless of the sanction. V. Have resided in the country during the two years prior to the day of the appointment."

Source: Authors' elaboration.

Art. 605 of the LFT must also be considered. The norm provides that the Federal Courts, of the federal entities and of Mexico City, will each be in charge of a judge and will have the secretaries, officials and employees who they deem appropriate, determined and designated in accordance with the Organic Law of the Judiciary of the Federation or the Organic Law of the Local Judiciary, as appropriate.

The LOPJF attributes to the Federal Council of the Judiciary the administration, monitoring, discipline and judicial career of the Judicial Branch of the Federation, except for the Supreme Court of Justice and the Electoral Court (Art. 68). Based on Art. 81, the law attributes the following functions to the Federal Judicial Council:

I. Issue internal regulations on administrative matters, the judicial career, ranking and disciplinary regime of the Judicial Power of the Federation, and all the general agreements that are necessary for the proper exercise of its powers under Article 100 of the Constitution.

II. Determine the number and territorial limits of the circuits into which the territory of the Republic is divided.

III. Determine the integration and operation of the Plenary Circuit in the terms provided in the LOPJF.

IV. Determine the number and, where appropriate, the specialisation by subject of collegiate and unitary courts in each of the circuits referred to in section IV of this article.

V. Determine the number, territorial limits and, where appropriate, specialisation by subject of the district courts in each of the circuits.

VI. Make the appointment of circuit magistrates and district judges, and decide on their ratification, secondment and removal.

Further, the LOPJF provides that the entry and promotion of civil servants of a jurisdictional nature to the Judicial Power of The Federation will be made through the judicial career system referred to in Title VII, which will be governed by the principles of excellence, professionalism, objectivity, impartiality, independence and seniority, if applicable (Art. 105).

Art. 106 lays down the following requirements for a candidate to be appointed as district magistrate: be a Mexican citizen by birth, with no other nationality and in full enjoyment and exercise of their civil and political rights, be over 35 years old, have a good reputation, not having been convicted of an intentional crime with custodial sentence of more than one year, possess a legally issued law degree and a professional practice of at least five years, in addition to the requirements provided in this law regarding the judicial career. Circuit magistrates will last six years in the exercise of their mandate, at the end of which, if ratified, they can only be ousted from their positions for reasons indicated in this law, or due to forced retirement upon reaching 75 years of age.

Art. 108, in turn, sets the following requirements to be designated as district judge: be a Mexican citizen by birth, with no other nationality, and in full exercise of rights, be over 35 years old, possess a legally issued Law degree and a minimum of five years of professional practice, enjoy a good reputation and not having been convicted of an intentional crime with a custodial sentence of more than one year. District judges will last six years in the exercise of their office, at the end of which, if they are ratified or appointed to hold the post of circuit magistrates, they may only be deprived of their position due to reasons indicated by this law or by forced retirement upon reaching 75 years of age.

7.3.3 Recruitment, selection and training

Art. 112 determines that entry and promotion for the categories of circuit magistrate and district judge happen through internal and free competitions (*concurso interno de oposición y oposición libre*). Art. 113 specifies that in the internal competitions for the position of circuit magistrates, only the district judges and the Magistrates of Regional Chambers of the Electoral Court can participate, whereas the competitions for district judge are open to those

belonging to the categories indicated in sections III to IX of Article 110 (i.e., Secretary General of Agreements of the Supreme Court of Justice or the Superior Chamber of the Electoral Court; Assistant Secretary-General for Agreements of the Supreme Court of Justice or the Superior Chamber of the Electoral Court; and other positions assigned to assist judges and magistrates in the study and review of decisions, as well as the formulation of draft agreements and sentences in accordance with the applicable regulations).

In accordance with Art. 114, internal competitions for circuit magistrate and district judge will be subject to the following rules:

I. Federal Judicial Council will issue a summons that must be published once in the Official Gazette of the Federation and twice in one of the newspapers with the largest national circulation, with a 5 business-day interval between each call. It must be specified whether the contest is open or closed. The call will indicate the categories and number of vacancies available, the place, date and time of the examinations, as well as the term, place of registration and other necessary elements.

II. Registered applicants must answer a questionnaire in writing, whose content will cover subjects that are related to the position for which they are competing.

III. The applicants who earned the highest grades will proceed to the next stage, ensuring that the number of selected candidates is greater than the number of vacancies.

IV. The Federal Judicial Council shall establish in the respective summons, in a clear and precise manner, the parameters used to define the highest grades and the minimum approval threshold for this stage.

V. Ties are to be resolved through a criterion of equity, promoting affirmative action.

VI. Selected applicants will solve practical cases that are assigned by issuing and/or drafting the respective sentences. Subsequently, the oral and public examination will be carried out via questions and inquiries by members of the jury referred to in Article 117 of this Law, covering various issues relating to the functions of circuit magistrate or district judge, as appropriate. The final grade will be determined by an average point system assigned by each member of the jury.

VII. Once the oral examination is concluded, a final act will be drawn up and the president of the jury will declare the winners, as well as the selection criteria. The president immediately informs the Federal Judicial Council to make the respective appointments and publish the results in the Federal Judicial Weekly Gazette.

The Federal Judicial Council is also responsible for determining the territory and the body in which the circuit magistrates and district judges will have to exercise their functions (Art. 118). The same body is also responsible for ratifying both magistrates and judges, as required by Art. 97 of the Constitution, considering the following elements:

The performance during the exercise of the function.

I. Results of inspection visits.

II. The academic degree corresponding to the civil servant's level of education, as well as their various specialisation and refresher courses.

III. Not having been sanctioned for serious misconduct due to administrative complaints.

IV. Others pertinent elements, provided they are published 6 months prior to the ratification date.

Labour Defence Attorney. Article 530 of the LFT. The Labour Defence Attorney's Office has the following functions:

1. To represent or advise workers and their unions before any authority, upon request, in matters related to the application of labour standards.

2. To file ordinary and extraordinary resources for the defence of workers or unions.

3. Propose friendly solutions to the interested parties for the settlement of their disputes and record the results in authorised minutes, as well as conclude agreements between the parties, which will be considered as signed before the meeting.

Article 531. The Labour Defence Attorney's Office is composed of a General Attorney and the number of Auxiliary Attorneys deemed necessary for the defence of workers' interests. Appointments will be made by the Secretary of Labour and Social Welfare, state governors or by the Head of Government of Mexico City.

The Office of the Attorney for the Defence of Workers is integrated into the State Service by an Attorney, two Deputy Attorneys, a Coordinator and the number of Auxiliary Attorneys deemed necessary for the defence of the interests of workers at the service of the State and their beneficiaries. It has 47 representative offices throughout the country and a central office in the Federal District .

Technical experts. As mentioned in Section 2C, the LFT regulates evidence involving technical experts through Art. 821 to 826. As reported by Martínez and Pérez Estrada (2019), when an event that is the subject of the dispute needs to be analysed through scientific or technical knowledge, expert evidence will be used. It is known as the test instrument that the parties offer to attest the truth of their scientific or technical claims to the judge, through people outside the lawsuit who possess such specialised knowledge.

The expert witness is a person called to the lawsuit to render their opinion to the judge regarding facts whose assessment is related to some specialised science, art or technique; If the profession or art is legally regulated, the experts must prove that they are legally authorised to exercise. Due to the nature of the experts' function, they have been considered auxiliary to the judge, quality witnesses, a means of proof, judicial officers or auxiliaries in the administration of justice.

Labour law requires indicating the matter regarding which the proof must be produced, exhibiting a respective questionnaire, with a copy for each of the parties. Omission of this questionnaire will result in the non-admissibility of evidence by the court.

In accordance with Art. 825 the following provisions shall be observed:

1. The expert or experts, once they accept their position in accordance with the Law and become aware of the penalties incurred by false claims, will provide their name, age, occupation and place where they practice or provide their services. They must also prove that they have the knowledge required of the matter regarding which they will render their opinion, through proper documentation. They must then issue their opinion.

2. Their opinion will deal with the points referred to in Article 823 of the LFT.

3. The parties and the judge may ask the experts any questions they deem appropriate; as well as provide remarks on the shortcomings or inconsistencies of the expert's opinions, or of supporting aspects. For this purpose, the provisions of Article 815 of the LFT shall be applicable.

When the court deems ex officio or at the request of a party that the expert opinion is false, biased or inaccurate, it will give the Prosecutor's Office a view to determine if there is a crime.

Training of judges

Finally, regarding the initial and continuous training of judges, reference must be made to the Institute of the Judiciary. Art. 92 of the LOPFJ provides that the Judicial Institute is the auxiliary body of the Federal Judicial Council in matters related to the investigation, formation, training and updating of the members of the Judicial Power of the Federation and of those who aspire to it. In accordance with the same disposition, the Judicial Institute may establish regional extensions, support the programmes and courses of the local judicial powers in the terms that are requested and coordinate with the country's universities so that they can help to carry out the tasks indicated in the previous paragraph. Art. 96 attributes to the same institution the duty to carry out preparatory courses for the exams corresponding to the different categories which compose the judicial career.

As determined by Art. 95, the programmes offered by the Judicial Institute aim to ensure that the members of the Federal Judicial Branch or those who aspire to join it strengthen the knowledge and skills necessary for the proper performance of their judicial functions. To this end, the Institute of the Judiciary will establish programmes and courses aimed at:

1. Developing practical knowledge of the procedures, proceedings and actions regarding matters within the jurisdiction of the Federal Judicial Branch.

2. Perfecting skills and techniques in the preparation and execution of legal proceedings.

3. Strengthening, updating and deepening knowledge regarding the legal system, legal doctrine and jurisprudence.

4. Providing and developing analysis, argumentation and interpretation techniques that allow for the correct assessment of the evidence provided in the proceedings, as well as the adequate formulation of lawsuits and decisions.

5. Disseminating organisational techniques in the jurisdictional function.

6. Contributing to the development of service vocation as well as to the exercise of the ethical values and principles inherent to the judicial function.

7. Promoting academic exchanges with higher education institutions.

Considering that the judicial branches of the federal entities must adapt to the new court model resulting from the reform and that this case study focuses specifically on Mexico City and the state of Guanajuato, it is necessary to refer to the respective constitutions and the two Organic Laws regulating the Judiciary Branch.

Table 7.32 reports the relevant constitutional provisions for Mexico City.

TABLE 7.32 Political constitution of Mexico City

Art. 35, let. b), 1: the Judicial Branch of Mexico City is deposited in a Superior Court of Justice of Mexico City, which is made up of a Constitutional Chamber; a Council of the Judiciary and courts in their different matters of competence.
Art. 35, let. b), 2: The administration, monitoring, evaluation, discipline and career service of the Judicial Power of Mexico City will be in charge of the Council of the Local Judiciary.
Art. 35, let. b), 3: The Judicial Council will appoint the judges as provided by this Constitution and the governing law. The judges must present the respective opposition exam [...]. The judges will last six years in office and may be ratified, prior to public evaluation [...]. They will last in office until seventy years of age, and they can only be deprived of their positions in the terms that establishes this Constitution and the laws.
Art. 35, let. b), 5: To be a magistrate, the requirements established in sections I to V of Article 95 of the Political Constitution of the United Mexican States and those provided by law must be fulfilled.
Art. 35, let. b), 6: The Courts of the Judiciary will function fully and in sections. The Council of the Judiciary will determine the number of chambers, magistrates, judges and other staff. Fundamental principles that must be guaranteed include autonomy and independence of the people who comprise the Judiciary.
Art. 35, let. e), 11: The entry into, formation, permanence and specialisation of the judicial career are based on performance results and merit recognition. The judicial career will be governed by the principles of excellence, objectivity, impartiality, professionalism, honesty and independence. Entry will result from public competitions of opposition under the responsibility of the Institute of Judicial Studies as a decentralised body of the Judicial Council, which will have an Academic Council. Permanence will be subject to compliance with the requirements of the position, as well as performance evaluation and monitoring of in the terms provided by law and in the general agreements issued by the Academic Council. The law will regulate the service career for administrative branch staff.

Source: Authors' elaboration.

The Organic Law of the Judicial Branch of Mexico City (last amended in 2019) determines that the Judicial Council is in charge of nominating judges for a period of six years, who can then be ratified after their evaluation (Art. 17). Conversely, magistrates are appointed based on the proposal of the Council of the Judiciary, consisting of shortlists that must be ratified by a two-third majority by the Deputies at Congress (Art. 11).

Art. 21 sets the following requirements for a candidate to be nominated magistrate of the Superior Court of Justice:

1. Have a Mexican citizenship, including full enjoyment of political and civil rights.

2. Be at least 35 years old on the day of the appointment.

3. Have had for at least 10 years prior to the date of designation a Law degree title and a professional certificate issued by a legally empowered authority or institution.

4. Enjoy a good reputation, including not being a defaulting 'maintenance' debtor (*deudor alimentario moroso*) and have a 'respectable' career path (this assessment results from a careful analysis of the applicant's priors, including their ethical conduct).

5. Not having been sentenced for a wilful crime imposing sanctions of more than one year in prison: theft, fraud, forgery, breach of trust or other crimes that seriously affect good reputation in the public opinion, will disqualify the applicant from the position, regardless of the sanction imposed.

6. Have resided in the country for two years prior to the day of the appointment.

7. Not having held the position of Head of Government, General Secretary, General Prosecutor's Office of Justice or a member of Congress in Mexico City, during the year prior to the date of designation.

8. Present a declaration of wealth evolution, according to the law regulating the matter.

9. Be approved in the trust control evaluation processes that are issued through the Agreement of the Judicial Council in coordination with the Institute of Judicial Studies.

The appointment of magistrates will preferably be carried out from among those candidates engaged in the judicial civil service career and served as judges, or those who have provided their services efficiently and honestly in the delivery of justice or law enforcement, or as the case may be, those that due to their honour, competence and background in other branches of the legal profession are considered suitable for the position. In case of a tie, the natives or residents of Mexico City will be given preference.

Further, Art. 22 establishes the following requirements to be designated a judge in Mexico City:

I. Being Mexican by birth, not having acquired another nationality and being in full enjoyment and exercise of civil and political rights.

II. Be at least 30 years old on the day of the appointment.

III. Have a Bachelor of Law degree and a Professional Certificate issued by a legally empowered authority or institution.

IV. Have at least five years of professional practice related to the position.

V. Have resided in Mexico City or its metropolitan area during the previous two years counting from the day of appointment and having submitted a statement of wealth evolution (for tax purposes), in accordance with the law regulating the matter.

VI. Enjoy a good reputation, including not being a defaulting 'maintenance' debtor (*deudor alimentario moroso*) and have a 'respectable' career path (this assessment results from a careful analysis of the applicant's priors, including their ethical conduct).

VII. Not having been sentenced for a wilful crime imposing sanctions of more than one year in prison: theft, fraud, forgery, breach of trust or other crimes that seriously affect good reputation in the public opinion, will disqualify the applicant from the position, regardless of the sanction imposed.

VIII. Participate and obtain favourable results in the competition, as well as in the exams established by this Law, in the same terms that it provides.

Further, Art. 31 provides that Judges and Magistrates will retire in case of physical or mental disability that prevents the proper performance of the position, or upon reaching the age of 70.

In accordance with Art. 32, the Superior Court of Justice of Mexico City can function either *in plenum* or in sections. Art. 56 regulates the labour sections and provides that they will resolve disputes assigned by the LFT and the other applicable dispositions entailing their specific competence.

TABLE 7.33 Relevant articles of the Organic Law.

Article 386. People interested in entering the civil service career must comply with the requirements established in the Job Catalogues.
Article 387. Admission to the civil service career includes the recruitment and selection of applicants for vacant positions.
Article 388. The entry procedure will be carried out in accordance with the following: I. By open competition, which is the entry procedure aimed at internal personnel and external applicants to the Superior Court of Justice and the Council of the Judiciary. II. By closed contest, which is the selection route for the internal personnel of the Superior Court of Justice and the Council of the Judiciary. The contests will be held according to the needs of the service as assessed by the committee of the civilian career. Preference will be given to the open mechanisms. In case of urgent vacancy of a crucial occupation, the head of the administrative area may carry out the appointment bypassing competition, in which case whoever is selected to fill the position must do so immediately following their appointment.
Article 389. The recruitment and selection processes will be carried out in accordance with the regulations approved by the Council of the Judiciary. The terms, requirements and form of dissemination of the calls will be established in regulations.

Source: Authors' elaboration.

The number of courts (*Juzgados*) presided by judges, as well as their specialisations, are determined by the Judicial Council (Art. 58). As disposed in Art. 78, the labour courts will know

of all those conflicts that Article 123, section A, fraction XXXI, of the Political Constitution of the United Mexican States does not reserve as the competence of the Judicial Power of the Federation and that fall within the local competence of Mexico City.

Finally, the Institute of Judicial Studies, in addition to being responsible for initial and continuous training, is also in charge of selection and evaluation of the personnel that will integrate the labour courts (Art. 272), which are carried out in accordance with Chapter 3 of the aforementioned Organic Law. The relevant articles are reported in Table 7.33.

Table 7.34 lists the relevant constitutional provisions for Guanajuato:

TABLE 7.34 Political constitution of Guanajuato

Art. 39: The exercise of the Judicial Power corresponds to the state's Supreme Court of Justice, to the judges and to the Council of the Judicial Power, in the terms of their respective laws.
Art. 83: [...] The Judiciary will have a Council that will be the general administrative body, in charge of the judicial career, training, discipline and evaluation of the civil servants of the Judicial Power.
Art. 90: Faculties and obligations of the Council of the Judicial Branch include: III. Managing the judicial career. IV. Making proposals for the appointment of Magistrates in accordance with the rules of the judicial career, in the shifts that correspond to the Judicial Power, and submitting them to the approval of the state legislature. V. Appoint judges and court personnel, in accordance with the rules of the judicial career, in the terms of law.
Art. 95: The organic law of the judicial branch will determine the necessary requirements in order for someone to be appointed as a judge.
Art. 93. The organic law of the Judicial Branch will establish: IV. The organisation, competence and functioning of its different courts and bodies. V. The obligations to be fulfilled by civil servants of the Judiciary and their responsibilities, in order to safeguard impartiality, legality, honesty, independence, truthfulness, loyalty, speed, efficiency and effectiveness in the performance of their duties; the disciplinary sanctions to be imposed on those who breach their obligations; the procedure and appeals that proceed against the resolutions that are issued, as well as the respective competence of each body. VI. The judicial career that will establish the catalogue of positions, the bases for admission, permanence and promotion of civil servants of the Judiciary, as well as their training, specialisation and modernisation. VII. The norms, criteria and procedures for the evaluation of judges and Magistrates of the Supreme Court of Justice, as well as of the Councillors of the Judiciary and other judicial servants.

Source: Authors' elaboration.

The Organic Law of the Judicial Power of Guanajuato (as last amended in 2017) establishes in Art. 64 that the state legislature will appoint magistrates of the Supreme Court of Justice based on three lists, presented by the state governor and the Council of the Judiciary. The shortlists presented by the state governor may be composed of people who are not engaged in a judicial career but who have distinguished themselves for their worthiness and competence in the exercise of the legal profession. The shortlists presented by the Council of the Judiciary must be composed of judges who satisfy the requirements of the judicial career, in the terms established by the same Law.

Referring to judges, the law distinguishes between the so called *jueces de partido* and *jueces menores*. The requirements for both categories are reported in Table 7.35.

TABLE 7.35 Requirements for *jueces de Partido* and *jueces menores*.

***Juez de partido* (Art. 107)**		***Juez menor* (Art. 120)**	
I.	To be a Mexican citizen in the full exercise of their civil and political rights.	I.	To be a Mexican citizen in the full exercise of their civil and political rights.
II.	Have a law degree or a legal academic equivalent, with at least **five** years of professional practice, as well as a professional license.	III.	Have a law degree or its legal academic equivalent, with at least three years of professional practice, as well as a professional license.
IV.	Not having been convicted of an intentional crime that merits custodial sentence of more than a year; in case of theft, fraud, falsification, abuse of trust or other crimes that seriously hurts good their public reputation, the applicant will be disregarded for the position, whatever the penalty may have been.	V.	Not having been convicted of an intentional crime that merits custodial sentence for more than a year; in case of theft, fraud, falsification, abuse of trust or other crimes that seriously hurts their public reputation, the applicant will be disregarded for the position, whatever the penalty may have been.
VI.	Possess renowned integrity.	VII.	Possess renowned integrity.
VIII.	Satisfy, where appropriate, the requirements of the judicial career.	IX.	Satisfy, where appropriate, the requirements of the judicial career.

Source: Authors' elaboration.

In both cases, the judges are nominated by the Judicial Council (Art. 104 and Art. 120).

In accordance with Art. 144, the Council of the Judiciary will create both free opposition contests and internal competitions, attending to the needs of the service and the nature of the category of the contest. For every two internal competitions for the positions of judges and secretaries there will be a free competition through a public tender, open to all citizens who are not in the Judicial Power, who meet the requirements of the Organic Law for the category of the competition and that have been approved in the required training course.

The training course must be open to the public in general, and all professionals who meet the requirements legally established for the category may register for it. In internal competitions, those who are in an immediate lower category meet the requirements of this Law and have passed the training course for the corresponding exam applied by the School of Judicial Studies and Research.

Against this background, Art. 145 clarifies that the entry in the judicial career is under the category of actuary, whereas Art. 146 limits the internal competition for the position of magistrate to the *Jueces de Partido*.

Article 148. The Council of the Judiciary, in accordance with the respective regulations, will issue the call for the competition for each of the judicial career categories, which must contain:

I. The modality of contest: free or internal.

II. The category that is entered.

III. The number of vacancies subject to competition.

IV. Date and time in which the exams will be carried out.

V. The time granted to complete the exams.

VI. Term, place and requirements for the registration of applicants.

VII. All other elements deemed necessary.

The following Art. (149) reinforces that to be able to participate in the competition, applicants will need to have accredited training courses that have been taught for that purpose. As determined by Art. 151, the competition comprises both theoretical and practical examinations. Having passed the first grants access to the second. The contents of both exams are determined by the Council of the Judicial Power.

Finally, the School of Judicial Studies and Research will design the training programmes for the exams corresponding to the different categories of the judicial career, carried out by the School itself or through specialised institutions or universities (Art. 180).

7.4 PERFORMANCE INDICATORS OF THE DISPUTE RESOLUTION SYSTEM (2015–2019)

7.4.1 Number of received, processed, resolved and pending orders, by economic sector and location

This chapter uses data from INEGI and the Federal Attorney for Labour Defence (*Procuraduría Federal de la Defensa del Trabajo*—PROFEDET)[33] as its main sources. As the time frame used here goes back to 2019, when the *Centros de Conciliación Laboral* (Labour Conciliation

33. In meetings with experts in Mexico's labour justice, it was highlighted that data from PROFEDET may not be representative at the national level, differing from data gathered by other institutions. However, it is important to note that data on Mexican labour justice can be extremely difficult to access or entirely unavailable to the general population. For this case study, data was requested via the National Transparency Platform of the *Secretaría del Trabajo y Previsión Social* and the *Junta Federal de Conciliación y Arbitraje*. In most requests, the authors were informed that certain data were not collected or that the institution is not responsible for providing the relevant information.

Centres) did not exist, data on labour conflicts are extracted from the *Juntas de Conciliación*[34] *y Arbitraje* (Conciliation and Arbitration Boards). Whenever possible, the figures on conciliations and lawsuits will be presented, as well as data referring to Guanajuato and Mexico City, encompassing the period from 2015 to 2019.

INEGI (2020b) explains:

> "The Local Boards of Conciliation and Arbitration, according to Article 621 of the Federal Labour Law until its reform on May 1, 2019, corresponded to the cognisance and resolution of disputes of a labour nature that arise between workers and employers during the labour relationship. Currently, Article 590-E of this law stipulates that, before resorting to the labour courts, workers and employers must seek the corresponding conciliatory body. In the local sphere, the conciliation function will be in charge of the specialised and impartial *Centros de Conciliación Laboral* that are set up in the federative entities. Until the *Centro Federal de Conciliación y Registro Laboral* begins its registration functions, the Boards of Conciliation and Arbitration, as well as the Secretariat of Labour and Social Prevision will continue performing the duties provided for in the Federal Labour Law in force at the time of entry into force of the reform Decree, adding and derogating several provisions of the Federal Labour Law. (p. 7, our translation)."

Therefore, data on the *Centros de Conciliación Laboral* are not discussed, as several states in Mexico do not present them. Finally, sometimes the data refer to Mexico City as 'Federal District', considering that the name of this federative entity was changed in 2016.

Since PROFEDET is a key player in labour conflicts and lawsuits in Mexico, the numbers of services provided by this institution include advisory services, conciliations, lawsuits or protections. PROFEDET services are free, providing legal representation to workers in labour disputes and lawsuits. Between 2015 and 2018 there was a non-linear increase in demands for PROFEDET services, peaking in 2018. This is in line with the trend towards an increase in the number of conciliations and disputes, to be discussed in this section.

The figures for work conciliations initiated in the states of Guanajuato and Mexico City, according to according to PROFEDET, are presented in Table 7.37 The figures for Mexico City increase every year. In 2018 there was a large increase in both states: in the case of Mexico City, the figures increased tenfold from 2017 to 2018, while in the same period the Guanajuato figures increased threefold.

34. *Juntas de Conciliación y Arbitraje*: "Constitutionally, they are the only authorities that can resolve worker-employer disputes." (INEGI, n.d., own translation).

TABLE 7.36 Total number of matters handled by PROFEDET:[35] advice, conciliations, lawsuits and *amparos*

Year	Total (Nationwide)
2015	186,434
2016	148,840
2017	155,584
2018 (until November)	209,136

Source: PROFEDET.

TABLE 7.37 Conciliations initiated by state

Year	Guanajuato	Mexico City
2015	426	949
2016	421	884
2017	537	821
2018 (until November)	1,595	8,522

Source: PROFEDET.

TABLE 7.38 Lawsuits initiated by the top 7 areas of economic activity in terms of lawsuits

Economic activity	2015	2016	2017	2018 (until November)
Electric	213	226	155	132
Food production	215	215	244	209
Automotive sector	143	158	196	207
Companies with origin in direct or decentralised administration by the federal government	5629	5279	5390	4,237
Companies that execute work in federal zones	1,056	888	900	894
Companies handling federal contracts or concessions	6508	5934	5,455	4,816
Local branches	494	725	860	1,026
Other[36]	869	989	1046	1,056
Total	15,127	14,414	14,246	12,577

Source: PROFEDET.

35. PROFEDET is a decentralised body of the *Secretaría del Trabajo y Previsión* Social (STPS), which provides advisory services, legal representation and mediation to workers and unions free of charge.

36. PROFEDET separates this data by 25 branches of economic activity, therefore, 'others' refers to 18 additional branches of economic activity: textile, film, rubber, sugar, mining, metallurgical steel, hydrocarbons, petrochemical, cement, heating, chemical, cellulose and paper, vegetable oils and fats, beverage manufacture, railroads, lumber, glass, and tobacco.

Table 7.38 shows the main branches of economic activity that give rise to labour lawsuits in the country. In general, unlike conciliations and PROFEDET services, labour lawsuits have not increased over the years. On the contrary, the total number of labour lawsuits decreased between 2015 and 2018. This highlights the importance of conciliation in prior phases, which might be linked to the reduction of claims in other legal instances.

The only branch of economic activity shown in Table 7.38 that saw an increase in the number of lawsuits during this period was the automotive sector, a very relevant sector in Mexico. Activities related to the federal government are among the main sectors of the economy, with proportionally high lawsuit figures. Even though there was a decrease in these activities within this time frame, their figures continue to be the most representative when compared to other sectors nationwide.

Table 7.39 presents labour conflicts by the top 5 economic sectors[37] nationwide, in Mexico City and in Guanajuato, from 2015 to 2019. These data encompass the number of disputes, number of workers and is disaggregated by sex.

It is clear that there was an increase in the number of disputes and in the number of claimant workers, both nationally and in the states of Guanajuato and Mexico City, between 2015 and 2019. This is also true when considering data disaggregated by sex; the only exception is the number of lawsuits filed by men in Guanajuato.

Despite the overall increase in these figures at the national level, two sectors saw a decrease: construction and other services, except government activities. However, Mexico City saw an increase in lawsuits in these two sectors. The other three sectors in the table saw an increase in all dimensions analysed, especially in the manufacturing industries sector, where the number of plaintiff workers in disputes almost tripled between 2015 and 2019. In all 5 sectors at the national level, women are underrepresented among worker plaintiffs in disputes. Claims from men are always the majority in worker disputes, although in some cases the difference may be considered low (in the order of tens).

37. INEGI divides Mexico's economy into 21 different sectors. These are the 16 sectors that are not directly included in the table, but rather grouped as 'remaining categories': 1) agriculture, livestock, forestry, fishing and hunting; 2) oil and gas extraction; 3) mining; 4) electricity, water and gas supply through pipelines to the final consumer; 5) transportation, mail and storage; 6) information in mass media; 7) financial and insurance services; 8) real estate services and rental of movable and intangible assets; 9) professional, scientific and technical services; 10) corporate and business management; 11) educational services; 12) health and social assistance services; 13) recreational, cultural, sports and other recreational services; 14) temporary accommodation and food and beverage preparation services (hotels and restaurants); 15) activities of the government and international and extraterritorial organisations; 16) not specified.

TABLE 7.39 Labour disputes in the top 5 economic sectors[38] with the most records of conflicts, nationally, in Guanajuato and Mexico City, disaggregated by sex, 2015–2019

Sector of economic activity	Federal entity	Categories	2015	2016	2017	2018	2019
Total	National	Number of disputes	221,921	233,036	229,464	227,900	238,532
		Total claimant workers	254,937	311,570	272,002	308,020	338,959
		Men	164,777	192,963	171,454	190,433	214,438
		Women	89,898	109,873	99,318	115,861	124,250
		Unspecified sex	262	8,734	1,230	1,726	271
	Mexico City	Number of disputes	25,428	31,696	32,421	33,842	33,752
		Total claimant workers	29,811	36,830	36,960	38,518	39,425
		Men	17,720	21,474	21,226	23,083	25,492
		Women	12,081	15,354	15,734	15,435	13,933
		Unspecified sex	10	2	0	0	0
	Guanajuato	Number of conflicts	16,072	16,671	15,988	16,461	17,828
		Total workers demanding	17,061	17,777	17,027	17,547	18,620
		Man	11,802	12,083	11,182	11,104	11,799
		Woman	5,239	5,685	5,842	6,414	6,803
		Unspecified Sex	20	9	3	29	18
Construction	National	Number of disputes	18,120	18,055	17,600	15,841	15,846
		Total claimant workers	22,464	23,927	22,139	20,371	21,254
		Men	19,876	20,774	19,329	17,204	18,598
		Women	2,587	2,976	2,808	3,013	2,648
		Unspecified sex	1	177	2	154	8
	Mexico City	Number of disputes	1,969	2,050	2,270	2,241	2,185
		Total claimant workers	2,354	2, 508	2,881	2,714	2,925
		Men	1,999	2,049	2,364	2,070	2,435
		Women	355	459	517	644	490
		Unspecified sex	0	0	0	0	0
	Guanajuato	Number of disputes	737	891	748	589	602
		Total claimant workers	901	1,105	947	648	650
		Men	805	1,001	847	555	553
		Women	96	104	100	92	97
		Unspecified sex	0	0	0	1	0

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38. The sectors of economic activity are a: "Classification of economic activities, according to the type of good or service that is produced in the economic unit. The classification is made based on the North American Industry Classification System (NAICS)." (INEGI, n.d., our translation). For more details on this classification, see: <https://www.inegi.org.mx/rnm/index.php/catalog/345/download/10091>. Accessed on: 06/07/2021.

Sector of economic activity	Federal entity	Categories	2015	2016	2017	2018	2019
Manufacturing industries	National	Number of disputes	24,563	26,669	26,412	27,297	29,007
		Total claimant workers	28,540	54,638	37,442	61,738	79,766
		Men	18,748	32,885	23,026	38,202	48,715
		Women	9,760	18,268	14,404	23,478	31,016
		Unspecified sex	32	3,485	12	58	35
	Mexico City	Number of disputes	1,714	2,188	2,195	2,237	2,088
		Total claimant workers	2,084	2,672	2,458	2,725	2,600
		Men	1,206	1,600	1,414	1,606	1,657
		Women	878	1,071	1,044	1,119	943
		Unspecified sex	0	1	0	0	0
	Guanajuato	Number of disputes	1,765	1,835	1,823	2,134	2,346
		Total claimant workers	1,820	1,867	1,886	2,266	2,477
		Men	1,298	1,333	1,253	1,486	1,615
		Women	522	534	632	777	861
		Unspecified sex	0	0	1	3	1
Commerce	National	Number of disputes	52,259	53,007	54,459	56,813	55,079
		Total claimant workers	57,068	63,022	58,614	63,441	64,762
		Men	33,930	35,341	34,704	37,286	38,956
		Women	23,117	23,919	23,899	26,035	25,759
		Unspecified sex	21	3,762	11	120	47
	Mexico City	Number of disputes	7,267	7,069	7,939	9,281	8,674
		Total claimant workers	8,360	8,122	8,852	10,295	9,715
		Men	4,590	4,487	4,653	6,029	5,935
		Women	3,763	3,635	4,199	4,266	3,780
		Unspecified sex	7	0	0	0	0
	Guanajuato	Number of disputes	2,865	3,512	3,523	3,544	3,673
		Total claimant workers	3,005	3,784	3,710	3,705	3,753
		Men	1,915	2,307	2,247	2,190	2,225
		Women	1,089	1,475	1,463	1,506	1,526
		Unspecified sex	1	2	0	9	2

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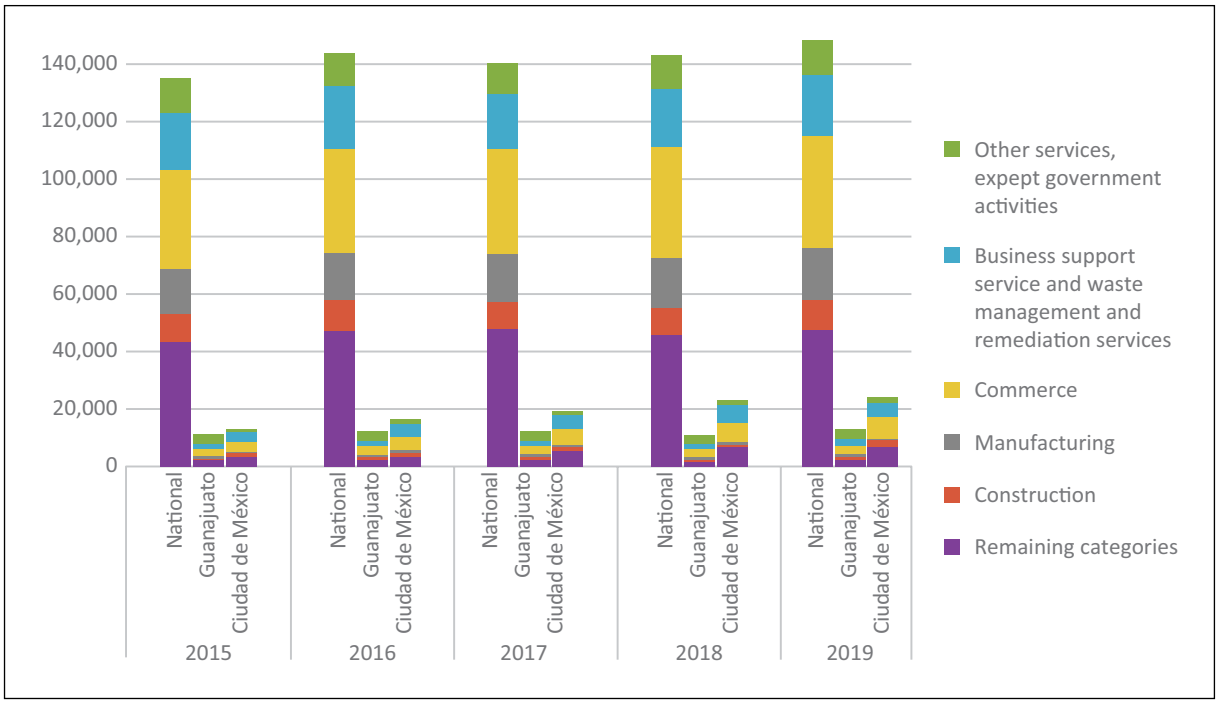
Sector of economic activity	Federal entity	Categories	2015	2016	2017	2018	2019
Business support service and waste management and remediation services	National	Number of disputes	32,126	35,835	35,431	34,249	37,484
		Total claimant workers	36,311	43,968	41,527	41,000	46,459
		Men	24,295	28,399	26,861	26,313	31,127
		Women	12,003	14,405	14,636	14,428	15,291
		Unspecified sex	13	1,164	30	259	41
	Mexico City	Number of disputes	5,396	7,736	7,277	6,843	7,246
		Total claimant workers	6,306	8,818	8,029	7,797	8,222
		Men	3,796	5,225	4,749	4,717	5,471
		Women	2,509	3,593	3,280	3,080	2,751
		Unspecified sex	1	0	0	0	0
	Guanajuato	Number of disputes	2,352	2,550	2,630	2,699	2,951
		Total claimant workers	2,457	2,648	2,787	2,938	3,093
		Men	1,758	1,860	1,855	1,824	2,018
		Women	697	787	931	1,109	1,066
		Unspecified sex	2	1	1	5	9
Other services, except government activities	National	Number of disputes	19,842	19,487	17,859	18,907	18,540
		Total claimant workers	21,565	23,518	20,000	21,923	21,153
		Men	13,501	14,866	12,280	13,404	12,814
		Women	8,053	8,641	7,718	8,424	8,332
		Unspecified sex	11	11	2	95	7
	Mexico City	Number of disputes	1,792	3,020	1,965	2,365	2,167
		Total claimant workers	2,146	3,751	2,245	2,727	2,580
		Men	1,084	1,882	1,022	1,435	1,439
		Women	1,062	1,869	1,223	1,292	1,141
		Unspecified sex	0	0	0	0	0
	Guanajuato	Number of disputes	5,160	4,648	4,123	4,096	4,687
		Total claimant workers	5,416	4,840	4,347	4,298	4,934
		Men	3,801	3,370	2,895	2,850	3,158
		Women	1,610	1,465	1,451	1,442	1,771
		Unspecified sex	5	5	1	6	5

Source: INEGI.

To complement the previous analysis, Figure 7.8 illustrates labour conflicts across the most relevant economic sectors between 2015 and 2019, nationwide, in Guanajuato and in Mexico City. The 'remaining categories' (16), despite not individually representing the highest numbers, are quite representative, especially at the national level. The top 3 economic sectors in both Mexico City and Guanajuato are commerce, business support service and waste management and remediation services, and other services, except government activities.

FIGURE 7.8 Labour disputes according to the top 5 economic sectors with the most records of conflicts in Guanajuato and Mexico City, 2015–2019



Source: <https://www.inegi.org.mx/app/tabulados/interactivos/?pxq=Laborales_Laborales_07_ad59e904-82fe-4f33-b9a0-511d29746e65>.

Table 7.40 details labour disputes by economic sector (primary, secondary and tertiary),[39] between 2017 and 2019. It is evident that the primary sector is practically irrelevant in terms of disputes figures when compared to the secondary and especially the tertiary sectors (which saw almost 80 per cent of all nationwide disputes during the period).

TABLE 7.40 Labour disputes at the national level, by economic activity, 2017–2019

Sector of economic activity	2017	2018	2019
Primary	1.1%	1.1%	1%
Secondary	20.1%	19.7%	19.8%
Tertiary	78.8%	79.2%	79.2%

Source: INEGI.

Regarding labour conflicts in view of the Federal Labour Law reform, INEGI (2020b) explains the role of the Labour Courts of the Judicial Power of the Federation and of the *Juntas Locales de Conciliación y Arbitraje*:

39. According to INEGI, the primary sector refers to activities based on the exploitation of natural resources, the secondary sector comprises the manufacturing industries, and finally the tertiary sector encompasses the services sector <http://cuentame.inegi.org.mx/economia/>.

"Regarding the resolution of labour disputes (individual or collective), Article 123 of the Political Constitution of the United Mexican States and Article 604 of the Federal Labour Law in force stipulate that it corresponds to the Labour Courts of the Judicial Power of the Federation or of the federative entities, the cognisance and the resolution of labour conflicts that arise between workers and employers, only between those (workers) or only between them (employers), derived from the work relationships or the facts related to them.

It is up to the Local Boards of Conciliation and Arbitration to remain aware of the individual, collective and registry procedures that begin after the entry into force of the Decree reforming the Federal Labour Law, until the entry into the functions of the *Centros de Conciliación Laboral* in the local area. (p. 7, own translation)."

There was a large increase in the conciliations initiated and concluded from 2015 to 2019, peaking in 2018, with an almost fourfold increase. Except for 2017, the conciliations initiated were always more numerous than concluded conciliations.

Similar to the national data, there was also an increase in the figures for conciliations in both the Federal District and in Guanajuato, peaking in 2018. As in the national figures, there were more conciliations initiated than concluded in the two states analysed here.

TABLE 7.41 Conciliations initiated and concluded by federal entity

Federal entity	2015		2016		2017		2018		2019	
	Initiated	Completed	Initiated	Completed	Initiated	Completed	Initiated	Completed	Initiated	Completed
Total	8,155	7,653	8,445	8,332	8,517	8,603	36,033	35,886	10,741	10,622
Federal District	949	851	884	916	821	804	9 231	9 202	1 301	1 274
Guanajuato	426	358	421	364	537	538	1,608	1,566	749	787

Source: PROFEDET (via the National Transparency Platform).

Data from INEGI and PROFEDET show that there was a decrease in the number of initiated and concluded lawsuits at the national level. The year with the most lawsuits initiated was 2015. Completed lawsuits reached a peak in 2016, while 2019 represented the year with the lowest number of both initiated and completed lawsuits at the national level.

Concerning the Federal District and Guanajuato, unlike what was seen with conciliations, there are generally more concluded lawsuits than merely initiated lawsuits. However, there is no apparent trend over the years for either state. For instance, 2018 was the year with the least initiated lawsuits in Guanajuato, unlike the Federal District, which had the most initiated

lawsuits in that same year. The number of concluded lawsuits peaked in 2017 in the Federal District, and in 2016 in Guanajuato.

TABLE 7.42 Initiated and concluded lawsuits, by federal entity

Federal entity	2015		2016		2017		2018		2019	
	Initiated	Completed	Initiated	Completed	Initiated	Completed	Initiated	Completed	Initiated	Completed
Total	15,127	15,755	14,414	19,394	14,246	19,335	13,232	18,292	12,280	12,772
Federal District	1,855	1,591	1,827	3,228	1,890	4,417	1,933	2,855	1,710	2,721
Guanajuato	431	584	419	657	417	330	304	366	352	314

Source: PROFEDET (via the National Transparency Platform).

Regarding concluded labour disputes, Table 7.43 presents INEGI data with the same 5 main economic sectors as in previous tables, disaggregated by sex, from 2015 to 2019, at the national level, and in the states of Guanajuato and Mexico City.

TABLE 7.43 Labour conflicts resolved[40] according to the top 5 economic sectors recording conflicts nationwide, in Guanajuato, and in Mexico City, disaggregated by sex, 2015–2019

Sector of economic activity	Federal entity	Categories	2015	2016	2017	2018	2019
Total	National	Number of disputes	135,222	143,837	140,532	143,507	148 699
		Total claimant workers	155,037	163,933	161,587	320,829	307 167
		Men	100,737	105,355	102,489	182,710	183 780
		Women	53,876	58,179	58,784	136,966	122 722
		Unspecified sex	424	399	314	1,153	665
	Mexico City	Number of disputes	13,145	16,367	19,311	23,023	23 826
		Total claimant workers	15,457	19,041	22,022	25,934	27 413
		Men	9,234	10,908	12,191	14,751	16 796
		Women	6,217	8,129	9,828	11,183	10 617
		Unspecified sex	6	4	3	0	0
	Guanajuato	Number of disputes	11,675	12,742	12,278	10,446	12 890
		Total claimant workers	12,312	13,578	13,255	11,196	14 791
		Men	8,529	9,404	8,938	7,309	9 927
		Women	3,772	4,164	4,315	3,876	4 824
		Unspecified sex	11	10	2	11	40

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40. According to INEGI, 'resolved' labour conflicts represent: "the final settlement or resolution presented by individual or collective labour disputes." (INEGI, n.d., own translation).

Sector of economic activity	Federal entity	Categories	2015	2016	2017	2018	2019
Construction	National	Number of disputes	9,617	10,021	9,329	9,023	10 106
		Total claimant workers	12,510	12,606	12,111	12,416	13 280
		Men	11,043	11,084	10,562	10,552	11 525
		Women	1,418	1,517	1,543	1,813	1 750
		Unspecified sex	49	5	6	51	5
	Mexico City	Number of disputes	567	266	297	351	1 620
		Total claimant workers	712	320	373	405	2 185
		Men	613	251	284	310	1,815
		Women	99	69	89	95	370
		Unspecified sex	0	0	0	0	0
	Guanajuato	Number of disputes	423	602	616	399	588
		Total claimant workers	486	777	781	462	691
		Men	433	712	698	404	613
		Women	53	65	83	58	77
		Unspecified sex	0	0	0	0	1
Manufacturing industries	National	Number of disputes	16,251	16,917	16,558	17,732	18,623
		Total claimant workers	18,803	19,365	19,535	106,760	91,984
		Men	12,577	13,091	12,877	60,698	51,769
		Women	6,140	6,149	6,609	45,493	39,964
		Unspecified sex	86	125	49	569	251
	Mexico City	Number of disputes	937	1,105	1,280	1,434	1,122
		Total claimant workers	1,186	1,418	1,500	1,636	1,455
		Men	691	884	882	940	864
		Women	495	534	616	696	591
		Unspecified sex	0	0	2	0	0
	Guanajuato	Number of disputes	1,374	1580	1,513	1,480	1,659
		Total claimant workers	1,407	1,611	1,620	1,774	1,703
		Men	1,016	1,171	1,087	1,257	1,134
		Women	391	440	532	516	569
		Unspecified sex	0	0	1	1	0

Sector of economic activity	Federal entity	Categories	2015	2016	2017	2018	2019
Commerce	National	Number of disputes	33,900	35,989	36,483	38,580	38,691
		Total claimant workers	36,959	39,442	39,660	54,617	62,666
		Men	22,143	23,612	23,287	30,846	37,155
		Women	14,754	15,771	16,304	23,724	25,479
		Unspecified sex	62	59	69	47	32
	Mexico City	Number of disputes	3,371	4,286	5,528	6,829	7,071
		Total claimant workers	3,920	4,839	6,413	7,651	7,944
		Men	2,145	2,638	3,432	4,098	4,719
		Women	1,774	2,197	2,980	3,553	3,225
		Unspecified sex	1	4	1	0	0
	Guanajuato	Number of disputes	2,178	2,600	2,662	2,446	2,851
		Total claimant workers	2,237	2,784	2,805	2,564	4,054
		Men	1,417	1,727	1,759	1,523	2,787
		Women	817	1,055	1,046	1,034	1,263
		Unspecified sex	3	2	0	7	4
Business support service and waste management and remediation services	National	Number of disputes	20,085	21,613	19,428	20,742	21,518
		Total claimant workers	23,118	24,609	22,229	35,135	28,971
		Men	15,583	16,236	14,740	21,686	18,729
		Women	7,495	8,350	7,454	13,289	10,119
		Unspecified sex	40	23	35	160	123
	Mexico City	Number of disputes	3,571	4,598	4,771	5,546	5,221
		Total claimant workers	4,036	5,398	5,354	6,083	5,711
		Men	2,558	3,294	3,183	3,817	3,685
		Women	1,475	2,104	2,171	2,266	2,026
		Unspecified sex	3	0	0	0	0
	Guanajuato	Number of disputes	1,611	1,883	1,887	1,637	2,025
		Total claimant workers	1,718	1,958	1,978	1,726	2,126
		Men	1,260	1,369	1,354	1,123	1,419
		Women	458	588	624	602	699
		Unspecified sex	0	1	0	1	8

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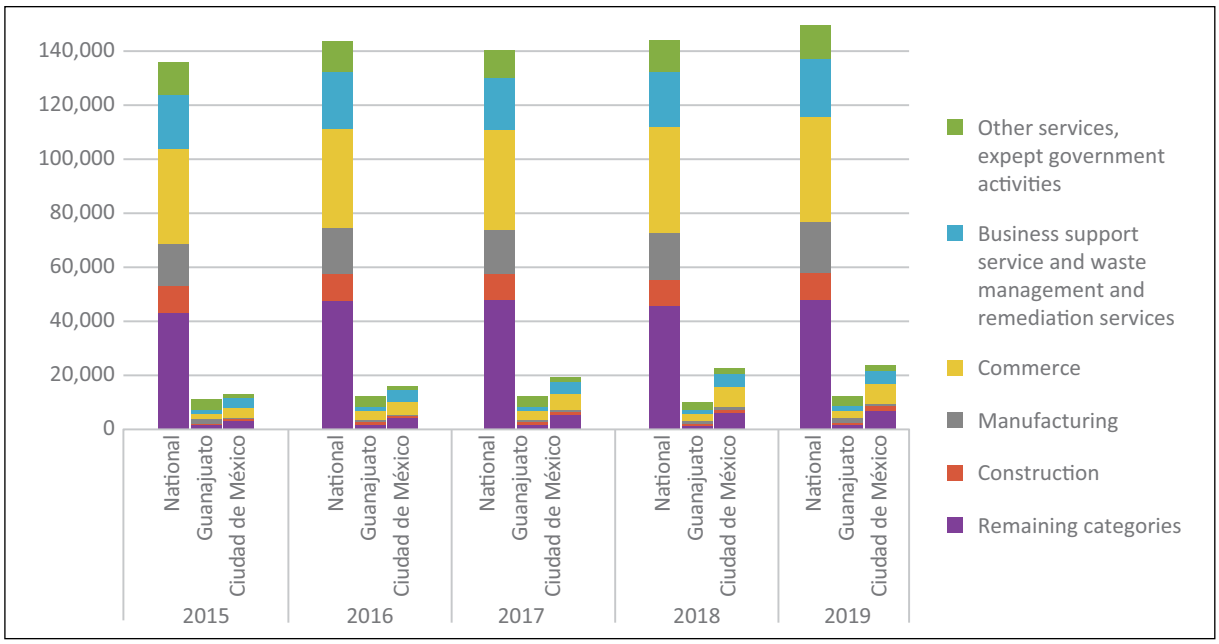
Sector of economic activity	Federal entity	Categories	2015	2016	2017	2018	2019
Other services, except government activities	National	Number of disputes	11,782	11,316	10,448	11,278	11,670
		Total claimant workers	12,843	12,227	11,414	13,619	14,596
		Men	8,065	7,460	6,870	7,970	8,885
		Women	4,694	4,756	4,536	5,477	5,613
		Unspecified sex	84	11	8	172	98
	Mexico City	Number of disputes	967	1,355	1,222	1,703	1,567
		Total claimant workers	1,089	1,499	1,397	2,067	1,955
		Men	527	688	593	1,041	934
		Women	562	811	804	1,026	1,021
		Unspecified sex	0	0	0	0	0
	Guanajuato	Number of disputes	3,732	3,693	3,114	2,490	3,215
		Total claimant workers	3,896	3,841	3,294	2,578	3,471
		Men	2,769	2,750	2,305	1,709	2,275
		Women	1,120	1,086	988	868	1,174
		Unspecified sex	7	5	1	1	22

Source: INEGI.

There was an increase in all figures, regardless of federative entity or gender. When analysing the top 5 economic sectors separately, 4 presented an increase, with the only exception being 'other services, except government activities'. Women are underrepresented in solved labour disputes. Women represent a minority nationwide in labour conflicts across these 5 sectors.

FIGURE 7.9 Labour disputes resolved nationwide, Guanajuato and Mexico City, by the top 5 economic sectors recording conflicts, 2015–2019



Source: <*https://www.inegi.org.mx/app/tabulados/interactivos/?pxq=Laborales_Laborales_22_75955ee5-39b0-4f42-bb99-02f932f3dca1*>.

Figure 7.9 depicts the number of labour disputes concluded across the same 5 economic sectors during the same period. This is very similar to the data on labour conflicts presented above in terms of the proportion of each sector within each federative entity. Here too, the item 'remaining categories' is significant. The least significant economic sectors are construction and manufacturing industries.

Table 7.44 shows the number of proxy services in the labour courts, which according to include personalised legal advice, conciliations and demands met by these bodies. There was a decrease in these demands between 2015 and 2017, with 2016 being the year with the fewest requests, even considering the increased number of completed services, which led to an increase in the percentage of services completed by the Attorney's Office.

TABLE 7.44 Completion of labour attorney services to workers' requests

Year	Completed services	Requests for attorney services	Percentage of completed services
2015	149 894	204 983	73,10%
2016	171 777	154 220	111,30%
2017	176 631	180 752	97,70%

Source: PROFEDET.

7.4.2 Order type, processing type, average time, success rate, average conviction and compliance rate indicators

This section discusses the main reasons behind conflicts leading to labour lawsuits in Mexico. According to PROFEDET, contributions and designation of beneficiaries are the main drivers of these lawsuits, even though contributions saw a decrease of about 1/3 between 2015 and 2018. In general, there was a decrease in the total number of lawsuits during the same period.

TABLE 7.45 Labour lawsuits, by the 5 main reasons for conflict according to PROFEDET

Year	Contributions	Designation of beneficiaries	Dismissal	Pension IVCM work risk	Benefits federal labour law	Others[41]	Total
2015	6,186	4,987	1,393	1,146	1,079	336	15,127
2016	5,117	5,072	1,338	1,295	1,241	351	14,414
2017	4,657	5,395	1,396	1,330	1,091	377	14,246
2018 (until November)	3,871	4,421	1,518	1,181	1,312	274	12,577

Source: PROFEDET.

41.PROFEDET separates this data by 16 conflict reasons, therefore, the item others refer to 11 other conflict reasons, namely: Bonus, General Conditions of Work, Disciplinary Measures, Payment of Profit Sharing, Preference of Rights, Social Security Benefits, Contract Termination, Termination for Harassment, and Salary Withholding, Voluntary Withdrawal, Other Instances.

The categories refer to: a) 'designation of beneficiaries', which is when the employee dies and their dependents and/or family members request the amount related to the contributions made by the worker to the social security system; and b) 'contributions', which refers to issues related to the contribution made by workers and employers to the social security system. An example of a potential legal action caused by 'contributions' would be when the employer did not make the contributions timely or correctly. The category c) 'others' refers to 11 additional reasons leading to labour lawsuits in the country, with little relevance in numerical terms compared to the others.

Table 7.46 presents data related to reasons for individual labour conflicts in 2017, 2018 and 2019. Unjustified dismissals were one of the major reasons leading to individual labour disputes during those years.

TABLE 7.46 Main drivers of individual labour disputes according to INEGI, 2017–2019

Reasons	2017	2018	2019
Unjustified dismissal	92.9%	88.1%	87.8%
Breach of contract	1.2%	2.9%	2.3%
Others	5.9%	9%	9.9%

Source: INEGI.

Regarding the motivations for collective conflicts, issues involving ownership of the employment contract often lead to disputes, although this has been decreasing over the years. Furthermore, collective conflicts motivated by other reasons have increased.

TABLE 7.47 Main drivers of collective labour disputes according to INEGI, 2017–2019

Reasons	2017	2018	2019
Contract ownership	84.5%	61%	63.6%
New working conditions	6.6%	3.5%	6.3%
Others	5.9%	35.5%	30.1%

Source: INEGI.

Table 7.48 shows the figures for individual, collective and resolved conflicts. Based on these data, it is understood that the values related to resolved conflicts are always lower than those for individual conflicts—i.e., there is always an accumulation of unresolved conflicts. Also, there are more individual conflicts than collective conflicts.

Mexico City represents a large proportion of collective conflicts, especially between 2015 and 2017. On the other hand, the figures for collective conflicts in Guanajuato do not represent even 1 per cent of total national figures. In addition, the average number of individual conflicts registered in Mexico City were twice those registered in in Guanajuato.

Except for collective conflicts in Guanajuato, all other data showed an increase across all sectors between 2015 and 2019.

TABLE 7.48 Individual, collective and resolved labour disputes, 2015–2019

Year		2015	2016	2017	2018	2019
Total	Individual labour conflicts[42]	221,257	232,225	228,828	226,886	237,067
	Collective labour conflicts[43]	664	811	636	1,014	1,465
	Work conflicts resolved	135,222	143,837	140,532	143,507	148,699
Guanajuato	Individual labour conflicts	16,072	16,671	15,988	16,452	17,827
	Collective labour conflicts	ND[44]	ND	ND	9	1
	Work conflicts resolved	11,675	12,742	12,278	10,446	12,890
Mexico City	Individual labour conflicts	25,111	31,373	32,134	33,484	33,358
	Collective labour conflicts	317	323	287	358	394
	Work conflicts resolved	13,145	16,367	19,311	23,023	23,826

Source: INEGI.

In response to the request made to the National Transparency Platform, PROFEDET reported that the average time to complete a lawsuit in the Federal District was five years for the period 2012–2021. For conciliations in the same federative entity, the average duration was three months (104 days). In the case of Guanajuato, the average time for conciliations turned out to be four months (133 days), and two years for legal actions. At the federal level, the average for conciliations was three months (96 days), while legal actions had an average duration of three years.

Therefore, we can conclude that the Federal District resolves conciliations faster than other states, but lawsuits take longer there than in the state of Guanajuato. It is also worth mentioning that, in general, conciliations in the country last up to 10 months, while lawsuits last from one to six years.

Table 7.49 depicts the completed conciliations, and which ones were favourable or not to workers between 2015 and 2019. The data show that there was a non-linear increase in the percentage of favourable cases over the years. The number of conciliations also increased, with 2018 being the year the highest average cases in favour of workers.

42. Individual labour conflicts "Are those disagreements or disputes of a labour nature that arise between individually determined worker (s) and employer due to omissions, faults or non-compliance by any of the parties to the working conditions that were agreed by them, or of those clauses that are stipulated in the Law." (INEGI, n.d., our translation).

43. Collective labour conflicts are: "Disagreements derived from the opposition of interests between the union (s) and the employer (s), in order to achieve the effectiveness of the labour clauses agreed in the collective contract, or those originated by the claim of any of the parties to modify the conditions of work in force or previously agreed" (INEGI, n.d., our translation).

44. No Data.

The agreements take place at *Juntas Locales de Conciliación y Arbitraje*, and thus do not involve the judicial sphere. Half of them (between 48 per cent and 46 per cent) from 2017 to 2019 were motivated by the termination of a contract. The next main reason was voluntary retirement, which during the same period accounted for between 44 per cent and 47 per cent of the cases for conciliation via agreements.

TABLE 7.49 Conciliations completed by type of resolution, 2015–2019

Year	Type of resolution	National figures	Percentage of solutions favourable to the worker
2015	In favour of the worker (agreement)[45]	6,096	79,6%
	Not favourable to the worker (*defensoría*)	532	
	Not favourable to the worker (archive)	978	
	Not favourable to the worker (local jurisdiction)	47	
2016	In favour of the worker (agreement)	6,944	83,34%
	Not favourable to the worker (*defensoría*)	472	
	Not favourable to the worker (archive)	856	
	Not favourable to the worker (local jurisdiction)	60	
2017	In favour of the worker (agreement)	7,125	82,81%
	Not favourable to the worker (*defensoría*)	491	
	Not favourable to the worker (archive)	903	
	Not favourable to the worker (local jurisdiction)	84	
2018	In favor of the worker (agreement)	34,761	96,89%
	Not favourable to the worker (*defensoría*)	512	
	Not favourable to the worker (archive)	580	
	Not favourable to the worker (local jurisdiction)	21	
2019	In favour of the worker (agreement)	9,061	85,30%
	Not favourable to the worker (*defensoría*)	567	
	Not favourable to the worker (archive)	969	
	Not favourable to the worker (local jurisdiction)	25	

Source: INEGI.

Table 7.50 shows the compensations received by workers, in MXN millions, from conciliations that were favourable to them. A significant increase in these figures took place between 2015 and 2018. When we look at the number of conciliations favourable to the workers (Table 49), we also see a large increase between 2015 and 2018.

When considering data on conciliations completed, the reconciliation awards have proportionally increased over the years. In 2015, the average value of reconciliations was MXN7,000, while in 2016 this value rose to MXN17,000, and in 2017 and 2018 this value was MXN20,000, on average.

45. A "formalized agreement between a worker or workers (union) and their employer or employers, which settles conflicts arising from a labour dispute." (INEGI, n.d., own translation).

TABLE 7.50 Compensation awarded to workers in favourable conciliations (in MXN millions)

Year	Compensation
2015	43
2016	121
2017	148
2018 (until November)	613

Source: PROFEDET.

Even though the number of labour dispute conciliations varied between 2015 and 2019, figures for non-compliance with decisions has remained fairly constant at the federal level. Similarly, non-compliance in Guanajuato and the Federal District did not vary significantly. Across all federative entities, 2018 was the year with the highest figures for compliance, following the same pattern as the number of conciliations.

TABLE 7.51 Number of conciliations that complied with and failed to comply with decisions, by federative entity

Federal entity	2015		2016		2017		2018		2019	
	Compl.	Non-compl.	Compl.	Non-compl.	Compl.	Non-compl.	Compl.	Non-compl.	Compl.	Non-compl.
Federation	6,096	1,557	6,944	1,388	7,125	1,478	34,772	1,114	9,061	1,561
Guanajuato	211	147	216	148	292	246	1 338	228	428	359
Federal District	668	183	777	139	659	145	9,017	185	1,070	204

Source: PROFEDET (via National Transparency Platform).

Finally, Table 7.52 shows different trends arising from the conciliations presented in Table 7.52. Guanajuato and the Mexican federation showed a significant decrease in non-compliance figures during the analysed period. The Federal District's compliance figures, on the other hand, did not increase as much as the non-compliance ones.

TABLE 7.52 Number of lawsuits that complied and failed to comply with decisions, by federal entity

Federal entity	2015		2016		2017		2018		2019	
	Compl.	Non-compl.	Compl.	Non-compl.	Compl.	Non-compl.	Compl.	Non-compl.	Compl.	Non-compl.
Federation	14,193	3,612	17 304	8,681	16,214	3 121	15 963	2,355	10 938	1,834
Guanajuato	372	222	497	254	268	62	304	62	256	58
Federal District	1,612	219	3,211	359	3,602	815	2 501	354	2 471	250

Source: PROFEDET (via National Transparency Platform).

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CHAPTER 8. CASE STUDY: ARGENTINA

8.1 EMPLOYMENT PROTECTION

A. Evolution of substantive labour law

The 1853 Constitution, in addition to enshrining civil and political rights, also provided for the equality of Argentina's inhabitants, formally abolishing slavery (Art. 15). From a labour perspective, only the individual's right to work and engage in any lawful business were granted (Art. 14). Labour relations, in accordance with the liberal ideology founded on the freedom of contract and private property, were mainly regulated by the 1869 civil code—through the legal institute of services location.

The origin of labour legislation is linked with the advent of capitalism and the consequent division of capital owners and workers—including children and women—who supplied labour in inhumane conditions for minimal retribution. As a result, protective measures were introduced. In 1905 rest on Sundays was made mandatory. In 1907 the work of women and children was regulated—setting, for example, the minimum legal age for employment (10 years) and protecting pregnant women. The National Department of Labour—responsible, among others, for the enforcement of legislation and for mediating labour/capital conflicts—was set up the same year.

Law No. 9.688 was enacted in 1915 regarding work-related risks. Despite various amendments, it remained valid up until 1991. Such law determined the liability of the employer in certain cases and the corresponding compensation for the injured worker. In 1929 was introduced the current law on the working day (Law No. 11.544, as amended), limiting its duration to 8 hours (48 hours per week). The following year, mandatory rest was extended, and the General Confederation of Labour founded.

In 1933 the law amending the Commercial Code, besides introducing the principle of employment stability, also guaranteed paid vacations and compensation against arbitrary dismissal to workers in the commercial sector. The 1940s were a watershed moment in the evolution of labour legislation. In the first place, the social function of employment, intended as a dignifying element guaranteeing social mobility, was recognised. Secondly, collective labour relations were fostered as a result of the creation of new trade unions and strengthening of the existing ones. These elements combined to improve working conditions. Further, in 1944 labour courts were created in the Federal Capital. In the following year, employment stability, minimum wage and supplementary pay were guaranteed to all workers.

Finally, in 1949, the Constitution was reformed and the right to work was recognised, together with the rights to fair remuneration, qualification, dignified working conditions, social security, economic progress, and defence of professional interests (including the right of assembly)—among others.

Whilst the Constitution was annulled in 1955, Art. 14-bis was introduced by the 1957 constituent assembly (which could not progress due to not having the necessary quorum) and tacitly applied until the 1994 constitutional reform. This norm—analysed in next sub-section—stands at the core of workers' protection.

Law No. 14.250 on collective conventions, was enacted in 1953 and is still valid today with several amendments. As to individual labour relations, the employment contract was regulated in 1974 by Law No. 20.744, also in force today (as amended). Such act allows outsourcing with labour rights liability (for both the outsourcing and receiving companies) as well as seasonal contracts. In 1988 three pieces of legislation were promulgated: Law No. 23.546, regulating the procedure for collective bargaining; Law No. 23.551, regulating the internal activities of representative organisations; and the Law on Discriminatory Acts (No.23.592), which also applies to labour relations.

Three years later, in 1991 the National Employment Law (No. 24.013, as amended) was enacted, concerning employment promotion, protection of the unemployed and the regularisation of informal workers. In particular, the law provides for the cases in which the employer does not register the employment relationship, those in which the registration of the employment relationship happens after the worker has started providing his services, and those in which the remuneration indicated is superior to what is really earned. The same law also introduced apprenticeships and internships for those under 24 years of age as well as new forms of employment contracts with fixed duration. Fixed-term contracts were incentivised by reducing or exempting social security contributions. These contractual forms were derogated in 1998 as a result of Law No. 25.013, which loosened the rules for outsourcing and seasonal work. Finally, it allowed the parties to collective labour relations to bargain and eventually include in collective agreements the functional mobility of workers, thus making the organisation of production more flexible. Flexibility in employment was further bolstered in 1995, as a result of Laws No. 24.465 and No. 24.467. As reported by Bertranou et al. (2013, p. 12), fixed-term contracts were further incentivised and the compensation for termination of fixed-term contracts was eliminated for small and medium-sized enterprises. The law of Risk at the Workplace was first amended in the same year by Law No. 24.028 and subsequently replaced by Law No. 24.557, in 1995. The latter was complemented in 2017 by Law No. 27.348, which fundamentally requires workers to go through a mandatory administrative instance before a medical commission prior to resorting to ordinary labour justice. In 1998 Law No. 25.013 introduced a new compensatory regime—derogated in 2004 by Law No. 25.877—which reduced the compensation for dismissal.

Law No. 25.877 (*Ley del Ordenamiento del Regimen Laboral*), from 2004, brought important amendments in employment contracts, collective labour relations (in particular related to collective bargaining, its procedures and collective labour conflicts), labour administration and labour inspections, among other issues. As a result, Decree No. 1.135/2004 of the same year ordinated Laws No. 14.250 (on collective conventions) and No. 23.546 (on collective bargaining). Decree No. 1.964/2006 regulates temporary service companies (*empresas de servicios eventuales*)—legal entities exclusively dedicated to making personnel available to third parties to temporarily provide extraordinarily predetermined services, or those resulting from extraordinary and transitory requirements, whenever the term for the completion of the contract cannot be anticipated.

Law No. 26.485 was enacted in 2009, guaranteeing the right of women to live a life without violence, and promoting the development of institutional policies. It designated the National Council of Women as the body responsible for making the provisions of the law effective, defining the basic guidelines for state policies. Finally, the law created the Observatory on Violence Against Women.

In 2011, Law No. 26.727 provided for the agrarian labour regime, further regulated by Decree No. 301/2013. Law No. 26.488 was also implemented that same year, establishing norms related to the special regime of employment contract for personnel of private houses, further implemented by Decree No. 467/2014.

In 2016 the government presented the 'National Production Plan', which fundamentally implied a restructuring of the labour market and a reconversion of employment stemming from the new forms of the organisation of production. Since 2017 there have been various attempts to reform Argentina's labour laws, yet these were largely unsuccessful, except for the 2017 complementation of the legislation for accidents and diseases in the workplace.

Important changes have been occurring in the world of work since the mid-1970s: the decentralisation of production and the consequent segmentation of the production process, technological development, globalisation and the digital economy are some of the most significant ones. The typical subordinated and open-ended employment relationship inserted in a single, horizontally coordinated company has been complemented with various kinds of atypical employment relationships, which have gained more and more importance over time in the labour market. In Argentina, as elsewhere, there is an ongoing debate between those who advocate for an integral protection of the worker and those who demand less stringent limits for hiring and dismissing employees. This issue becomes even more relevant when considering the size of Argentina's informal economy and unemployment rates.

B. Constitution and labour

In accordance with the 12th section of Art. 75 of the Constitution, the development and enactment of substantive labour legislation is the purview of the National Congress, whereas its application/enforcement is left to federal and provincial courts. In other words, substantive labour legislation is uniformly applied throughout Argentina, as its scope is national.

As previously mentioned, Art. 14-bis stands at the core of workers' protection. It states: "labour in all its forms shall be protected by law". This clause enshrines the protective principle at the constitutional level, which affords protection to the weakest part of the employment relationship by endowing it with minimal rights. Therefore, the human dignity of the person/worker is ensured while the work provided cannot be intended as a mere commodity (Caubet, 2018).

The norm creates entitlements for workers, trade unions and social security, as detailed in Table 8.1.

TABLE 8.1 Entitlements for workers, trade unions and social security

Workers' rights in the employment contract/relation
Dignified and equitable working conditions
Right to rest, including limited working hours and paid rest and vacation
Remuneration regime, encompassing fair remuneration, minimum vital and adjustable wage, equal pay for equal work as well as participation in the profits of enterprises, with control of production and collaboration in management
Protection against unfair dismissal
Employment stability for civil servants
Rights related to trade unions
Right to free and democratic trade union organisation recognised by the simple enrolment in a special registry
Right to enter in collective labour bargains
Right to resort to conciliation and arbitration
Right to strike
Guarantees for union representatives necessary to carry out their union tasks and those related to the stability of their employment
Rights related to social security
Granting of social security benefits as integral and inalienable
Compulsory social insurance
Retirement and mobile pensions
Comprehensive protection of the family, family financial compensation and access to decent housing

Source: Authors' elaboration.

The Constitution of the Autonomous City of Buenos Aires (CABA) explicitly ensures to the worker the rights set in the national Constitution (Art. 43). The same applies to Córdoba's Constitution, through Art. 18. While CABA's Constitution also contains additional dispositions related to the public employment regime, the professional and cultural development of workers, and interpretations of labour legislation, Córdoba's Constitution includes several entitlements in Art. 23. For example, inhabitants have the right to training, well-being, and

improvement of economic conditions. The same norm also determines the gratuity of labour, social security, and trade union-related administrative or judicial actions. Finally Córdoba's Constitution explicitly provides that, in case of doubt in the application of labour legislation, the interpretation that most favours the worker should prevail.

C. Substantive labour law

a) Labour law contextualisation and features

Argentina's labour law can be understood as part of private law, although limited and integrated by norms pertaining to the public order. The autonomy of the will of the parties is limited: if a clause in violation of the minimum standards provided by labour legislation is inserted in an employment contract, it is null and automatically substituted by the relevant norm. Further, rights stemming from imperative norms which form the public labour order are inalienable and non-disposable. The sources of Argentina's labour law are as follows:

1. Constitution
2. International treaties
3. Legislation, decrees and resolutions
4. Jurisprudence: constitutional control by the National Supreme Court of Justice; and nomophylactic function of the National Supreme Court as well as of the National Labour Chamber of Appeals in plenary.
5. Uses and customs (if not in violation of public order labour norms)
6. Collective bargaining
7. Special/professional statutes
8. Arbitration awards (voluntary and mandatory)
9. ILO's conventions to which Argentina is a State Party
10. The internal regulations of companies

The hierarchical order of such sources is determined by Arts. 31 and 75 (section 22) of the Constitution. The Constitution and international human rights treaties stand at the top of

this order. In second place are international treaties other than human rights instruments. Legislation, decrees and resolutions come next. After these, collective agreements and arbitration awards (with the same force). Finally, uses and customs should be mentioned. Against this background, it is worth noting that, as a result of the protective principle, lower hierarchy norms can prevail over higher ones if they are more favourable to the worker.

Table 8.2 outlines the main principles of Argentinian labour law.

TABLE 8.2 Main principles underpinning Argentina's labour law

Principle
Protective, which unfolds in • *In dubium pro-operario*: in the interpretation of the law or evaluation of evidence by the judge • Application of norm that is most favourable to the worker (in case of two norms applicable to the same juridic situation) • Most beneficial condition: working conditions agreed in the individual employment contract cannot be modified in the future if detrimental to the worker
Inalienability/non-disposability of rights
Continuity of the employment relationship (in case of doubt regarding the continuation of the contract or its duration)—the typical employment contract is open-ended, while other contracts with definite duration stand as exceptions
Primacy of reality over form
Good faith in the conduct of the parties regarding the employment relationship
Non-discrimination and equality of treatment (in equal situations)
Equity—allowing the judge to go beyond the literal formulation of a norm (which is of a general nature) in case its application would produce an irrational/inequitable result
Social justice, as a subsidiary mean for the judge in case of lack of regulation of a given situation
Gratuitous access to justice for workers
Reasonableness
Progressivity

Source: Authors' elaboration.

In conclusion, the following characteristics can be attributed to Argentina's labour law (Grisolia, 2019):

1. It is a dynamic branch of law, in constant evolution
2. It is a branch of law interlinked to social integration: its principles and norms follow general interests and are interlinked with social reality
3. It protects the worker, who is the weakest part in the employment relationship
4. It is a special branch of law: labour norms are applied over civil legislation, which can supplement or complement the former
5. It is an autonomous branch of law

D. The employment contract

The Employment Contract Law (LCT) regulates individual employment relationships. As in other legal systems, the employment contract is functionally interlinked with the employment relationship. In accordance with the LCT, an employment contract exists, despite its form or denomination, whenever a person assumes an obligation to perform actions, execute works or provide services to the benefit of another, under the dependence of the latter, for an open-ended or determined period and in correspondence of a remuneration (Art. 21).

Several features characterise the subordinate employment contract. In the first place, as in any other agreement, the employment contract is consensual, as we shall observe in the next paragraph. Second, the contract is personal: the obligation is non-fungible, as only that employee can execute what was agreed on based on the specific competences and skills for which was hired. Further, it is characterised by a position of subordination of the employee, as analysed in the next subsection. Fourth, the contract is carried out over time, including when it has a fixed term. Finally, the employment contract is *synallagmatic* and has a patrimonial nature—as the payment of a remuneration corresponds to the main obligation of the employer.

The contract becomes valid as a result of the mere consent of both parties: this consent is manifested through the proposal of a party to the contract directed at the other, and its acceptance (Art. 45). To express consent, it is sufficient to state the essentials of the object of the contract (i.e. the main obligations assumed by the parties), while the rest is governed by the applicable law, professional statute, collective agreement and customs/uses (Art. 46). In terms of capacity to stipulate and be a party to a contract, the general principles of civil and commercial law are applicable to the employer, as no specific norm is provided in labour legislation. Concerning the employee, the LCT in principle prohibits the employment of individuals under 16 years of age (Art. 189),1 while those between 16 and 18 years can enter into any type of contract, if authorised by their parents or legal representatives (Art. 187 and 32).

The object of the contract corresponds to the provision of a personal and non-fungible activity (Art. 37) and has to be possible and licit—i.e. not prohibited nor going against society's morals and decency (Art. 38).

In principle, no particular form is required for the establishment of the contract, except when explicitly demanded by the law or collective agreement (Art. 48).

To conclude, Art. 23 of the LCT presumes the existence of an employment contract corresponding to the provision of a service, unless otherwise proven. The burden of proof falls on the employer.

1. Art. 189-bis allows those older than 14 years of age to work in a family company if certain conditions are met.

E. The employment relationship

An employment relationship exists when a person willingly performs actions, executes works or provide services to the benefit of another, under the dependence of the latter and in correspondence of remuneration (Art. 22). One of the parties is the employee—an individual with legal capacity, who assumes the obligation to provide services in a situation of dependence and personally in exchange for retribution. The other is the employer—the individual or legal entity requiring the services of an employee (Art. 26).

Table 8.3 lists the rights and duties of both parties, set in the LCT (Arts. 62 to 89). Additional rights and duties may arise from professional statutes and collective agreements.

TABLE 8.3 Rights and duties of the parties

Duties common to both parties	
• Duty to act in good faith in the establishment, execution and extinction of the employment relationship; • Duty of collaboration and solidarity	
Rights of the worker	**Duties of the worker**
• Right to invention or discovery • Right to professional formation in small and medium enterprises • Right to freedom of expression • Right to privacy • Right to perceive remuneration • Right to effective employment • Right to equality of treatment and non-discrimination	• Duty of diligence and collaboration • Duty of fidelity • Duty to keep confidential information • Duty of obedience • Duty to preserve instruments and equipment • Liability for damage • Duty of non-competition • Duty to render extraordinary aid • Duty to not accept bribes
Rights of the employer	**Duties of the employer**
• Power of organisation • Power to enact company's internal regulations • Power of direction • Power of control • Ius variandi (the unilateral faculty of the employer to modify non-essential conditions of the contract)[2] • Disciplinary power (necessity of proportionality between the misconduct of the worker and the sanction)	• Duty to remunerate • Duty of care and provision (adoption of measures—considering the specific activity—to avoid damages to the worker or his goods)[3] • Duty to provide employment in the agreed conditions • Duty of diligence and initiative • Duty to provide professional formation • Duty of information • Duty of non-discrimination and equality of treatment • Duty to observe obligations related to trade unions and social security

Source: Authors' elaboration based on Grisolia (2019).

2. In accordance with Art. 66 of the LCT, the modification of the contract, in addition to being exclusively related to non-essential aspects, must be reasonable (justified based on the necessities of the company) and cannot result in material or moral prejudice to the worker.

3. This entails the duties of personal security (physical and mental health) and economic security (reimbursement of expenses and compensation for damages), and the duty to protect the life and goods of the worker.

Subordination is the central element of the employment relationships that fall under the scope of the LCT, but there is no legal definition; yet, in certain instances the legislator has intervened to recognise a given activity as subordinated or not, and the jurisprudence has also done so through the resolution of cases in which the existence of the employee's dependence was debated. Scholars have also contributed to define the concept. In accordance with Grisolia (2019), the subordination of the employee results in:

1. technical dependence, as the services provided or actions performed by the worker must conform to the instructions of the employer or management;

2. economic dependence, as the worker makes his work force available in exchange for retribution. On the other hand, the employee does not enjoy the product of his labour or bear the risks of the economic activity; and

3. juridic dependence. The employee is subject to the authority of the employer, including organisation, direction, control, and disciplinary powers.

The position of dependence (or subordination) of the employee is what distinguishes subordinated employment from other kinds of employment that are not regulated by the LCT, such as self-employment. It is important to note that changes in the economy, the decentralisation of production and the consequent reorganisation of labour have resulted in an ever-increasing number of workers who provide juridically independent services yet are in a position of economic dependence. Rather than having a large company in which the whole productive process takes place, the large corporations of today often resort to smaller companies, outsourcing non-strategic functions or certain phases of the process (Seco, 2020). As stated by Sanguineti (2009), this results in companies that are juridically independent, but functionally and economically controlled by the main company, whose dominant position allows to externally condition the exercise of their activities—including the management of the workforce—without the creation of an employment relationship.

Art. 2 excludes from the LCT's scope of application:

1. employees of the national, provincial and municipal public administration;

2. domestic workers; and,

3. rural workers.

These employees are subject to an ad hoc regulatory regime. Regarding domestic and rural workers, it is important to note that the norms of the LCT are applicable only insofar as they are compatible with the nature of the specific regulatory regime.

F. Non-standard forms of employment

The third chapter of the LCT regulates various types of employment contract. Art. 90 stipulates that the employment contract is open-ended unless a specific duration is explicitly provided in written form and the modalities of the tasks or activities required reasonably justify this feature. In case of a dispute regarding the qualification of a contract as being of a predetermined duration, the burden of the proof falls on the employer (Art. 92).

Except for the trial period (Art. 92-bis), which is part of the open-ended employment contract, the LCT includes various forms of employment contracts with a determined duration:

1. Fixed-term employment contract. The LCT includes various requirements for the employer to resort to this mode of contract. It must be established in writing; its term must be defined therein (Art. 90) and its duration cannot exceed 5 years (Art. 93). The 5-year limit is also applicable in case of multiple contracts established between the same employer and worker—except when the worker has a disability. In this case, the maximum duration is 10 years (Art. 42, Law No. 24.013/91). If this limit is exceeded, the contract is deemed to be open-ended. More substantially, the LCT requires the existence of an objective reason that justifies this contract type based on the tasks or the nature of the activity: such reason must be explicitly stated in the contract.

   Except for cases in which the duration of the contract is less than one month, the parties must give notice of termination one to two months prior to the expiration of the agreed term (Art. 94). In this way, the notice ratifies the expiration of the term and the consequent extinction of the contract. If a notice is lacking and unless the contract is renewed, the contract is deemed to be converted into open-ended. Regarding term expiration, if the duration of the contract is one year or more and the agreement has been fully implemented, the worker is entitled to 50 per cent of the compensation provided in Art. 245 for dismissal without just cause (Art. 95, 250 and 247 LCT). Conversely, if the duration of the contract is less than one year, no compensation is due except for mandatory payments.

   Finally, in case of dismissal without just cause prior to the expiration of the term, the worker is entitled to the compensation of moral and material damages in addition to the indemnities provided for in Art. 245.

2. Seasonal employment contract. In accordance with Art. 96, a 'seasonal contract' exists when the relationship between the parties, originated by activities inherent to the normal business of the company or enterprise, is fulfilled only at certain times of the year and is subject to being repeated in each cycle due to the nature of the activity. This type of contract is open-ended yet has a discontinuous nature. Therefore, when the activity does not take place, the obligations of the parties are suspended.
   A seasonal contract is also permitted when the activity is carried out continuously throughout the year, yet demands an increased workforce during a given period (season): in this case, a notice of the termination of the season is required (Grisolia, 2019): 30 days before the start of the season, the employer must give notice (through letters, publication in newspapers and/or the radio) to the workers of his intention to reiterate the contracts in the same terms of the previous cycle. Workers must manifest their intention to continue or interrupt the employment relationship within 5 days (Art. 98). If the employer does not carry out this notification, the contract is deemed as unilaterally terminated by them, with the associated consequences. Seasonal workers are entitled to vacations upon the conclusion of each working cycle (Art. 163): one day off for every 20 days of work (Art. 153).

   In the event of dismissal without just cause during the season, the worker is entitled to the economic reparations provided for in Art. 95 (i.e. indemnity for dismissal without just cause and civil compensation for moral and material damages).

3. Temporary employment contract. This type of contract exists when the activity of the worker is carried out under the dependence of an employer to reach specific objectives related to predetermined extraordinary services, or extraordinary and transitory demands of the employer, whenever a certain term cannot be foreseen for the conclusion of the contract (Art. 99). In accordance with the same norm, the employment relationship begins and ends with the performance of the work, the execution of the act or the provision of the service for which the worker was hired.
   The burden of the proof falls upon the employer (Art. 99).

   Several norms of Law No. 24.013 complement this contract modality. It is forbidden to use this contract to substitute workers exercising licit measures of union action (Art. 70). Further, companies which have suspended or dismissed workers in the preceding six months due to a decrease or lack of activity cannot resort to this mode of contract to replace personnel (Art. 71). Art. 69 regulates the case in which the contract aims to temporarily substitute permanent workers of the company (on leave or whose position is reserved for an indefinite period): when the substituted worker is reinstated and the substitute employee continues to work, the temporary contract is converted to an open-ended one. Further, when the contract aims to meet the extraordinary demands of the market, Art. 72 limits its duration to 6 months each year,

up to a maximum of 1 year every 3 years. In principle, this contract does not need to be established in writing. However, Arts. 69 and 72 of Law No. 24.013 require the written form: according to Art. 69, the name of the substituted worker needs to be indicated, while Art. 72 requires the identification of the cause that justifies the contract.

Two final observations are necessary. First, Art. 73 explicitly excludes the duty of the employer to give notice of the contract expiration. Secondly, no indemnity is due to the worker when the task or work is realised or when the cause underpinning the contract (referred to in Art. 72) ceases to exist (Art. 74).

4. Outsourcing companies: Art. 2 of Presidential Decree No. 1964/2006 defines an 'outsourcing company' as an entity that, constituted as a legal person, has the exclusive purpose of making industrial, administrative, technical, commercial or professional personnel available to third parties ('user companies') to carry out, on a temporary basis, extraordinary services determined in advance or extraordinary and transitory demands of the company, operation or establishment, whenever a definite period cannot be foreseen for the termination of the contract. These companies need to be homologated by the competent authority (the Ministry of Labour, Employment and Social Security—MTEySS).

   Art. 29 of the LCT clarifies that workers contracted by outsourcing companies are considered to be in a relation of dependence (either continuous or discontinuous) with them. In other words, outsourcing companies are the employers. However, Art. 29-bis provides for the joint liability of the user company for all labour obligations as well as the obligation to withhold social security contributions from the payments to the outsourcing company.

Art. 6 of Decree No. 1964 allows outsourcing exclusively in the following hypotheses:

a) when a permanent worker is absent (during the period of absence);

b) in case of legal or conventional licenses or suspensions (except when the suspension results from a strike, force majeure, or lack or decrease of activities);

c) in correspondence of an increase in the activities of the user company, which extraordinarily and occasionally demands more workers;

d) in correspondence of the organisation/participation in congresses, conferences, expositions, etc;

e) in correspondence of the pressing execution of a work to prevent accidents, urgent security measures or to repair equipment, installations or buildings which

are dangerous for workers and third parties, as long as these tasks cannot be undertaken by the personnel of the user company; and

f) for carrying out transitory or extraordinary tasks which fall outside the normal and usual business of the user company.

Finally, so to avoid frauds, Art. 7 indicates that there must be a reasonable and justified proportion between outsourced and permanent workers.

5. Team/group contract. This contract exists when an agreement is established between an employer and a group of workers acting through a delegate or representative, to provide services inherent to the activities of the employer (Art. 101 of the LCT). The intermediary agrees on the working conditions in the name of the group, yet there is an individual employment contract for each worker. As a result, the employer has the same duties and obligations towards each worker as provided in the law.

6. Part-time contract. A part-time work contract occurs when the worker agrees to provide services for a certain number of hours per day or per week, amounting to less than two-thirds of the typical working day. In this case, the remuneration may not be proportionally inferior to that of a full-time worker, established by law or collective agreement, of the same category or job position. If the working day exceeds that proportion, the employer must pay a remuneration which corresponds to a full-time worker (Art. 92-Ter).

   Part-time workers cannot work supplementary hours—except as detailed in Art. 89: i.e. in correspondence of a serious and imminent danger for persons or things of the company. The violation of the working day limit entails the payment of a full-time day of work.

   Collective agreements determine the maximum ratio of part-time workers in each establishment and can also assign priority to part-time workers to fulfil open-ended positions in the company. The part-time regime is applicable to both open-ended contracts and those with a definite duration.

7. Apprenticeship contract. As determined by Art. 1 of Law No. 25.013, an apprenticeship contract is characterised by a practical-theorical purpose and is specifically directed at unemployed youths in between 16 and 28 years of age. The contract must be established in writing and its duration spans from a minimum of 3 months up to a maximum of 1 year. The apprenticeship contract cannot exceed 40 hours a week, including training time. The contract terminates when the term expires, but the employer must give notice of termination 30 days in advance or pay half a month's salary. The employer must also provide a certificate stating the trainee's acquired knowledge/experience. In case the employer does not observe the applicable obligations provided for in Law No. 25.013,

the contract is converted to an open-ended one. Finally, the Law establishes some limits to apprenticeships: no former employee can be contracted as an apprentice. Further, the number of apprentices cannot exceed 10 per cent of permanent employees in the establishment, notwithstanding some exceptions. Finally, employment cooperatives and outsourcing companies cannot use this type of contract.

G. Termination of the employment contract

The causes for termination of the employment contract can be classified as follows (Grisolia, 2019):

1. Extinction depending on the will of the employer:

   1.1 Dismissal with just cause (Art. 242 and 243 LCT)

   1.2 Dismissal without just cause (Art. 242 245 LCT)

2. Extinction due to causes that are independent from the will of the parties:

   Affecting the employer:

   Economic reasons:

   2.1 Decrease or lack of activities (Art. 247 LCT)

   2.2 Force majeure (Art. 247 of the LCT)

   2.3 Bankruptcy or pre-bankruptcy procedures (Art. 251 of the LCT)

   Biologic reasons:

   2.4 Death (Art. 249 of the LCT)

   Affecting the employee:

   2.5 Absolute incapacity (Art. 212 of the LCT)

   2.6 Professional disqualification (Art. 254 of the LCT)

2.7 Ordinary retirement (Art. 252 and 253 of the LCT)

2.8 Death (Art. 248 of the LCT)

3. Extinction depending on the will of the worker:

3.1 Indirect dismissal (Art. 246 of the LCT)

3.2 Renouncement (Art. 240 of the LCT)

3.3 Abandonment of employment (Art. 244 of the LCT)

4. Extinction dependent on the will of both parties:

4.1 Mutual agreement/concurrent will (Art. 241 of the LCT)

4.2 Expiration of the term (Art. 250)

4.3 Accomplishment of the objective or finalisation of the work (Art. 99 of the LCT)

From a patrimonial perspective, the renouncement of the worker, extinction by mutual agreement of the parties, the expiration of the fixed-term contract whose duration is inferior to one year, the accomplishment of the objective in temporary employment, dismissal with just cause and ordinary retirement do not entail any indemnity for the worker, only the payment of an annual bonus (Aguinaldo) and proportional vacations based on Arts. 123 and 156 of the LCT. In the remaining hypotheses, the worker is entitled to a compensation—which can be reduced, integral or aggravated.

Although due to space constraints it is not possible to go through each of the hypotheses for termination of the employment contract, here follows a brief description of the rules for the dismissal of workers. The principle of employment security implies that the worker is entitled to maintain the relation for the agreed duration (either open-ended or determined). While the Constitution affords protection against arbitrary dismissal, statutory legislation does not guarantee the effective duration of the employment contract in absolute terms: a dismissal without just cause entails compensation, which has reparatory, sanctioning and persuasive functions.

Art. 231 of the LCT explicitly states that the employment contract cannot be resolved by one of the parties without prior notice to the other. When the employer intends to dismiss a worker, if the notice lacks a compensation which depends on the seniority of the worker is due. This notice

is particularly relevant, as the extinction juridically occurs when the intention to terminate the contract is known by the other party. Various minimum terms—which can be prolonged by the partie—are set by the LCT: 15 days for the employee; 15 days for the employer during the worker's trial period; 1 month when the worker has worked for less than five years; and 2 months when seniority exceeds 5 years. Notification must be in written form (Art. 235).

The dismissal of the worker is, in principle, a unilateral decision of the employer and can happen with or without just cause. Dismissal without just cause entails the decision of the employer to dismiss the worker without providing any reason (or when the reason is not clearly expressed or proven), which is legally intended as just cause. In this case, the employer must pay a compensation in lieu of the notice, the integration of the month (i.e. the payment of the wage for each day until the end of the month, Art. 233 of the LCT) as well as compensation for seniority (Art. 245), which include vacations and the annual bonus. In addition, there might be further compensation (e.g. in the event of the maternity of the dismissed worker) and eventual fines. Presidential Decree No. 1043/2018 grants a non-remunerative sum of ARS5,000 to workers dismissed without just cause. The same decree also introduced a transitory procedure (until the end of March 2019): the employer who intended to dismiss without just cause had to communicate the decision to the (then) Ministry of Production and Employment, ten days in advance. The Ministry could, ex officio or on the request of one of the parties, summon the parties to consider the conditions in which the termination will take place. Non-compliance did not have any effect on the validity of dismissal, but resulted in an administrative sanction for the employer.

On the other hand, dismissal with just cause depends on a breach of what was agreed in the employment contract. However, not every breach of contract corresponds to a just cause: the offence (injuria) must be serious enough to make the continuation of the working relation impossible (Art. 242). The same disposition attributes to the judge the prudential evaluation of the existence of the offence, taking into account the nature of the relations resulting from the contract and the specific personal circumstances in each case. The LCT does not typify the hypotheses which constitute a just cause. Examples of hypotheses that might be intended as just cause by the judge include (Grisolia 2019): absence and lack of punctuality; intoxication from alcohol or other substances; aggressions, quarrels and insults; improper use of internet and e-mail; commitment of a crime against the company; loss of trust; and a decrease in the worker's productivity. Art. 243 requires the notice to be given in writing, clearly stating the reasons underlying the intention to resolve the contract. Such reasons cannot be changed in an eventual labour suit.

Argentina's legal system also allows for indirect dismissal. In this case, the dismissal depends on the will of the worker in case of non-compliance by the employer, which constitutes an offence making it impossible to continue the contract. This dismissal must be notified in writing and must be preceded by an intimation to the employer to comply with their obligations, expressing the reasons underpinning this decision. The burden of the proof falls on the employee: if the cause is demonstrated, the employee is entitled to the same compensations

as for a dismissal without just cause. Serious offences of the employer include, among others: non-payment of remuneration, abusive use of the *ius variandi*, non-registration of the employment relationship, non-payment of social security contributions (Grisolia 2019).

H. Collective labour relations

Collective labour law deals with the relations of collective subjects (trade unions and employers' organisations), collective bargaining and agreements, as well as collective disputes.

Trade unions are regulated by Law No. 23.551/1988 (as amended). A trade union can be intended as a permanent coalition of workers who exercise a professional or economic activity for the defence and promotion of their interests. Workers are free to be affiliated, not affiliated or to disaffiliate from a trade union (Art. 4).

In Argentina's legal system, a trade union can be composed of (Art. 10):

a) workers of a same (or similar) activity;

b) workers of a same profession or category although undertaking different activities; and,

c) workers who are employed in the same company.

Further, Law No. 23.551 includes the following forms of workers' organisations, which results in a pyramidal organisation: a) trade unions; b) federations, grouping those in letter a); and c) confederations (either sectoral or not), made of trade unions and federations (Art. 11).

To establish a trade union, it is necessary to send a request to the administrative authority: the effective enrolment of the trade union in the special registry and the consequent publication confers legal personality to the organisation and the rights listed in Art. 23, which allows the organisation to:

1. petition and represent, at the request of a party, the individual interests of its members;

2. represent the collective interests, when there is no association with '*personería gremial*' in the same activity or category;

3. promote: the formation of cooperative and mutual societies; the improvement of labour legislation, social security and pensions; and general education and professional training of workers;

4. impose contributions to its affiliates; and,

5. hold meetings or assemblies without the need for prior authorisation.

Only trade unions with '*personería gremial*' possess the rights conferred by Art. 31:

1. Defend and represent before the State and the employers the individual and collective interests of the workers.

2. Participate in planning and control institutions.

3. Participate in collective bargaining and monitor compliance with labour and social security regulations.

4. Collaborate with the State in the study and solution of workers' problems.

5. Constitute assets with the same rights of cooperatives and mutual societies.

6. Manage their own social works and, as the case may be, participate in the administration of those created by law or by collective labour agreements.

The '*personería gremial*' is granted by the MTEySS to the most representative association in each activity, craft or profession. Art. 25 requires the trade union to be registered in compliance with the law, to have been in operation for at least six months, and to enrol more than 20 per cent of the workers it intends to represent. The qualification of 'most representative' is given to the association with the highest average number of contributing members as a proportion of the average number of workers that it intends to represent.

On the other hand, as mentioned in the introductory paragraph, there are employers' associations, regulated by Law No. 14.295/1953. Unlike workers' representative organisations, these entities defend not only the interest of their associates in labour law, but also other aspects of economic activity (e.g. market analysis, technical counselling etc).

The main role of these associations is to be the counterpart of trade unions in collective bargaining.

Collective bargaining and agreements. Collective bargaining—regulated by Law No. 23.546/1988 (as amended)—relies on the collective autonomy of the will of the parties. Therefore, there must be an intent by workers' and employers' representatives to bargain over a collective agreement: bargaining occurs before the so called 'bargaining commissions' integrated by an equal number of trade union representatives (with *personería gremial*) and employers' representatives. The procedure set in the law establishes that (Grisolia, 2019):

1. The party promoting the bargaining (either the employer or workers' representative) notifies the other in writing (with a copy to the labour administrative authority) indicating the subject to be negotiated and the territorial and personnel scope of the agreement.

2. Within five days of receiving notice, the parties must provide the MTEySS with documents demonstrating their representativeness and nominate those who will participate in the bargaining commission.

3. The receiving party must reply and nominate its respective representatives.

4. Both parties must bargain in good faith. It is for example considered contrary to bargaining in good faith to not attending meetings, not designating negotiators lacking a sufficient mandate, etc.

5. The bargaining commission must be set up within 15 days from the reply.

6. The parties have the right to be informed of several relevant aspects for collective bargaining, listed in Art. 4 of Law No. 23.546.

7. Within 15 days of summons, the parties will present the draft of the agreement and decide whether bargaining will be conducted directly or under the coordination of a designed functionary.

8. Agreements are adopted with the consent of the sector represented. When there is no unanimous agreement by one of the parties, decisions are taken based on the majority.

9. Collective conventions are homologated by the MTEySS within 30 days, provided that legal requirements are met. After this period, the convention is deemed to be tacitly homologated.

Collective agreements are regulated by Law No. 14.250/1953 (as amended).
They are established between a professional association of employers, an employer or a group of employers, and a professional association of workers with *personería gremial* (Art. 1).

In accordance with Art. 2, a collective agreement must be established in writing and include:

1. the place and date of its celebration;

2. the name of the participants and accreditation of their legal capacity;

3. the activities and categories of workers to which they refer;

4. the area of application; and,

5. the term of validity.

From a more substantial perspective, collective agreements establish norms that regulate the employment relationships and working conditions of a given professional category. Once the collective agreement is homologated by the MTEySS, it is mandatory for all workers and employers of the activity (*erga omnes*).

Collective agreements can be classified as follows:

1. national, regional or other territorial agreement;

2. corporate collective agreements—homologation not necessary;

3. collective agreements of profession, trade or category;

4. activity collective agreements: covering all workers and companies in a given economic activity;

5. intersectoral collective agreements, which establish conditions or principles applicable to certain activities to which future collective agreements must conform; and

6. agreements related to small- and medium-sized enterprises: peculiarities in the regime (see Art. 99 to 103 Law No. 24.467).

Collective agreements in Argentina are typically valid nationwide, involve a given activity (notwithstanding the increase in company-level collective agreements over the last decade), and *erga omnes* (Grisolia, 2019).

Industrial action. Prior to examining the regulation of strikes, it is necessary to recall that, regarding collective disputes, Law No. 14.786/1959 requires that parties to go through mandatory conciliation before the administrative authority prior to resorting to industrial action. In parallel, Law No. 7.565/1989 does the same for the province of Córdoba.
The MTEySS (or the provincial Department of Labour) can also intervene *ex officio* when deemed opportune, considering the nature of the conflict. If a conciliation cannot be reached, the conciliator will invite the parties to submit the matter to arbitration.

Art. 11 provides a 15-day term for the conciliation procedure, which can be extended for an extra five days, at which point the conciliator, based on the attitude of the parties, decides whether it is possible to reach an agreement. Once the term has expired without conciliation (or arbitration), the parties are allowed to resort to industrial action.

A collective conflict arises from opposing interests between a trade union and an employer's representative organisation. Regarding collective conflicts, the Constitution recognises the right to strike to trade unions with '*personería gremial*'. The strike consists in the temporary, collective abstention from the provision of work, with the abandonment of the workplace. It is a way of pressuring the employer to obtain a benefit resulting from the enactment of a new disposition, the reform of an existing one or its effective implementation. The main effect of the strike is the suspension of the basic conditions of the employment contract (service provision and remuneration).

The strike can be either licit or illicit, in correspondence of the determination of the MTEySS or labour justice. According to Grisolia (2019), a strike can be declared illegal if the procedures for the auto-composition of the conflict (conciliation) have not been not fully exhausted; the object of the strike is not work related; the strike was not decided by a trade union with '*personería gremial*'; or if, during the strike, the establishment was seized or acts of violence occurred. If the strike is declared illegal, participating workers can be intimated by the employer to return to work, with the contextual information that their conduct can be deemed a serious offence, which can result in a dismissal with just cause.

In conclusion, a brief observation on strikes in essential services is necessary. In this case, there is a conflict between the constitutionally guaranteed right to strike and citizens' rights to essential services (for example, the right to health). In such a case, minimum services must be guaranteed during the strike (Art. 24 of Law No. 25.877). The same norm identifies as essential services those related to health and hospitals, the production and distribution of drinking water, electricity and gas, as well as air traffic control. In addition, other services can be exceptionally deemed as essential by an independent commission when: a) the duration and territorial extension of the interruption of the activity endanger the life, security or health of part of the population; or b) the public service is of 'transcendental importance'.

I. Quantitative aspects

a. Employment and labour market indicators

We consider as the first indicator the population projections for Argentina at the national level, in CABA and Córdoba.

The following demographic trends should be considered for Argentina (Gragnolati et al. 2015, 7):

1. Its demographic transition started much earlier and is advanced compared to other Latin American countries, but it is still a relatively young country relative to other OECD members.

2. The recent decline in both fertility and mortality has been slower than in many other Latin American countries, and the differences have decreased substantially in the past three decades.

3. The population age structure has shifted significantly and will keep changing in the coming decades.

4. In 2010, Argentina started its 'demographic dividend', which is potentially conducive to higher economic growth.

TABLE 8.4 Population projections for Argentina at the national level, in CABA and Córdoba

		2015	2016	2017	2018	2019
Nacional	Total	43,075,000	43,508,000	43,937,000	44,361,000	44,781,000
	Male	20,989,000	21,206,000	21,420,000	21,632,000	21,841,000
	Female	22,068,000	22,303,000	22,517,000	22,729,000	22,939,000
CABA	Total	3,054,267	3,059,122	3,063,728	3,068,043	3,072,029
	Male	1,426,582	1,430,531	1,434,323	1,437,936	1,441,350
	Female	1,627,685	1,628,591	1,629,405	1,630,107	1,630,679
Córdoba	Total	3,567,654	3,606,540	3,645,321	3,683,937	3,722,332
	Male	1,741,325	1,761,138	1,780,905	1,800,593	1,820,172
	Female	1,826,329	1,845,402	1,864,416	1,883,344	1,902,160

Source: United Nations, Department of Economic and Social Affairs, Population Division (2019); Instituto Nacional de Estadística y Censos (2021).

The same authors (Gragnolati, 2015, p. 28 *et seq*.) conclude that Argentina is experiencing a demographic dividend, during which a large working-age population results in more people in the labour force, which, in turn—all else remaining equal—results in more wealth being generated. However, to take advantage of this dividend, the economic dependency rate needs to be reduced while increasing the productivity of the workforce.

Importantly, for most indicators reported below, data for the years 2015 and 2016 are missing. This is probably because the national statistical institute (*Instituto Nacional de Estadística y Censos*—INDEC) suspended the publication of statistics during the state of administrative emergency in the national statistical system resulting from Decree No. 55/2016.

It is important to point out that the quality of Argentina's statistics—including censuses and surveys—deteriorated from 2007 to 2015. In, 2011 the International Monetary Fund (IMF) observed a breach of its minimum reporting requirements, which led the IMF's Executive Board to issue a Declaration of Censure in 2013. The Censure was lifted in 2016 (OECD, 2017).

TABLE 8.5 Working-age population of Argentina and selected provinces (thousands)

	2015	2016	2017	2018	2019
Total			21,462.7	21,709.2	22,152.8
Male			10,116.1	10,178.1	10,481.3
Female			11,346.6	11,531.1	11,671.5

Source: ILOSTAT (2021).

Yearly data could not be retrieved at the province level. However, in the fourth trimester of 2017 the working-age population amounted respectively to 2,560,000 in CABA, and 2,677,000 people in Córdoba (Subsecretaría de Planificación, Estudios y Estadísticas, 2020).

TABLE 8.6 Labour force (thousands)

	2015	2016	2017	2018	2019
Total			12,621.8	12,937.6	13,355.7
Male			7,174.4	7,227.1	7,484.7
Female			5,447.4	5,710.5	5,871

Source: ILOSTAT (2021).

Data for the working-age population were available only for the fourth quarter of 2017. In CABA, the labour force corresponded to 1,650,000 individuals, whereas in Córdoba it was 1,668,000.

TABLE 8.7 Labour force participation rate

	2015	2016	2017	2018	2019
Total			58.80%	59.60%	60.30%
Male			70.90%	71%	71.40%
Female			48%	49.50%	50.30%

Source: ILOSTAT (2021).

CABA's labour force participation rate in the third quarter of 2018 stood at 53.8 per cent, increasing by 3.1 percentage points in the third quarter of 2019 (to 56,9 per cent). The labour force participation rate in the agglomerates of Gran Córdoba and Rio Cuarto remained stable, at around 49 per cent and 45 per cent, respectively, during same period (Subsecretaría de Planificación, Estudios y Estadísticas, 2020).

TABLE 8.8 Employment-to-population ratio

	2015	2016	2017	2018	2019
Total			53.90%	54.10%	54.40%
Male			65.60%	65%	64.90%
Female			44%	44.30%	44.90%

Source: ILOSTAT (2021).

TABLE 8.9 Argentina's national employment distribution by economic activity in 2019 (ISIC-Rev.4, thousands)

Total	**12,041.14**
G. Wholesale and retail trade; repair of motor vehicles and motorcycles	2,184.81
C. Manufacturing	1,432.78
F. Construction	1,088.14
P. Education	994.232
O. Public administration and defence; compulsory social security	981.761
T. Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use	925.465
Q. Human health and social work activities	757.999
H. Transportation and storage	640.776
M. Professional, scientific and technical activities	500.693
N. Administrative and support service activities	475.555
S. Other service activities	466.3035
I. Accommodation and food service activities	463.0722
J. Information and communications	274.603
K. Financial and insurance activities	254.430
R. Arts, entertainment and recreation	241.261
U. Activities of extraterritorial organisations and bodies	139.211
L. Real estate activities	81.394
E. Water supply; sewerage, waste management and remediation activities	54.350
D. Electricity; gas, steam and air conditioning supply	42.668
X. Not elsewhere classified	29.521
A. Agriculture; forestry and fishing	6.9692
B. Mining and quarrying	5.1192

Source: ILOSTAT (2021).

TABLE 8.10 Argentina's distribution of employment in 2019 by aggregate economic sectors (as a percentage)

Agriculture	0.10%
Manufacturing	11.90%
Construction	9%
Mining/quarrying; Electricity, gas, water supply;	1%
Trade, Transportation, Accommodation and Food, and Business and Administrative Services	40.50%
Public Administration, Community, Social and other Services and Activities	37.40%
Not classified	0.20%

Source: ILOSTAT (2021).

In the fourth quarter of 2017, Córdoba's employment to population ratio was 58.27 per cent, whereas CABA's was 60.66 per cent.

TABLE 8.11 Argentina's employment distribution by broad economic sectors (thousands)

Year	Agriculture	Non-agriculture	Industry	Services	Not classified	Total
2015	NA					
2016	NA					
2017	6.84	11,561.38	2,589.004	8,943.493	28.88	11,568.22
2018	11.153	11,733.55	2,566.49	9,135.842	31.2135	11,744.7
2019	6.9692	12,034.17	2,623.066	9,381.578	29.5215	12,041.14

Source: ILOSTAT (2021).

At the province level, the situation is as follows:

TABLE 8.12 Employment distribution in Córdoba and CABA by broad economic sectors (thousands)

	Córdoba				CABA			
	Employment		Variation 4th quarter 16/17		Employment		Variation 4th quarter 16/17	
	IV trimester 2016	IV trimester 2017	Jobs	%	IV trimester 2016	IV trimester 2017	jobs	%
Agriculture, livestock and fishery	30,569	30,941	372	1.2%	9,939	9,374	-205	-2.1%
Mining & oil	1,736	1,786	50	2.9%	7,771	7,688	-83	-1.1%
Industry	107,162	108,644	1,482	1.4%	206,896	199,59	-7,306	-3.5%
Electricity, gas and water	7,676	7,815	139	1.8%	17,286	17,996	710	4.1%
Construction	32,858	39,576	6,718	20.4%	87,578	97,206	9,628	11%
Commerce	110,509	112,22	1,711	1.5%	238,376	238,563	187	0.1%
Services	237,437	242,858	5,421	2.3%	1,064,234	1,083,876	19,642	1.8%

Source: Subsecretaría de Planificación, Estudios y Estadísticas (2020).

TABLE 8.13 Distribution of employment by employment status

Category	2015	2016	2017	2018	2019
Employees	NA		74.70%	74.50%	73.50%
Employers			3.80%	3.90%	3.80%
Own-account workers			20.90%	21.10%	22.20%
Contributing family workers			0.60%	0.50%	0.60%

Source: ILOSTAT (2021).

TABLE 8.14 Distribution of employment by employment status in selected provinces, 4th quarter 2017

	4th quarter of 2017			
	Employees	**Employers**	**Own-account workers**	**Contributing family workers**
CABA	1,227 (79%)	56 (4%)	267 (17%)	2 (0.1%)
Córdoba	1,125 (72%)	62 (4%)	361 (23%)	4 (0.2%)

Source: Subsecretaría de Planificación, Estudios y Estadísticas (2020).

TABLE 8.15 Share of temporary employees

2015	2016	2017	2018	2019
NA		9.40%	10.30%	10.20%

Source: ILOSTAT (2021).

TABLE 8.16 Incidence of part-time employment

2015	2016	2017	2018	2019
NA		37.30%	37.80%	39.50%

Source: ILOSTAT (2021).

No data could be retrieved in the selected provinces.

TABLE 8.17 Argentina's informal employment rate (harmonised series)

2015	2016	2017	2018	2019
NA		47.90%	48.10%	49.40%

Source: ILOSTAT (2021).

It should be stressed that the data provided by the Ministry of Labour, Employment and Social Security are significantly lower than those reported by ILOSTAT, although the data source is the same—i.e. the *Encuesta Permanente de Hogares* (EPH), which relies on 31 urban agglomerates. Table 8.18 reports the data from the Ministry for the third quarter of each year.

TABLE 8.18 Argentina's informal employment rate, 2015–2019

2015	2016	2017	2018	2019
NA	33.8%	34.4%	34.3%	35%

Source: MTEySS—SSPEyE—Dirección General de Estudios y Estadísticas Laborales (2021).

In CABA, the informal employment rate shifted from 19.5 per cent in the third quarter of 2018 to 25 per cent in the third quarter of 2019; likewise, in the urban settlements of Gran Córdoba and Río Cuarto the rates shifted from 42 per cent to 42.9 per cent and from 39 per cent to 41.8 per cent, respectively, in the same period.

TABLE 8.19 CABA's and Córdoba's distribution of employers and workers (by category; thousands)

Category		Córdoba	CABA	
Employers		26 (42%)	9 (16%)	4th Quarter of 2017
Own-account workers		259 (72%)	111 (42%)	
Employees	Public sector	21 (8%)	21 (8%)	
	Private sector	201 (23%)	201 (23%)	
	Domestic work	45 (71%)	45 (71%)	

Source: Subsecretaría de Planificación, Estudios y Estadísticas (2020).

TABLE 8.20 Annual output growth per worker (GDP in constant 2011 PPP USD) as a percentage, 2015–2019

2015	2016	2017	2018	2019
1.40%	-3.50%	1.30%	-4.00%	-3.50%

Note: No data were found for the province level.

Source: ILOSTAT (2021).

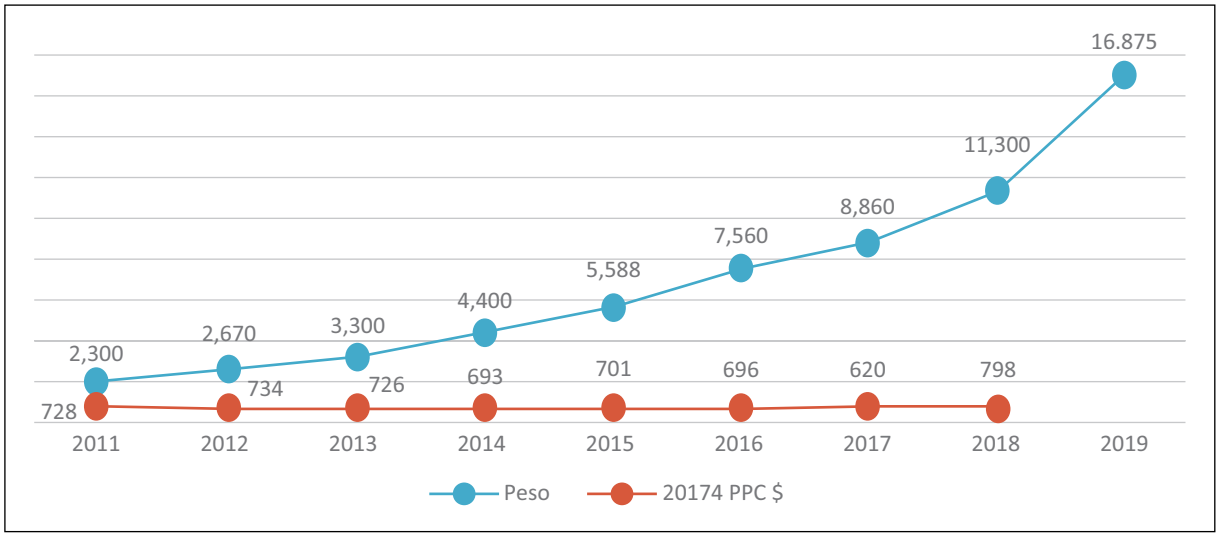
TABLE 8.21 Argentina's mean nominal monthly earnings of employees, by sex and occupation. Annual harmonised series, 2015–2018 (2017 PPP USD)

2015	2016	2017	2018
NA		1,340.9	1,302.9

Source: ILOSTAT (2021).

The mean monthly remuneration of employees in the private formal sector corresponded to ARS30,623 (2017) in CABA and ARS23,162 in Córdoba (Subsecretaría de Planificación, Estudios y Estadísticas, 2020).

FIGURE 8.1 Statutory gross monthly minimum wage (annual), 2011–2019



Source: ILOSTAT (2021).

The unemployment rate in the settlements of *Gran Córdoba* and *Rio Cuarto* shifted from 9.1 per cent to 11 per cent and 7.8 per cent to 4.5 per cent, respectively, from the third quarter of 2018 to the third quarter of 2019. In CABA, the rate dropped from 8.4 per cent to 7.9 per cent over the same period (Subsecretaría de Planificación, Estudios y Estadísticas, 2020).

TABLE 8.22 Argentina's unemployment, NEET and inactivity rates, 2015–2019

		2015	2016	2017	2018	2019
Unemployment rate	Total	NA		8.30%	9.20%	9.80%
	Male			7.50%	8.20%	9.20%
	Female			9.40%	10.50%	10.70%
NEET Rate				19.20%	19.20%	19.50%
Inactivity Rate				41.20%	41.20%	40.40%

Note: People not engaged in education, employment or training.

Source: ILOSTAT, 2021.

a. Trade union density rate and collective bargaining coverage

In Argentina there are 3,419 representative organisations: 3,290 are trade unions, 110 federations and 19 confederations (Klipphan, 2020).

TABLE 8.23 Trade union density rate, 2009–2014 (as a percentage)

2009	2010	2011	2012	2013	2014
31.9%	30.1%	31.8%	30%	30.4%	27.7%

Source: ILOSTAT, 2021.

It is important to point out the premise that ILOSTAT's trade union density rate—calculated based on administrative registries and related sources—excludes union members who are not engaged in remunerated activities (self-employed, unemployed, retired, etc.) (ILOSTAT, 2021). While data are not available for the reference period considered in the case study (2015-2019), in 2001 Argentina's trade union density rate was 42 per cent, whereas it was 37 per cent in 2005 (ibid.), indicating a drop of 10 percentage points in the trade union density rate between 2001 and 2009. From 2010 to 2013, the indicator remained relatively stable, and dropped by almost 3 percentage points in 2014. Considering the regional context, Argentina's trade union density rate (27.7 per cent in 2014) was higher than Brazil's (18.9 per cent) and the average of Latin American and Caribbean countries (16.3 per cent) (Kugler, 2019).

Over time, the Ministry of Labour has been conducting, in collaboration with other institutions, various surveys that might shed further light on this indicator.

In 2005, the '*Encuesta a Trabajadores en Empresas sobre Empleo y Trabajo*' surveyed private companies (excluding those operating in the primary sector) with ten or more employees in Gran Buenos Aires, Gran Rosario, Gran Mendoza, Gran Córdoba and Gran Tucumán: the union density of these workers was estimated at 37.6 per cent (Cardoso, 2009).

In 2009, the '*Encuesta Nacional a Trabajadores sobre Empleo, Trabajo, Condiciones y Medio Ambiente Laboral*' considered employees in registered companies with five or more employees in the secondary and tertiary sectors of the economy in the provincial capitals of the country, plus Gran Rosario and Trelew. This estimation for trade union density rate came out at 37.2 per cent (Ministerio de Trabajo, Empleo y Seguridad Social et al., 2009).

Finally, the 2018 '*Encuesta Nacional a trabajadores sobre Condiciones de Empleo, Trabajo, Salud y Seguridad*' surveyed 8,966 employees among the employed population aged 15 years or older, residing in urban locations in more than 2,000 locations across the country. It estimated that 36.9 per cent of registered employees was affiliated to a trade union (Ministerio de Trabajo, Empleo y Seguridad Social et al., 2018).

Based on the latest available survey, Table 8.24 details trade union affiliation rates by area of activity.

TABLE 8.24 Trade union affiliation rate by area of activity

Manufacturing	49.3
Community, Social and Personal Services (other)	46.8
Teaching	44
Hotels and restaurants	39
Construction	36.9
Social and health services	35.4
Financial services	35.1
Public administration and defence	34
Transportation, storage and communications	31.4
Trade	29.4
Primary activities	28.1
Domestic work	16.1

Source: Ministerio de Trabajo, Empleo y Seguridad Social et al. (2018).

Data regarding collective bargaining coverage rates are not available for the 2015-2019 reference period.

TABLE 8.25 Collective bargaining coverage rates (as a percentage)

	2008	2009	2010	2011	2012	2013	2014	2015	2016
Collective bargaining coverage rate (%)	50.9	50.6	52.4	51.2	50.5	51.5	51	52.9	51.8

Source: ILOSTAT (2021).

These estimations are based on the registries of Argentina's Ministry of Labour, Employment and Social Security. No clear pattern of growth or decline can be inferred from the table.

Further, the highest estimation of coverage was in 2015 (52.9 per cent), whereas the lowest coverage was estimated to be in 2012 (50.5 per cent). Two observations can be made, following Kugler (2019): first, the indicator is considerably higher than the LAC average (24.8 per cent); second, Brazil has a collective bargaining coverage rate of 70.5 per cent, despite having a trade union density rate of 18.9 per cent. This second observation clearly illustrates the fact that countries with low trade union density rates can have very high collective agreement coverage (and vice versa).

As reported by the Ministry of Labour, Employment and Social Security (MTEySS—Dirección General de Información y Estudios Laborales—Subsecretaría de Programación Técnica y Estudios Laborales, 2016), in 2015—the year for which ILOSTAT indicates the highest coverage rate—1,957 collective contracts and agreements (*convenios colectivos y acuerdos colectivos*)[4] were homologated, comprising 86 per cent of the registered employees in the private sector. Of these homologations, 72 per cent were at the company level, while the remaining 28 per cent covered an entire area of activity (predominantly the manufacturing industry). In 2015, 82 per cent of the collective contracts and agreements contained at least one clause concerning wages, a further 54 per cent regulated employment relationships and finally 31 per cent of the homologated instruments referred to employment conditions. As pointed out in the same report, after 2010—when the highest figure of homologations (2,038) of the last 20 years was recorded—the number of collective contracts and agreements declined in 2011 (-9 per cent, or 1,864), 2012 (-6 per cent, or 1,744) and 2013 (-3 per cent, or 1,699), increasing by 16 per cent in 2014, with 1,963 homologations. The following year, this figure remained stable with 1,957 homologated instruments. In 2016 there was a considerable drop, with 483 homologations (MTEySS—Dirección de Estudios de Relaciones del Trabajo—Subsecretaría de Políticas, Estadísticas y Estudios Laborales, 2017): this represents a 75 per cent decrease.

Finally, no data could be retrieved for either indicator in the selected provinces.

a. Industrial action

TABLE 8.26 Number of strikes, working days lost and workers involved in Argentina, 2014–2018

	2014	2015	2016	2017	2018
Number of strikes	1,336	1,235	1,321	1,010	833
Number of working days lost	11,057,860	4,955,667	10,385,401	10,648,393	12,273,316
Number of workers involved	1,458,238	1,147,777	1,705,169	1,266,601	1,303,493

Source: Ministerio de Trabajo, Empleo y Seguridad Social—Dirección de Estudios y Relaciones del trabajo (2021).

4. According to the MTEySS, collective contracts (*convenios colectivos*) are "new agreements or agreements that substantially renew a precedent and replace it; these are autonomous normative bodies that regulate the entire set of labour relations", while collective agreements (*acuerdos colectivos*) are "negotiations of partial content that modify collective agreements (sometimes only a specific clause) or incorporate salary corrections..

Argentina stands out for the number of strikes, working days lost and workers involved. After the debt default in 2001, the economy 'revived', with a consequent decline in inequality and poverty. However, a number of important issues (such as a high fiscal deficit, high inflation, low productivity, declining competitiveness, low quality of education, and weak institutions) were left unaddressed and triggered a series of unsustainable policy interventions, which led to a GDP growth close to zero between 2011 and 2015 (OECD, 2017). In April 2018, a severe economic crisis led to a deep recession, halving the value of the national currency and resulting in increased interest rates, unemployment and inflation. In 2019, 27 per cent of Argentinians were poor and 5 per cent extremely poor—half the level observed after the early 2000s crisis (OECD, 2019). These facts contributed to increased social tensions, demonstrated by the high number of general strikes that occurred between 2014 and 2019.

In 2014 1,336 strikes were registered, with the involvement of around 1,458,000 workers and resulting in 11,057,000 working days lost: this was the peak recorded in the series from 2006 to 2014 (Dirección de Estudios de Relaciones del Trabajo, 2015). Public sector strikes (868 cases) represented almost 65 per cent of the total, 66 per cent of the workers involved (964,818) and roughly 92 per cent (10,170,655) of the working days lost. The education sector accounted for 42 per cent of the workers involved and 60 per cent of the working days lost. Wage demands were the main reason behind the protests, due to commodities price hikes. The number of private sector strikes in 2014 (480) remained similar to that of the previous year (439), with an increase in workers involved and a decrease in lost working days. Although private sector strikes in any given economic activity amounted to 15 per cent of the total, they involved 86 per cent of the workers and represented 78 per cent of lost working days. Transportation was the most affected economic activity. This type of strike was predominantly driven by wage demands (46 per cent). Conversely, conflicts at the enterprise level accounted for 85 per cent of private sector strikes, with significantly smaller figures of workers involved and working days lost.

The following year, the overall number of strikes decreased by 100 (or -7 per cent, remaining relatively high) together with the number of workers involved (-21 per cent) (Dirección de Estudios de Relaciones del Trabajo, 2016). The most significant contraction was in the number of working days lost, which went from 11,057,000 in 2014 to 4,955,000 in 2015 (-55 per cent). The public sector once again accounted for the most strikes (65 per cent), workers involved (64 per cent) and working days lost (85 per cent), confirming the trend from 2005-2015. Education, public administration and health were the most affected sectors, while the main reasons for protesting were wage demands (34 per cent) followed by due payments (20 per cent). 87 per cent of private sector strikes remained at the enterprise level whereas private sector strikes concerning an economic activity (13 per cent) accounted for 90 per cent of workers involved and 77 per cent of working days lost.

At the enterprise level, strikes were largely driven by due payments (41 per cent) and dismissals (23 per cent), while wage demands (52 per cent) induced most sectoral strikes, with transportation standing as the most affected activity in each of the indicators.

2016 was characterised by a relative increase in the number of strikes (+90) whereas the number of working days lost doubled (+52 per cent) and the number of workers involved increased by 32 per cent (Dirección de Estudios de Relaciones del Trabajo, 2017).

The public sector accounted for most strikes (866, an increase of 7 per cent compared to the previous year), a 65 per cent rise in workers involved and a shift from 4,210,000 working days lost in 2015 to 9,429,000 in 2016. Again, the underlying causes were wage demands followed by due payments and working conditions, with the most affected sector being education. There was a slight increase in private sector strikes, (+40) which amounted to 482. Those affecting an economic activity (5 per cent) involved 70 per cent of the workers (353,000 of 505,000) and resulted in a loss of half a million working days (52 per cent). The main reasons for protesting remained due payments (33 per cent, decreasing compared to the previous year) and dismissals (28 per cent, an increase over the previous year). The most affected sectors were transportation, industry, education, and financial intermediation.

In 2017, 1021 strikes were recorded (687 in the public sector and 334 in the private sector), A decrease in 300 disputes compared to the previous year. The number of workers involved dropped consistently, from 1,705,169 in 2016 to 1,266,600 in 2017, whereas the working days lost remained relatively stable (Dirección de Estudios de Relaciones del Trabajo, 2018). Public sector strikes involved around 944,000 workers (a drop of 260,000) and were characterised by a slight increase in working days lost (9,922,700). The education sector accounted for over 70 per cent of workers and working days lost. All three indicators decreased for private sector strikes, with the number of workers involved (309,000) decreasing by 39 per cent compared to 2016. The most affected sectors were transportation, industry and education. The reasons listed for strikes in both public and private sectors were similar to previous years.

In 2018, the number of strikes decreased further by 188, comprising 833 strikes (Dirección de Estudios y Relaciones del Trabajo, 2019). Compared to 2017, there was a slight increase in the number of workers involved (around 36,900), while working days lost increased by 13 per cent, totalling 12,273,316, the highest figure in the 2014-2018 series. Public sector strikes (547)—mainly driven by wage demands and due payments—involved around 950,000 workers and resulted in 11,000,000 working days lost. Strikes related to education accounted for 56 per cent of the workers involved in public sector strikes and 68 per cent of the working days lost. The latter figure is the highest in the 2006-2018 series. Public administration strikes represented 56 per cent of the total public sector strikes. In relation to private sector strikes, which predominantly affected transportation, industry and education, it is worth highlighting that: a) the working days lost increased by 60 per cent over the previous year; b) private sector strikes affecting an economic activity at national level (5 per cent), in addition to involving 70 per cent of the workers and 57 per cent of the working days lost, were characterised by a significant increase in all three indicators—strikes (from 10 in 2017 to 16 in 2018), number of workers involved (from 208,000 in 2017 to 293,000 in 2018) and working days lost (from 287,000 in 2017 to 676,000) in 2018.

TABLE 8.27 Number of strikes, working days lost and workers involved in CABA and Córdoba, 2014–2018

		2014	2015	2016	2017	2018
CABA	Number of strikes	69	67	62	51	53
	Number of working days lost	114,837	105,439	83,379	92,557	148,314
	Number of workers involved	54,077	56,941	64,474	49,694	56,352
Córdoba	Number of strikes	129	115	104	50	36
	Number of working days lost	169,864	108,438	400,026	115,991	62,397
	Number of workers involved	52,203	30,708	80,622	34,717	20,028

Source: Ministerio de Trabajo, Empleo y Seguridad Social—Dirección de Estudios y Relaciones del trabajo (2021).

As illustrated in Table 8.27, from 2014-2016 Córdoba had a more work stoppages than CABA. In 2017, the number of strikes was almost the same. In 2018 the figure decreased in Córdoba and slightly increased in CABA .

Strikes in CABA decreased (23 per cent) 2014 and 2017, and remained relatively stable in 2018, with two additional strikes compared to the previous year. Likewise, Córdoba's number of strikes steadily decreased during the reference period, leading to a more significant decline (i.e. -72 per cent).

Working days lost in CABA decreased from 2014 to 2016, increasing again in 2017 and 2018. In 2018 the highest number of working days lost was recorded, despite that year having recorded the second lowest number of strikes. Most working days lost (129,000) were due to strikes in the public sector: claims against dismissals stood out in 47 per cent of the cases; the increase in the number of days is mostly explained by the teachers protesting against the possible closure of night schools and by national public administration employees requesting to engage in collective bargaining (Subsecretaría de Planificación, Estudios y Estadísticas, 2020). On average, 108,905 working days were lost each year as a result of work stoppages.

In Córdoba, the highest number of working days lost occurred in 2016, with a figure that significantly exceeds previous years in that province as well as those reported for CABA. Around 340,000 working days were lost due to strikes in the public sector (Ministerio de Trabajo, Empleo y Seguridad Social—Dirección de Estudios y Relaciones del trabajo, 2021). Conversely, in 2018 the overall lowest number of strikes and working days lost was registered. Córdoba averaged 171,343 working days lost per year.

The highest figure for workers involved in strikes was recorded in 2016, for both CABA and Córdoba. On average, 56,308 workers were involved in strikes in CABA, while 43,656 individuals participated in work stoppages in Córdoba. In Córdoba, less than 35,000 individuals were involved in strikes in 2015, 2017 and 2018 (lowest overall figure), while in CABA this figure only dipped below 50,000 strikers in 2017. The second highest number of strikes was recorded in Córdoba in 2017, albeit with the second lowest number of workers involved.

8.2 LABOUR DISPUTE RESOLUTION SYSTEM

A. Organisation of the dispute resolution system, jurisdiction and territorial distribution

Dispute resolution contextualisation. As reported by Arese (2020, p. 39), the National Constitution legislates on the organisation of justice with nationwide scope, while the Provinces and CABA, in addition to having their own constitution, judicial organisation and labour procedural codes, as provided in Art. 5, retain all power not delegated to the federal government (Art. 121 and 116). The Judicial Power of the Nation is vested in the Supreme Court and lower courts as determined by the National Congress (Art. 108). The Supreme Court and the lower courts of the Nation are empowered to hear and decide cases in which 'the Nation is a party' (i.e. either employer or defendant) (Art. 116). In CABA, labour disputes fall under the jurisdiction of national judges, since until now there has been no transfer of judicial powers from the Nation to the City. For this reason, the judges in charge of labour matters in CABA are still called 'national judges', although they deal with cases that in principle would correspond to the territorial (provincial) jurisdiction (Bronstein, 2021). This is because, after the 1994 reform of the constitution, Art. 129 disposes that the CABA shall have an autonomous system of government -implemented gradually – with power of legislation and jurisdiction.

Through Decree No. 635/2020, the Executive Branch created an Advisory Council for the strengthening of the Judicial Power and the Public Ministry. This Council, composed of 11 jurists, has the purpose of preparing recommendations and proposals regarding the operation of the following institutions: the Supreme Court of Justice of the Nation, the Council of the Magistracy, the Public Ministry, Implementation of the Trial by Jury and Transfer of Competences to CABA (Asociación por los Derechos Civiles, 2020, p. 7).

Dispute resolution system organisation. Labour dispute resolution in CABA can be divided into two different steps. The first corresponds to the mandatory administrative instance, which must be exhausted before judicial action: the *Servicio de Conciliación Laboral Obligatoria* (SECLO) is institutionally dependent from the MTEySS (Art. 1 Law No. 24.635/1996).

The second occurs before courts. The National Judicial Power is composed of the National Supreme Court of Justice, lower courts (Art. 108 of national constitution)—i.e. courts of first instance and the chambers of appeal and the National Council of the Magistracy, which does not have a jurisdictional function. Art. 1 of Law No. 1.258/1958 (as amended), regulating the organisation of National and Federal Justice, provides that the Judicial Power of the Nation is exercised by the Supreme Court of Justice and the national tribunals of the Federal Capital, among others. In turn, Art. 32 determines that CABA's national tribunals include a National Labour Chamber of Appeals (section 6, let. f)—divided in *salas*, each composed of three judges—and first instance labour courts (section 8, let. i) which are instead unipersonal.

As for Córdoba, Law No. 8.435/1995 (as amended) organises provincial justice. As determined by Art. 1 the judicial power is exercised by the Superior Court of Justice (…), Labour chamber and (…) conciliation judges. The province is divided into ten circumscriptions. Labour chambers are usually in the circumscription's capital, while conciliation courts are decentralised in other main cities. In the less populated circumscriptions, labour chambers and conciliation courts might be substituted by chambers and multiple competence courts (Art. 17 and 36 Law No. 8.435). Also within this context, labour chambers are made of *salas*, each composed of 3 members, whereas the conciliation court is unipersonal.

In addition, in CABA and Córdoba the Public Ministry plays a role in labour dispute linked to the function of promoting the participation to justice for the defence of the general interests of society (Art. 120 of the National Constitution). The body is subdivided into the Public Prosecutor's Office and the Public Ministry of Defence: the first gathers and coordinates the action of prosecutors, while the latter that of public defenders. The Attorney General and the Prosecutor Deputy General, who act before the Chamber, and additionally first-instance prosecutors, all have a role of legality control. In CABA, the Public Defence Ministry is exercised by the Public Defenders of Minors, Incapable and Absent from First Instance in Civil Matters. In Córdoba, the service is provided by legal advisors (*Asesores Letrados*) of the Public Defence, which are part of the Judicial Power. In CABA, the Public Ministry is an independent body with functional autonomy and financial autarchy. In Córdoba, this body is part of the Judicial Power, albeit with functional organic independence.

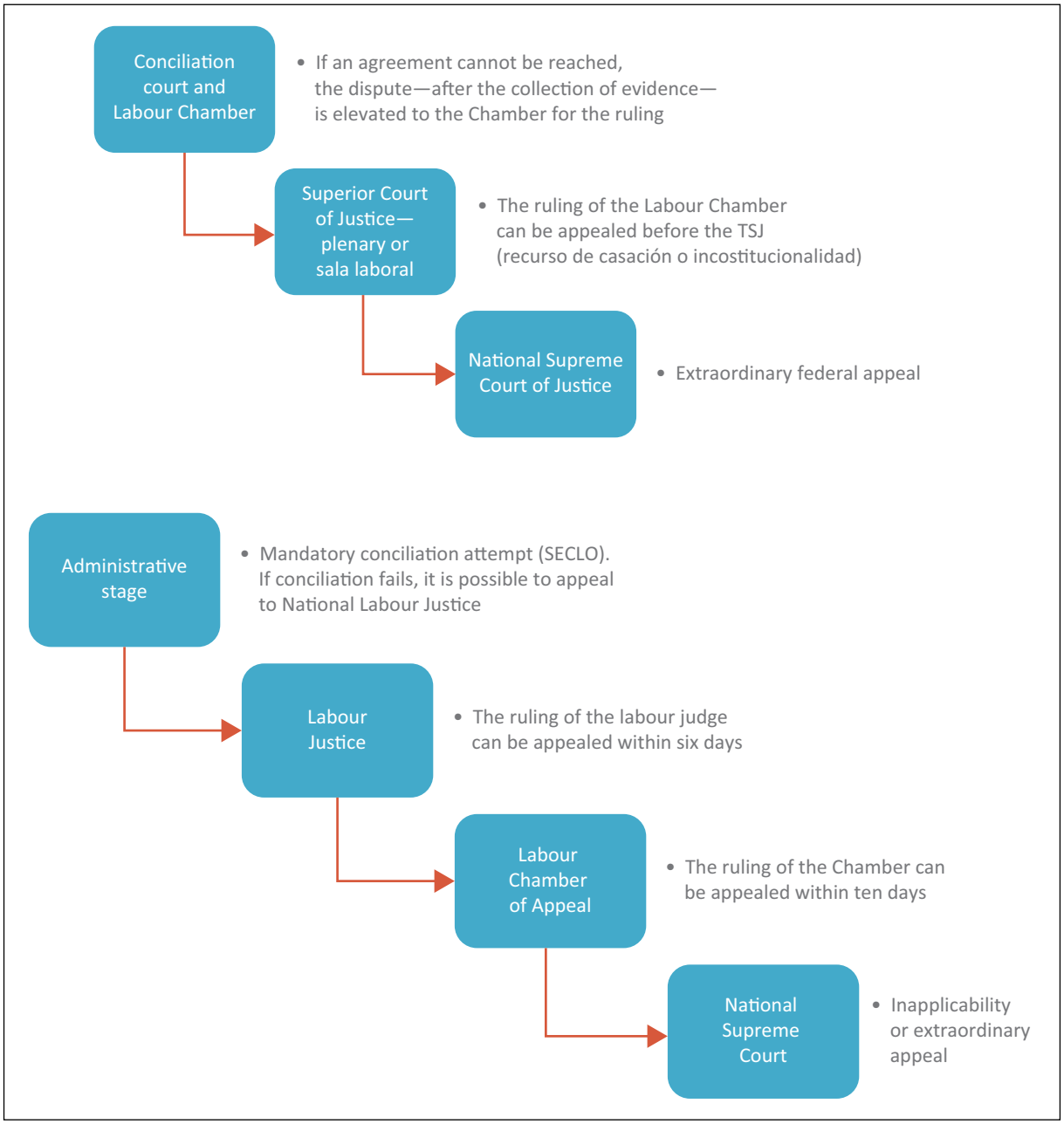
Figure 2 reports the degrees of judgement that a labour dispute might have in CABA and Córdoba. There might be a further non-mandatory step, prior to resorting to the courts: Law No. 8.015/1990 allows for an administrative conciliation for individual labour conflicts upon request by the parties (Art. 21).

Administration of justice. The administration of national justice is concurrently shared between the Supreme Court and the Council of the Magistracy. The Supreme Court is responsible for preparing the budget and submitting it to the Executive, whereas the Council administers resources and implements the budget. Further, this body—as analysed in Section 4—is responsible for the selection of magistrates (except for those serving at the Supreme Court) and for exercising disciplinary powers over them, including removal from their position. In addition, the Council can dictate regulations concerning the organisation of the judicial system and those which are necessary to guarantee the independence of the judiciary and the provision of effective services.

A similar discourse applies to Córdoba. The Superior Court of Justice (TSJ) supervises the administration of justice, including the conduct of judges, staff, auxiliaries and employees, applies sanctions, besides setting the disciplinary regime. Further, the tribunal is also responsible for submitting the budget to the Executive Power. Finally, among other functions, the Superior Court of Justice is also responsible for setting forward legislative

proposals to the provincial Legislature, through the intermediation of the executive, concerning the functioning and organisation of the judicial power. The Council of the Magistracy, in turn, is mainly responsible for the activities concerning the selection of judges, as analysed in Section 4.

FIGURE 8.2 Degrees of judgement that a labour dispute might have in CABA and Córdoba



Source: Authors' elaboration.

Both in CABA and Córdoba, the General Administrator, respectively under the aegis of the Supreme Court and the Superior Court of Justice, stands at the top of the administrative hierarchy. They are in charge of the programming, execution, coordination, and control

of the general administration of the Judicial Power and the fulfilment of superintendency functions, as well as the resolution of delegated administrative matters.

Public administration. The MTEySS is a national body, integrating the national Executive Power. It proposes, designs, elaborates, administers and enforces policies related to individual and collective labour relations, the legal regime of collective labour relations and agreements, employment, capacitation and social security. The same applies to the Ministry of Labour (MoL), part of Córdoba's provincial government. Table 8.28 reports key functions of the national and provincial ministry.

TABLE 8.28 Key functions of the national and provincial ministries

MTEySS (National)	MoL (Provincial)
• Determination of the objectives and policies under its purview; execution of plans, programmes and projects. • Promotion and regulation of workers' rights and supervision of compliance with the obligations of employers. • Deals with: the labour contract regime and other labour regulations; collective bargaining and agreements; individual, multi-individual and collective work conflicts, exercising powers of prevention, conciliation, mediation and arbitration. • Application of norms relating to the constitution and operation of professional and workers' associations and the organisation of the registration of employers' associations. • Exercise police power in labour as the central authority and of the Superintendency of Labour Inspection, coordinating national inspection policies and plans. • Elaboration and control of the general and particular regulations referring to health, safety at workplaces or environments. • Preparation and execution of guidelines for the salary policy of the private sector and preparing their establishment in the national public sector. • Intervene in policies and actions aimed at increasing the productivity of work and its equitable distribution.	• Promotion, regulation and supervision of compliance with the fundamental rights of workers, especially freedom of association, collective bargaining, equal opportunities and treatment, and the elimination of forced and/or child labour. • Labour contract regime and other labour protection regulations. • Treatment of individual and collective labour conflicts, exercising conciliation, mediation and arbitration powers. • Exercise of the power of the police in labour as central authority and of the Superintendency of the Labour Inspection, coordinating provincial and national enforcement policies and those related to unregistered employment. • Preparation and inspection of general and particular regulations regarding hygiene, health, safety and work environment. • Preparation and execution of guidelines for the salary policy of the private sector and establishing those in the national public sector. • Prevention and solution of labour and/or salary conflicts, safeguarding the right to decent work, duly remunerated, respecting the established agreements and laws. • Attention and advice in regional delegations with scope throughout the provincial territory.

Source: Authors' elaboration.

In short, within the context of individual labour relations, these bodies exercise verification and control, sanctioning, and conciliatory powers. For what concerns collective labour relations, the National Ministry is responsible for the qualification and control of collective subjects, concertation and homologation, as well as conciliation and mediation.

To conclude, the Comprehensive Inspection System of Labour and Social Security (SIDITYSS), created by Law No. 25.877/2004, allows the federal government to act nationally on the matter, although provinces retain powers of labour inspection. This results in serious gaps in the application of the law (Arese, 2020).

B. Dispute resolution system processes

Evolution of labour justice. Perhaps the most significant antecedent to labour courts can be found in the Organic Law of the National Labour Department, which provided for the ad hoc creation of 'Labour Councils', in correspondence of a labour conflict. These tripartite councils were responsible for conciliating or arbitrating labour disputes (Palacio, 2013).

The creation of labour justice in Argentina is narrowly connected with the 1943 coup, which marked a more pronounced intervention of the State in society and brought Juan Domingo Perón to the (then) Secretariat of Labour and Social Security. Labour tribunals were first created in CABA as a result of Decree No. 32347/1944, ratified by Law No. 12.948. The labour justice system was composed of 30 first instance judges, a Chamber of Appeals with 9 members and, as auxiliaries, the Labour Public Prosecutor together with commissions for conciliation and arbitration. Labour courts were introduced in Córdoba few years later, following Law No. 4.163/1949. As for national labour justice, the Provincial labour courts were created due to the asymmetric position of parties in the labour relation. Law No. 4.163, in addition to establishing conciliation courts and labour chambers in the provinces, introduced the gratuity of the procedure, its orality in the interest of expeditiousness, the inversion of the burden of the proof and the possibility to rule *ultra* and *extra petitum* (Portelli, 2020).

At the time of their institution, both CABA and Córdoba courts had jurisdiction exclusively for individual labour conflicts.

In CABA, Law No. 18.345—which still is valid today—derogated Law No. 12.948 in 1969, in addition to eliminating the Commission of Conciliation of National Labour Justice, the new Law expanded the number of courts, adding ten new ones, and also increased the number of members of the Chamber of Appeals to eighteen. Since its introduction, it has been amended several times. Some of the most significant amendments include Law No. 22.473/1981, modifying the applicable disposition of the National Civil and Commercial Processual Code listed in Art. 155, and Law No. 24.635/1996, which introduces a mandatory conciliatory phase prior to resorting to labour courts before an administrative body (SECLO) and its discipline. Presidential Decree No. 106/1998 ordinated the text of the law due to the several amendments introduced. Since then, various Acts have complemented Law No. 18.345, whereas the only modification of the text occurred in 2005, as a result of Law No. 25.999, which modified the notification referred to in Art. 119.

In Córdoba, Law No. 7.725/1988 fundamentally increased the number of courts, yet the system in place, which relied on a conciliation tentative, an *ex officio* process of the conciliation court for evidence collection and the subsequent ruling of the chamber, was also rendered obsolete as a result of the significant increase in labour disputes (Arese, 2018). Law No. 7.987/1991, which is still valid, reformed the processual labour legislation of the province: the abovementioned structure was maintained, but '*Salas Unipersonales*' were introduced, allowing unipersonal

rulings. In 2011, the number of conciliation courts increased from seven to ten (Seco, 2018), but the length of labour disputes has increased ever since.

In 2017, two important changes occurred. First, the Province adhered to Law No. 27.348 (Complementary Law on Work-related Risks), introducing a mandatory and preventive administrative instance before 'jurisdictional medical commissions' as a result of Law No. 10.456/2017. Further, the executive power of the province presented an important 14reform project for Law No. 7.987. Law No. 10.596 was approved by the provincial legislature in December 2018.

The reform relies on the following fundamental points (Seco 2018; Arese 2019, 13-14):

1. Double structure and procedure: the reform maintains, for more complex causes, the actual procedural structure—i.e. a single procedural instance subdivided into two distinct procedural stages. The request is received by the conciliation court, which tries to conciliate the parties: if conciliation is unsuccessful, the claim is contested by the defendant before the same body and evidence is collected. The labour chamber, unipersonal in most cases, first holds a public, oral hearing, and then dictates the ruling.

2. In a set of determined subjects of minor complexity, conciliation and resolution of causes occurs before unipersonal labour courts of first instance, the declarative abbreviated process (*procedimiento sumario*) applicable to the hypotheses provided in Art. 83-Bis.: sentences should be handed down in to eight months, on average.

3. The establishment of labour courts starts from the judicial circumscriptions in which there are 'pure' labour tribunals (and not with multiple competence). In the capital of the province, five new courts are created and three more in Río Cuarto, Villa María and San Francisco.

4. The fact that the implementation is gradual bears some consequences: the same dispute might be treated differently based on the applicable process, which in turn depends on the effective set up of the labour court in the circumscription. Also, where labour courts and conciliation courts coexist, a conflict of competence might arise between the two—which is solved by labour chambers, hence extending the duration of the process.

5. For the efficient resolution of cases, labour courts have three secretariats with conciliation, processing and rapporteur functions.

6. The law allows to appeal the resolutions of labour judges, both when there are restrictions on the incorporation of evidence and when they cause an irreparable lien or are expressly declared appealable. The appeal must be resolved within 35 business

days. Appeal of cassation is also established for sentences handed down by the labour courts, although restricted to cases of contradictory judgment.

7. The process must be fully digitised within two years. The hearings are to be recorded in video form to guarantee the fixation of the evidence and the right of defence.

8. The new system will be evaluated within three years, with particular attention given to whether the duration of lawsuits has been shortened.

9. From a temporal perspective, the entry into force of Law No. 10.596 was originally planned for the end of June 2019 but was suspended by Law No. 10.640 until the end of December 2019, and by Law No. 10.676 until April 2020. Law No. 10.640 remits to the Provincial Executive Power, through the Ministry of Justice and Human Rights, in agreement with the Superior Court of Justice, the establishment of the criteria and mechanisms for the progressive application of Law No. 10.596. In turn, Law No. 10.676, modifying Art. 18 of Law No. 10.596, provides that the abbreviated process will be applied at first only in the First Judicial District, with a seat in the city of Córdoba, and with respect to subparagraphs a), f), h) and l) of Art. 83-bis of the aforementioned Code.

Dispute resolution means. As mentioned numerous times, prior to resorting to courts a labour dispute must undergo a mandatory conciliation attempt through the SECLO, regulated by Law No. 24.635. This instance responds to the need to reduce litigation and the length of national labour lawsuits by functioning as a filter of potential labour disputes. The law explicitly excludes:

1. The filing of amparo actions and precautionary measures.

2. Preliminary proceedings and anticipated evidence.

3. When the individual or multi-individual claim has been subject to the actions in the productive restructuring, crisis prevention, or mandatory conciliation procedures provided for by Laws No. 24.013 and 14.786.

4. Lawsuits against bankrupt/insolvent employers.

5. Lawsuits against the national, provincial and municipal State.

6. Actions promoted by minors that require the intervention of the Public Ministry.

In addition, the legal actions resulting from accidents at work regulated by the Law of Risks at the Workplace must be also excluded. Conciliation can also occur on a voluntary basis—when one of the parties requests the intervention of the competent authority to approve and make *res judicata* the agreement voluntarily reached by both parties.

The SECLO procedure is free of charge for the worker. It is predominantly oral, yet it begins with the formulation of a claim through a form, which contains information related to the object of the dispute (including a monetary estimation of the claim), the worker and the employer. Once the claim has been received, a conciliator (a lawyer with experience in labour enrolled in the National Registry of Labour Conciliators) is drawn and a first meeting is set within ten days. The conciliator can order further meetings for the parties to reach an agreement. The process can either conclude with or without an agreement. In the latter case, the conciliator can propose to the parties to submit the matter to arbitration. In addition, the subject will provide a certification which demonstrates the conclusion of the process, which will enable the individual to propose judicial action before courts. If an agreement is reached, it is contextually transmitted to the SECLO, which, after having revised its contents, can either homologate or deny it. If the agreement is not subsequently implemented, the worker can ask the labour courts for its enforcement: in case of non-payment, the worker is entitled to a n additional 30 per cent over the base amount.

The process before labour courts—regulated by Law No. 18.345—is predominantly written and has a double instance. It begins with the presentation of the written demand before the General Secretariat of the National Labour Chamber of Appeals, which will draw the first instance court in charge of the dispute. According to Mansueti (2018), the process has the following features: a) it can only be initiated at the request of a party; b) the judge is bound by the claims made by each of the parties in their briefs; c) the judge must limit his pronouncement to the claims of the parties, based on the facts as they were exposed in the constituent writings of the process (demand and answer to demand); d) the judge decides the right that will apply to the case—that is, to the facts presented by the parties, regardless of what they have alleged; and e) it is the duty of the parties to provide evidence, and the judge can order additional evidence measures deemed appropriate.

As a general rule, the impulse of the process is *ex officio*—that is, it is under the purview of the Court and lasts until after the sentence has been handed down, when the Court liquidates the owed assets and requests payment. From there, the impulse of the execution of the sentence depends on the interested parties. The judge can pronounce himself *ultra petita*, whereas the question of the possibility of ruling *extra petita* is debated as a result of the tension between the right of defence and the protective principle.

Mansueti (ibid.) also identifies other characteristics of the labour procedure: its contradictory nature; the publicity of the process; the preclusion of procedural acts;

the preference for the concentration of proceedings and abbreviation of terms; and the rule for the acquisition of evidentiary measures, immediacy and gratuity in favour of the worker.

Labour dispute resolution in Córdoba, on the other hand, has a single instance, which can be subdivided into two different steps: the instruction and conciliation phase before conciliation courts, and the process before labour chambers. The following principles govern the provincial process:

1. Ex officio procedural impulse.

2. Predominant orality (although the instruction phase before the conciliation judge is mainly written).

3. Concentration, which in turn entails celerity and continuity of the process.

4. Gratuity.

5. Inversion of the burden of the proof in certain matters.

6. Primacy of reality.

7. Possibility to rule *ultra petita*.

As reported by Arese (2020, p. 46), in response to the claim of some legal operators and provincial unions regarding the excessive duration of judicial processes, the Labour Procedure Reform was approved by Law No. 10.596. The reform preserves a part of the process and the historical structure of Labour Justice through a provincial procedural model for the resolution of cases through the aforementioned oral, public and single instance process instructed by a conciliation judge and sentenced by eleven chambers made up of 33 chambermaids who act in a unipersonal manner in the Provincial Capital. An abbreviated procedure for the resolution of minor complexity cases was introduced with a double instance and the possibility of appeal, before the current chamber of work—with oral, continuous and concentrated processes. The reform also determined an expansion in the number of courts. The new abbreviated declarative procedure coexists with the traditional Ordinary Process. The main purpose of the reform was to significantly shorten the duration of the process, without affecting the right of defence. Since 2019, the Electronic Judicial File in the workplace has been in full operation, also approved by Law No. 10.596.

To conclude the present section, a graphical representation of ordinary labour disputes in CABA and Córdoba is shown in Figure 3.

FIGURE 8.3 Ordinary labour process in CABA and Córdoba

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Source: Authors' elaboration.

Types of labour disputes. Both CABA's and Córdoba's procedural legislation admit the adoption of precautionary measures. In particular, Law No. 18.345, in addition to recalling the applicability of the regime of the Civil and Commercial Procedural Code, explicitly provides for the preventive seizure of the debtor assets upon request of the other party, or the Public Ministry in certain cases (i.e. non-contestation of the demand, alienation or occultation of the goods, or substantial decrease of financial capacity)—Art. 62. Law No 7.987 provides that the claimant—during the process and even before the demand—can request preventive seizure, which can be eventually determined by the tribunal: if admitted, the claimant will have to deposit a collateral, which, in accordance with the tribunal, is sufficient to cover damages in case the debt does not exist (Art. 45).

In addition, both Law No. 18.345 and Law No. 7.987 include various special procedures, as reported in Table 8.29.

TABLE 8.29 Special procedures of Law No. 18.345 and Law No. 7.987

CABA	Córdoba
Workplace accidents (Art. 137)	Execution procedure (Arts. 68 to 76)
Execution of recognised or firm credits (Art. 138)	Eviction (From Art. 77 to 80)
Execution procedure (Arts. 139 to 144)	Procedure applicable to acts of voluntary jurisdiction (Art. 82)
Procedure applicable to tax- related claims (Art. 145)	Summary procedure (Art. 83)
Eviction (Art. 147)	Abbreviated Declarative Process (From Art. 83-bis to Art. 83-septies)
Judgements against the nation (Art. 148)	
Arbitration (From Art. 149 to 154)	

Source: Authors' elaboration.

The Complementary Law on work- related risks (No. 27.348) is applicable both in CABA and Córdoba, requiring the affected workers to appear before labour jurisdictional medical commissions—a mandatory administrative instance—prior to resorting to courts. The procedure is established in the first Chapter of the Complementary Law. In short, the territorially-competent medical commission is responsible for the determination of the professional character of the disease or contingency, the determination of incapacity, and the corresponding monetary compensation provided for in the Labour Risks Law (No. 24.557). The professional fees that correspond to legal representation and other expenses incurred by the worker as a result of his participation before the medical commissions are the responsibility of the respective occupational risk insurer.

The parties can request a review of the medical commission's decision before the Central Medical Commission, which in turn can be appealed before the courts of appeal with labour jurisdiction or, were these do not exist, before the single instance courts with equivalent jurisdiction. Alternatively, the worker can present an appeal before the provincial or CABA's labour justice. An appeal by the worker has a suspensive effect in principle, except for cases provided in let. A) and b) of Art. 2, in which the effect is devolutive.

It is also worth to expand a bit on Córdoba's Abbreviated Declarative Process, as it is one of the main novelties introduced by the latest reform of Law No. 7.987 in the interest of resolving causes of 'minor complexity' in a shorter time frame, therefore reducing the workload of the courts and the length of the procedure. The law directly identifies the cases in which this process can be applied in Art. 83-bis, from letter a) to letter l). This special procedure, in accordance with Art. 18 of Law No. 10.596 (as amended by Law No. 10.676) provides that the abbreviated procedure will be applied at first only in the First Judicial District with seat in the city of Córdoba, and exclusively in the following cases detailed by Art. 83-bis:

a) Compensation derived from direct dismissal without invocation of cause.

b) Lawsuits based on Art. 66 LCT for reestablishment of altered working conditions.

c) Payment of the salary corresponding to the month of termination, the supplementary annual salary and vacations, whatever the cause of termination.

d) Lawsuits derived from the Labour Risks Regime, when the work accident or occupational disease is recognised by the Jurisdictional Medical Commission, depending on the Superintendency of Labour Risks and the determination of the degree of disability. The compensation amount is questioned according to the legal rates and depends on the remuneration reported in the administrative instance.

Once the request is admitted, there is a six-day period for its contestation, presentation of exceptions and citation of third parties, as well as to offer evidence and accompany those of the defendant. An additional three-day term is set to extend evidence and contest exceptions.

Once the request and its exceptions have been answered, the parties and third parties, if any, will be summoned to a single hearing that must be held within ten days of the end of the previous stage, where, in the presence of the Judge, conciliation will be sought.

The parties must attend in person, without prejudice of Art. 49: the absence of the plaintiff, without just cause, will lead to the withdrawal of the lawsuit, and the opposite will entail a fine in favour of the plaintiff. If the contestation of the demand gives rise to controversial matters that require the production of evidence, according to the judge, the court can order it and set the date for the hearing within 60 days.

In certain cases provided by Art. 83-Quinquies, the judge, with motivated resolution, can determine the conversion of the procedure to an ordinary procedure. This decision can be appealed before the Labour Chamber.

Confessional and testimonial evidence is received in a single oral presentation and at the opportunity of the continuation of the hearing. Immediately upon receipt of the confessional and testimonial evidence, the parties will plead orally for twenty minutes and the judge will issue a sentence within fifteen days, unless the matter allows for an immediate pronouncement. The notification of the sentence is carried out electronically.

As determined by Art. 83-Septies, only the sentence can be appealed. The appeal has a suspensive effect, except in the cases of Article 83-bis paragraphs f), k) and l), in which the appeal will be granted with devolutive effect. The appeal must be filed in a well-founded manner, within five days of notification, and the other party has five days to answer the grievances expressed or adhere to the appeal. Once the grievances have been answered, the Judge, within a period of five days, will decide whether to grant the appeal and, where appropriate, will order the elevation of the proceedings to the corresponding Chamber of Labour. Once said provision is signed, the proceedings must be submitted to the Chamber of Labour and received by the Court within a period of five days.

The Chamber must act within a period of ten days from receipt of the file and will issue a judgment within twenty days from the signing of the certification. Both terms are peremptory. When the appeal includes grievances for denial of evidentiary measures, the Chamber may provide for the denied evidence to be received. Decisions on evidence suspend the procedural deadline, until the respective allegations are processed and produced. In no case may the suspension exceed a period of sixty days from the date the measure was ordered.

C. Access to justice

Various conditions must be fulfilled to access labour justice. Some of these are common to the civil process.

1. Jurisdiction of the court, international and internal (regarding matter, hierarchy, form and territory).

2. Personal capacity.

3. Judicial capacity. Art. 33 of the LCT allows for workers aged 16 or older to participate in labour lawsuits or actions related to the contract or employment relationship, and to be represented by agents by means of the instrument granted in the manner provided for by local laws;

In addition, in CABA there is a mandatory administrative instance preceding judicial action (SECLO).

The parties must be assisted by a lawyer, or—in the case of workers—by the trade union association of the activity with trade union status, or—in the case of employers—by their representative organisations. Legal representation is required also in Córdoba.

Regarding representation before courts, in CABA the parties may act on their own behalf or be represented in accordance with the provisions established for representation in court. Workers may also be represented by legally authorised professional associations (Art. 35 of Law No. 18.345) The same applies to Córdoba (Art. 24 Law No. 7.987).

The principle of gratuity of labour lawsuits to workers still applies. In addition, in Córdoba there are labour legal advisers (Art. 5 CPL) and the Ministry of Labour offers free legal advice. In CABA there is the Public Ministry of Defence (Law 27.149). There is also free advice in the administrative field.

In matters of conviction for costs, the principle of succumbence prevails, and the judge may distribute these as appropriate.

Fees are judicially regulated according to the current tariff law, established in Art. 277 of the LCT. Any payment that must be made in labour lawsuits is carried out through bank deposit upon order of the intervening Court, and personal judicial transfer to the holder of the loan or his rights-holders, even in the event of having granted power. The legal quota agreement that exceeds twenty percent (20 per cent) is prohibited, which, in each case, will require personal ratification and judicial approval.

The withdrawal by the worker of actions and rights will be personally ratified in the trial and will require approval. Any payment made without observing the prescribed and the non-approved litis fee or withdrawal agreement will be null and void. The responsibility for the payment of the procedural costs, including all professional fees corresponding to the first or only instance, will not exceed 25 per cent of the amount of the sentencing, transaction or instrument that put an end to the dispute. If the fee regulations practiced in accordance with tariff laws or local customs, corresponding to all professions and specialties, exceed 25 per cent, the judge will apportion the amounts among the beneficiaries. For the computation of the indicated percentage, the amount of professional fees that have represented, sponsored or assisted the party sentenced to costs will not be taken into account.

8.3 ADMINISTRATIVE ORGANISATION

A. Justice system budget

The Supreme Court of Justice of the Nation prepares the Budget of Expenditures and Resources of the Judicial Power, which is sent to the National Executive Power for incorporation into the

draft of the General Budget of the National Administration that is presented annually before the Honourable Congress. The Council of the Magistracy administers the resources and executes the budget that the law assigns to the administration of justice.

In Córdoba, the Superior Court of Justice exercises the administration of the judicial power and in matters of organisation and budget, it must calculate the resources, expenses and investments of the Judicial Power and present them to the governor for consideration by the legislature within the general budget of the Province, and present to the legislature, through the Executive Branch, draft laws on the organisation and operation of the Judicial Branch.

Table 8.30 reports the overall budget, expressed in Argentine pesos, allocated to the National Judicial Power from 2015 to 2019, including the budget allocated to CABA's ordinary justice.

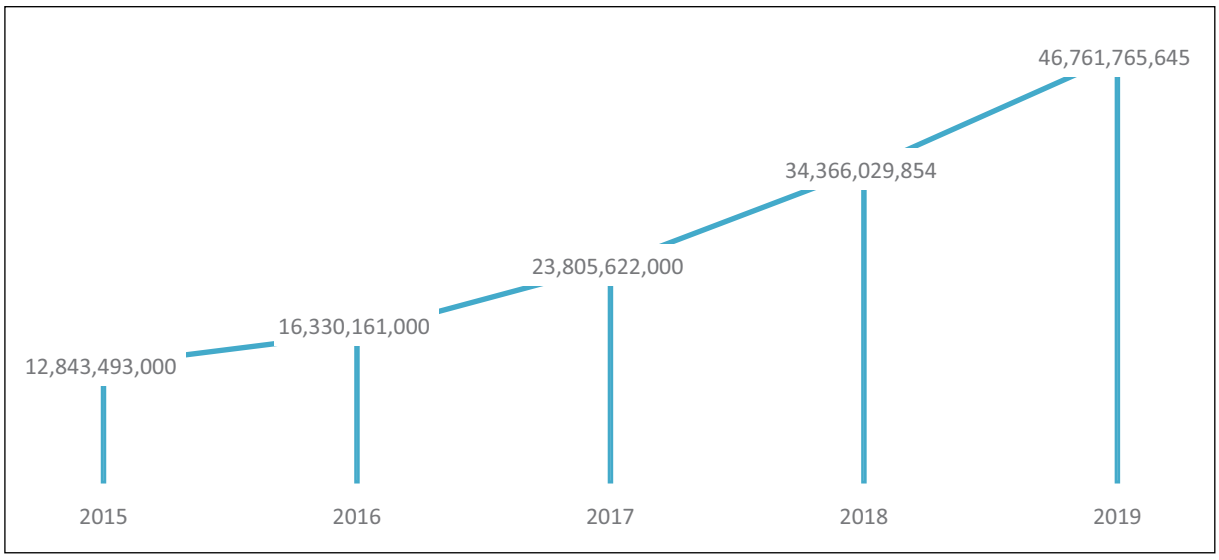
TABLE 8.30 Overall budget allocated to the National Judicial Power, 2015–2019 (in ARS)

	2015	2016	2017	2018	2019
Poder Judicial de la Nación (ARS)	12,843,493,000	16,330,161,000	23,805,622,000	34,366,029,854	46,761,765,645

Source: Authors' elaboration based on Ministerio de Economía—Oficina Nacional de Presupuesto (2021).

The budget allocated to the National Judicial Power increased year on year during the time series considered, although this occurred in a period of high inflation: an increase of 264 per cent from 2015 to 2019.

FIGURE 8.4 Overall budget allocated to the National Judicial Power, 2015–2019 (in ARS)



Source: Authors' elaboration

Table 8.31 depicts the overall budget allocated to CABA's *Juzgados* and *camaras*, as well as the budget allocated to CABA's labour courts from 2015 to 2019.

TABLE 8.31 Overall budget allocated to CABA's Juzgados, camaras, and labour courts, 2015–2019 (in ARS)

	2015	2016	2017	2018	2019
CABA—Juzgados y Camaras (total)	4,002,293,220	3,997,453,508	3,909,490,408	5,505,882,064	8,045,834,691
Labour jurisdiction	846,880,619	805,925,119	853,061,501	1,230,113,172	1,724,069,867
% (labour jurisdiction/total)	21%	20%	22%	22%	21%

Source: Ministerio de Economía—Oficina Nacional de Presupuesto (2021).

Despite a gradual decrease, the budget allocated to CABA courts remained relatively stable from 2015 to 2017. It increased by almost 41 per cent from 2017 to 2018, and by 46 per cent from 2018 to 2019. Yet, the ratio between CABA's overall court budget and the budget allocated to labour jurisdiction remained between 20 per cent and 22 per cent during the period. Finally, personnel-related expenses had the most significant impact in the budget. For example, in 2019, they represented almost 99 per cent of the allocated budget; permanent personnel-related expenses accounted for 95 per cent of the total budget. Data for the Province of Córdoba were more limited.

TABLE 8.32 Córdoba's approved and implemented budget—judicial power, 2015–2019 (in ARS)

		2015	2016	2017	2018	2019
Provincial Judicial Power	Approved	4,226,135,000	5,585,378,000	7,925,968,000	NA	14,391,497,000
	Implemented	4,625,930,000	6,538,445,516	8,607,912,040		NA
Ratio (implemented/approved)		109%	117%	109%		
Personnel expenses (implemented, except for 2019 approved)		4,257,800,000	6,016,073,846	7,970,472,979		12,443,308,000
Personnel expenses (relative participation in the overall provincial budget)		92%	92%	93%		86%

Source: Centro de Estudios y Proyectos Judiciales, Tribunal Superior de Justicia del Poder Judicial de Córdoba (2021) for 2017-2019; Junta Federal de Cortes y Superiores Tribunales de Justicia de las Provincias Argentinas y Ciudad Autónoma de Buenos Aires (2016) for 2015-2016.

As Table 8.32 illustrates, the overall budget allocated to the Córdoba's judicial power increased each year. From 2015 to 2019, the allocated budget increased by 240 per cent: expenses exceeded the approved budget. In addition, as in CABA, personnel expenses had a very significant impact in the overall budget. Personnel expenses grew by 192 per cent from 2015 to 2019.

B. Human resources

In CABA there are 80 unipersonal *Juzgados*, whereas in Córdoba there are a 10 unipersonal conciliation courts. As a result of the unipersonal nature of both instances, the number

of judges in principle corresponds to the number of tribunals:[5] 80 magistrates in CABA and an additional 10 in Córdoba (90 magistrates in total). In Córdoba, if the conciliation before the *Juzgado* fails, the dispute is transmitted to one of the 11 *Cámaras del Trabajo* of the Province. Each Chamber is composed of 3 magistrates; however CABA's chamber comprises 11 *salas*, each composed of 3 judges. Thus, there are 43 first instance judges in the province (33 operating in the *Cámaras del Trabajo* and 10 in the conciliation courts).

TABLE 8.33 Number of first instance labour judges per citizen and employee

Territory	Number of first instance judges per 100,000 citizens	Number of first instance courts per 100,000 employees
CABA	2.604142	6.5199674
Córdoba	1.155189	3.822222
Data used for calculation	First instance judges in CABA	80
	First instance judges in Córdoba	43
	Citizens of CABA (2019)	3,072,029
	Citizens of Córdoba (2019)	3,722,332
	Employees in CABA (4th quarter 2017)	1,227,000
	Employees in Córdoba (4th quarter 2017)	1,125,000

Source: Authors' elaboration.

The second instance in CABA is represented by the *Cámara Nacional de Apelaciones*—sub-divided into ten *salas,* each composed of 3 judges. In Córdoba, appeals are made before the same *Cámaras del Trabajo.*

C. Remuneration

While official data are available for other Provinces, official information related to the remuneration of magistrates could not be found for either CABA or Córdoba. According to a recent newspaper survey (Noguera, 2020), the average gross remuneration of a TSJ judge with 20 years of seniority is around ARS518,194 per month; the average gross salary of a Chamber judge with 15 years of seniority is ARS402,379; finally, a first instance judge with 15 years of seniority receives a gross wage of ARS315,877.

D. Recruitment, selection and training

Selection of judges, national justice (CABA). The Council of the Magistracy is a permanent body of the National Judicial Power, with a constitutional mandate to select

5. Although it should be noted that positions are not filled every year.

through public competitions the applicants to the lower courts and issue proposals in binding lists of three candidates for the appointment of magistrates of the lower courts (Art. 114).

The Council is regulated by Law No. 24.937, which attributes to its plenary the regulation of public competition, the organisation of the Judiciary School (including the approval of the formative programmes and the planning of the continuous training of magistrates), and also provides for the institution of the Commission for the Selection of Magistrates and Judiciary Schools (CSMJS), which calls public tenders. Those who are approved are nominated, with nomination valid for five years. During this period, depending on vacancies, the plenary will establish the number of lists to be filled with applicants by strict order of merit. Once these lists are established, the validity of the nomination expires.

In accordance with the same Act, the CSMJS is also responsible for the designation of the jury, the evaluation of the background and suitability of applicants, the production of the lists of three candidates to be submitted to the plenary, and the direction of the Judiciary School for the formation and training of staff and applicants.

The regulation of the plenary of the Council of Magistrates (*Reglamento de concursos públicos de oposición y antecedentes para la designación de magistrados del poder judicial de la nación*) establishes a detailed set of rules concerning the procedure, which fundamentally rely on the following directives chartered in the Act itself:

1. Candidates: To be admitted as a candidate, the law requires the individual to be a lawyer and fulfil the requirements necessary to be a member of the CM. Further, cannot participate as candidates those who have taken up public office during the last dictatorship period and those whose ethical beliefs go against democratic institutions and human rights. The nomination must be made public to allow for objections.

   Presidential Decree No. 1258/1958 establishes the following requirements for candidates for Judges of the Federal Chamber of Criminal Cassation, the National Chamber of Criminal Cassation, the federal and national chambers of appeals and the federal and national courts of trial: to be a citizen of Argentina, a lawyer with a nationally valid title and six years of professional experience, or a judicial function that requires such qualification and at least 30 years of age (Art. 5). In addition, candidates for national judges of first instance must be citizens of Argentina, lawyers with a degree from a national university with four years of practice, and at least 25 years of age (Art. 6).

2. Competition: When there is a vacancy, the CSMJS will call for a competition, informing the dates, the composition of the jury and the positions to be filled.

The criteria and mechanisms for scoring, and evaluation of prior experience must be determined before the competition, guaranteeing the ample right of non-discrimination for those with academic backgrounds and those practicing in the judicial sphere. Finally, the contents of the exam will be the same for all applicants. The written exam includes subjects directly linked to the position to be filled and must evaluate both practical and theoretical knowledge.

3. Procedures: The CM periodically elaborates, based on the CSMJS's proposal, lists of evaluators for each speciality. The list must include Law professors from public national universities. The jury is composed of 4 evaluators randomly selected by the CSMJS through a public lottery (members of the CM cannot be evaluators).

After the competition, the jury will evaluate the candidates' exams, relaying their scores to the CSMJS, which will then proceed to the evaluation of their prior experiences. Both evaluations will be reported to the applicants, with a view to allow for eventual objections.

Based on these elements and applicant interviews, the CSMJS establishes the three-candidate list and order of precedence, which are in turn transmitted to the CM's plenary, together with the candidates who will participate in the interview. The interview is public and evaluates the suitability, functional aptitude, and democratic vocation of candidates. Through a motivated decision, the plenary can revise the scores of written exams, the evaluation of prior experiences, eventual impugnments and opinions expressed.
The decision of the plenary is expressed through an absolute majority vote and this decision cannot be challenged. The duration of this process cannot exceed 90 days (which can be extended by an additional 30 days in case of impugnments) decurrent from the written exam. If the Senate rejects the proposed list, a new contest must be called to fill the vacancy in question. However, if the Senate approves the list, the national Executive Branch will proceed to nominate the approved candidates.

After reaching 75 years of age, magistrates must be reappointed every five years following the procedure listed above. Otherwise, judges remain in office, except in case of breach of good conduct: in that event, they might be displaced through a special procedure carried out before the CM (established in the same law mentioned above) because of the immovability guarantee provided in Art. 110 of the Constitution.

Training, national justice. The Judicial School of the Nation (JSN), established by Law No. 24.937 and regulated by CM Resolution No. 237/2001, operating under the CM and the CSMJS, has as main purpose the training, updating and continuous improvement of magistrates, officials and employees of the Judiciary, and the training of aspiring magistrates. With reference to the second component, bearing in mind that to be a judge in Argentina it is necessary to have previous legal professional experience, it is important to clarify that the

programme offered by the JSN to aspiring magistrates, PROFAMAG (*Programa de Formación de Aspirantes a Magistrados/as*), is not mandatory (although a certificate of its completion guarantees 8 points in the public competition).

The JSN operates through 13 Regional Delegations throughout Argentina's territory (including the province of Córdoba) and offers courses for magistrates, staff already in activity (Art. 21 Res. No. 237/2001), recently appointed magistrates/functionaries (and aspiring magistrates -Art. 22) as well as employees (Art. 23). Only courses for recently designated employees are compulsory. Art. 21 explicitly defines courses for magistrates and staff already in activity as non-mandatory; on the other hand, it guarantees a one-week remunerated license (at least once every year) for those who attend the courses. Art. 22 does not state anything in this respect. However, it should be noted that recently appointed magistrates and staff might be intended as belonging to Art. 21's category, consequently inferring the non-mandatory nature of the courses.

From a content perspective, Art. 21's courses are geared at those practicing in the jurisdictional sphere, focusing on updated training as well as organisational management, while courses for recently appointed judges and staff focus on more practical aspects.

Judge selection in Córdoba. The Constitution of the province directly establishes various requirements for appointments: to be a member of the Superior Court of Justice, twelve years of practice as a lawyer or magistrate, eight for Chamber Vocal, six for Judge and four for Legal Adviser. Argentinian citizenship is required for all cases. Members of the Superior Court of Justice must be at least 30 years of age, while members of other courts must be at least 25.

Further, Art. 157 of the province's Constitution remits to the law the establishment of the process that favours equal opportunities and selection by suitability for the appointment of lower magistrates. Córdoba's Council of Magistracy (CCM)—regulated by Law No. 8.802/1999—is the main body of reference. The CCM is responsible for (Art. 6): carrying out the calls for the evaluation and selection of applicants to occupy positions in the provincial magistracy at least once a year; receiving the respective applications; designating the members of each Chamber for the evaluation of applicants; regulating the public and open competitions for priors and opposition; carrying out the aptitude and suitability evaluations of the applicants according to position; and, approving the competitions and submitting to the Executive Power the order of merit obtained by the applicants.

The evaluation can be subdivided into three phases: evaluation of prior experience, written exam, and personal interview. There are some differences when compared to the national justice system. First, national justice foresees two distinct interviews (before the CSMJS and the Council of Magistrates plenary), whereas at the provincial level there is only one interview before the CCM (Art. 25). Second, rather than having an ad hoc commission

(such as the CSMJS) for receiving and evaluating the written exams, the CCM has three different *salas*—including one dedicated to labour and administrative and electoral disputes—whose members are renewed every two years, except for the possibility to be renominated once (Art. 13). Further, there are substantial dissimilarities in the written exam (see Art. 31 of the dedicated Regulation for national justice and Art. 22 of Law No. 8.802/1999). Finally, differences can also be found regarding requirements and cases of incompatibility of applicants.

Within ten days decurrent from the interviews, the CCM will determine the ranking of applicants—excluding those scoring less than 70 of 100 points. Differently from national justice, the applicant can appeal against the resolution of the CCM, although based exclusively on procedural issues. The ranking order is made publicly available on various media (including newspapers and the official gazette) and a public audience is held to allow for eventual objections (Arts. 28 and 29). In a subsequent step, the CCM transmits the list of the approved candidates to the Executive. The governor, with prior approval from the Legislative Branch, nominates the magistrates (Art. 144, Section 9 of the Constitution); the governor *can* (rather than *must*) respect the meritocratic order established by the CCM.

As guaranteed by the province's Constitution, the judges remain in office for as long as their good conduct lasts and can only be removed cases of poor performance, gross negligence, procrastination in the exercise of their duties, inexcusable ignorance of the law, alleged commitment of crimes, or physical or mental disability (Art. 154), after being judged by a Jury of Prosecution.

Training in Córdoba. The constitutional attributions of Córdoba's Superior Court of Justice include the creation and regulation of the school for the specialisation and training of magistrates and staff (Art. 166). The Ricardo C. Núñez Learning Centre (*Centro de Perfeccionamiento Ricardo C. Núñez*—LC), was created as a result of TSJ's Agreement Regulation No. 341—Series 'A', of 10 December 1996. The General Regulation for the Functioning of the LC can be found annexed to Agreement Regulation No. 810—Series 'A', of 13 March 2006. The main objective of the LC is to contribute to the training and specialisation of Magistrates, Officials and Agents of the Judicial Power of the Province of Córdoba. To this end, the LC offers various courses, targeting different audiences and subjects. For example, there is a programme for the continuous training of magistrates (Programme 'A'), one specifically offering initial training for future magistrates (Programme 'B'), and two additional ones focusing on substantial and procedural investigation (Programme 'I-Sust' and Programme 'I-Proc'). The regulation states nothing about the mandatory nature of these courses. Differently from the JSN, there is a fee for these courses, which is determined based on the guidelines approved by the Council Manager for each annual exercise.

8.4 LABOUR DISPUTE RESOLUTION SYSTEM PERFOMANCE (2015–2019)

8.4.1 Córdoba

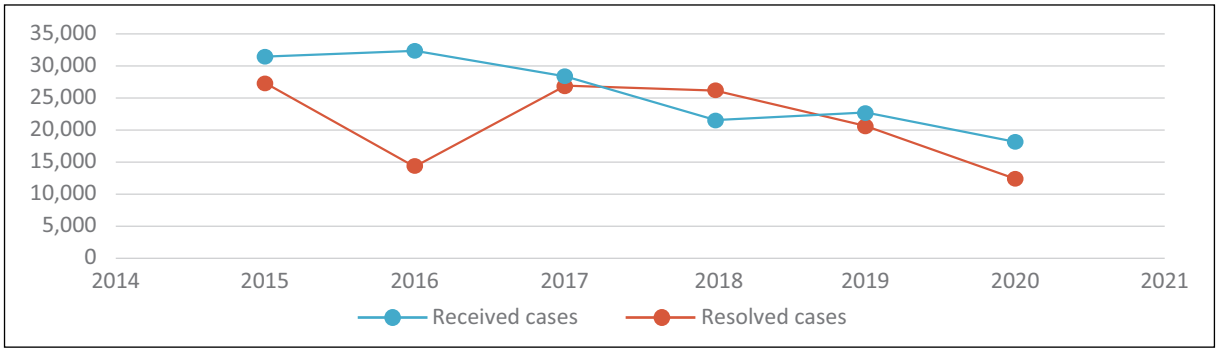
TABLE 8.34 Number of received, processed, resolved and pending labour cases

Year	Received cases	Processed cases	Resolved cases	Pending cases
2015	31,551		27,381	NA
2016	32,439	NA	14,344	22,265
2017	28,397		27,062	23,600
2018	21,671	16,692	26,256	19,015
2019	22,741	14,923	20,806	20,950
2020	18,291	5,992	12,487	26,754

Note: the number of pending cases could not be found: the figures reported calculated by the authors[6] refer exclusively to cases accumulated in the period observed and should not be intended as the overall number of pending cases.

Source: Authors' elaboration based on Junta Federal de Cortes y Superiores Tribunales de Justicia de las Provincias Argentinas y Ciudad Autónoma de Buenos Aires (2016) and Centro de Estudios y Proyectos Judiciales, Tribunal Superior de Justicia del Poder Judicial de Córdoba (2021).

FIGURE 8.5 Number of received, processed, resolved and pending labour cases



Source: Authors' elaboration.

8.4.2 Appeals

TABLE 8.35 Comparison between Córdoba and CABA labour suits, 2015–2020

	2015	2016	2017	2018	2019	2020
CEPJ single sources on website (Doc/Tableu) (whole Province, appeals)			303	222	246	
Annual report 2016–2017 (whole province, all types)		234	250			
CEPJ report 2000–2020—CABA Unified Appeals Court (all types)	429	142	255	246	229	294

Source: Centro de Estudios y Proyectos Judiciales, Tribunal Superior de Justicia del Poder Judicial de Córdoba (2021); Junta Federal de Cortes y Superiores Tribunales de Justicia de las Provincias Argentinas y Ciudad Autónoma de Buenos Aires (2018); Centro de Estudios y Proyectos Judiciales, Tribunal Superior de Justicia del Poder Judicial de Córdoba (2021).

6. Based on the formula: (pending cases of the previous year + received cases) – resolved cases. For 2015, the pending cases corresponded to the difference between received and resolved cases.

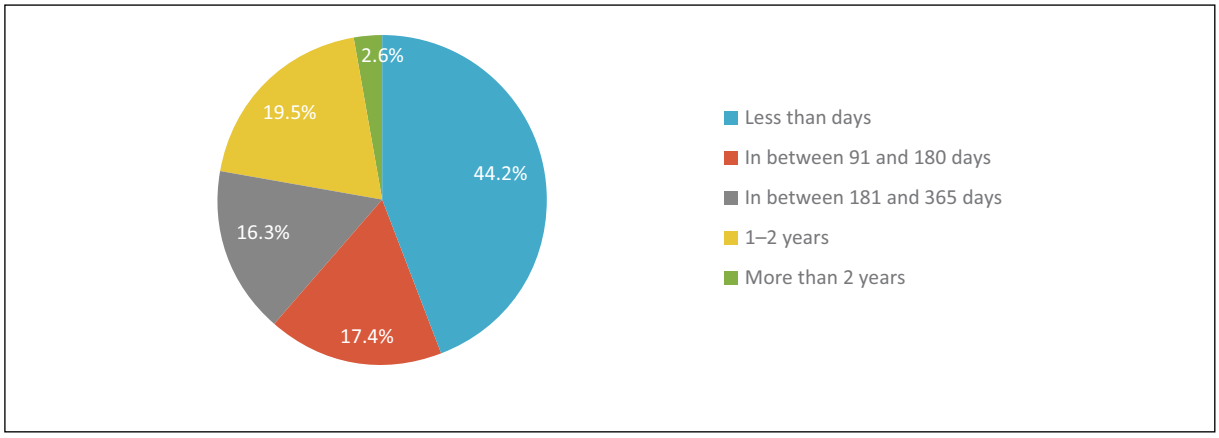
8.4.3 Duration

TABLE 8.36 Lawsuit duration in Córdoba, by category

Duration	Reference period	%
	January 2017–June 2019	
Less than 90 days	7,578	44.2%
In between 91 and 180 days	2,977	17.4%
In between 181 and 365 days	2,784	16.3%
1-2 years	3,342	19.5%
More than 2 years	450	2.6%
Total cases	17,131	100%

Source: Authors' elaboration based on Ministerio de Justicia y Derechos Humanos de la Nación (2021).

FIGURE 8.6 Lawsuit duration in Córdoba, by category



Source: Authors' elaboration.

8.4.4 Geographical distribution

It should be stressed that the overall number of cases reported by the Ministry of Justice and Human Rights is significantly lower than the data reported by the CEPJ. Arese (2020, p. 46) reports that the estimations based on official statistics, regarding ordinary disputes, suggest that the delay between the beginning of the lawsuit and its resolution exceeds four years. e also states that although statistical studies do not publish the time taken to process lawsuits, unofficial information indicates that in 2015, Córdoba's *salas de trabajo* took on average 20 months to issue a sentence. To this period should be added the processing period before the Conciliation Court, which on average is no less than one year, and a hypothetical delay of no less than two years if appealing to the Superior Court of Justice. In short, a case lasts three years on average if there is no appeal. If an appeal is made to the Superior Court of Justice, this timeframe may be doubled (Arese 2018).

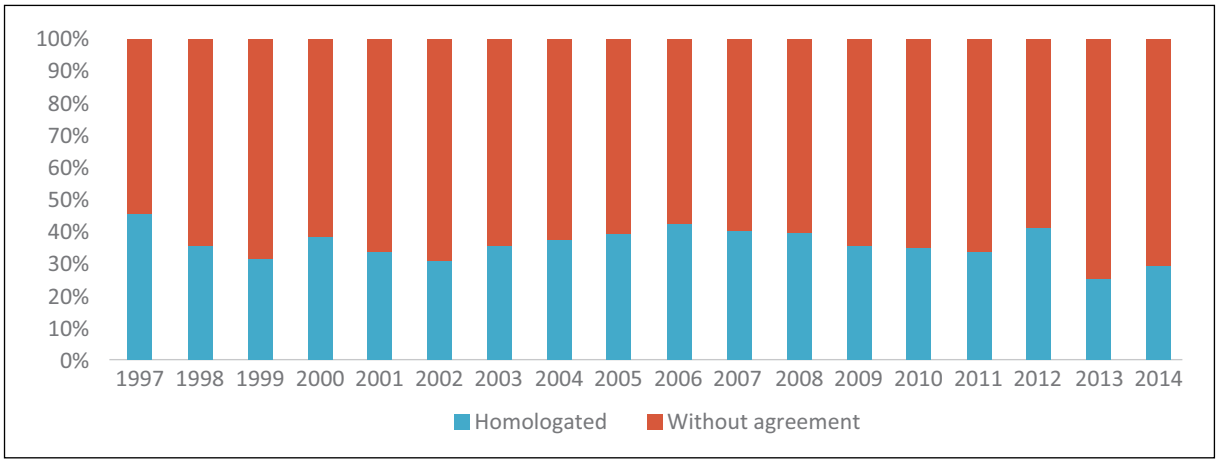
TABLE 8.37 Geographical distribution of labour disputes—Córdoba, 2016–2020

		2016	2017	2018	2019	2020
Jud. Circum. No 1	Capital	22,662	19,802	15,108	15,170	11,522
	Carlos Paz	732	736	675	628	688
	Alta Gracia	346	315	307	375	315
	Jesús María	443	374	249	274	317
	Río Segundo	959	734	472	517	447
Jud. Circum. No 2	Río Cuarto	1,867	1,666	1,123	1,218	1,094
	Huinca Renancó	71	70	65	68	78
	La Carlota	174	132	119	98	103
Jud. Circum. No 3	Bell Ville	516	478	376	537	534
	Marcos Juarez	251	224	197	295	232
	Corral de Bustos	39	43	72	63	62
Jud. Circum. No 4	Villa María	1,081	974	696	904	705
	Oliva	159	139	68	81	75
Jud. Circum. No 5	San Francisco	598	583	490	542	419
	Arroyito	178	171	110	124	139
	Las Varillas	131	110	115	120	85
	Morteros	176	157	127	168	129
Jud. Circum. No 6	Villa Dolores	179	143	116	112	159
	Cura Brochero	56	66	57	58	62
Jud. Circum. No 7	Cruz del Eje	173	133	58	79	77
	Cosquín	315	348	319	339	265
Jud. Circum. No 8	Laboulaye	97	93	101	123	109
Jud. Circum. No 9	Deán Funes	150	165	114	123	138
Jud. Circum. No 10	Río Tercero	1,086	741	537	725	537

Source: Authors' elaboration base don (Centro de Estudios y Proyectos Judiciales, Tribunal Superior de Justicia del Poder Judicial de Córdoba (2021).

8.4.5 CABA SECLO

FIGURE 8.7 Conciliation rates—SECLO



Source: Authors' elaboration.

TABLE 8.38 Cases—SECLO, 1997–2014

Year	Cases	Homologated	Not homologated	Without agreement
1997[7]	11,481	4,850	3	5,719
1998	35,133	11,313	7	20,575
1999	39,224	11,185	45	24,501
2000	42,648	15,279	52	24,478
2001	43,689	13,843	2	27,427
2002	61,366	18,626	24	40,998
2003	46,175	15,845	2	28,738
2004	55,215	20,243	2	33,426
2005	58,498	23,022	-	34,676
2006	68,792	29,384	-	39,408
2007	76,292	30,657	-	45,635
2008	92,975	36,921	42	56,051
2009	100,977	36,177	327	64,473
2010	96,021	33,665	230	62,126
2011	98,782	33,292	7	65,221
2012	68,046	28,291	254	39,502
2013	133,809	33,716	296	99,797
2014	135,867	31,159	239	74,831

Source: Authors' elaboration based on Dirección del Servicio de Conciliación Laboral Obligatoria—MTEySS (2016).

8.4.6 CABA Courts

First instance

TABLE 8.39 Pending, received and resolved cases—first instance, CABA, 2009–2013

Year	Pending	Received	Resolved
2009	40,645	42,145	31,206
2010	51,593	49,039	35,182
2011	65,445	50,782	38,529
2012	77,698	56,762	38,796
2013	95,664	64,890	43,650

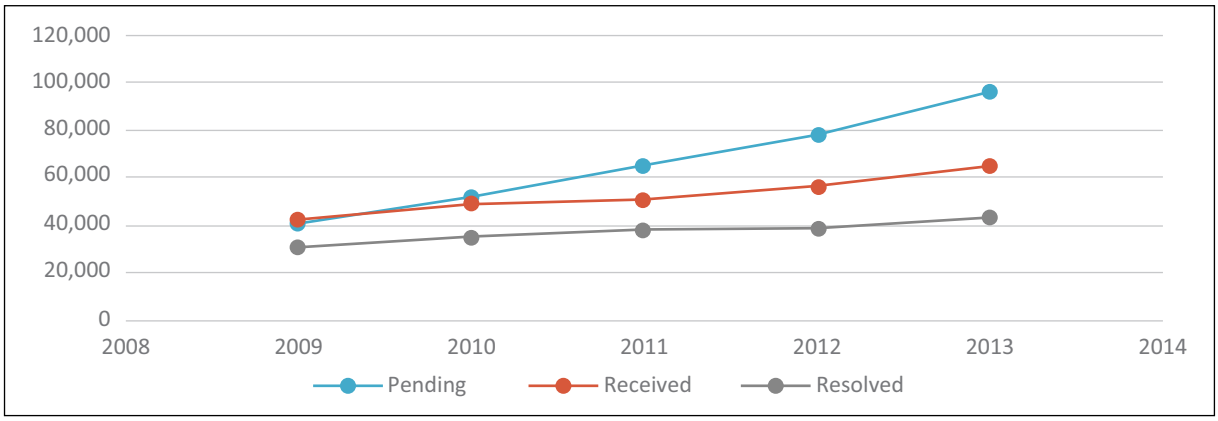
Source: Authors' elaboration based on Poder Judicial de la Nación (2021).

Data regarding the first instance processing of labour lawsuits could not be found for 2015-2019. In addition, since 2014 there has been a change in the reporting of data (Poder Judicial

7. As atividades do SECLO começaram em 1º de setembro de 1997.

de la Nación, 2021). The only relevant data available indicate that, from 31 August 2014 to 31 December 2019, first instance courts in CABA resolved 133,242 labour disputes (Cámara Nacional de Apelaciones del Trabajo—Prosecretaría General, 2020).

FIGURE 8.8 Pending, received and resolved cases—first instance, CABA, 2009–2013



Source: Authors' elaboration.

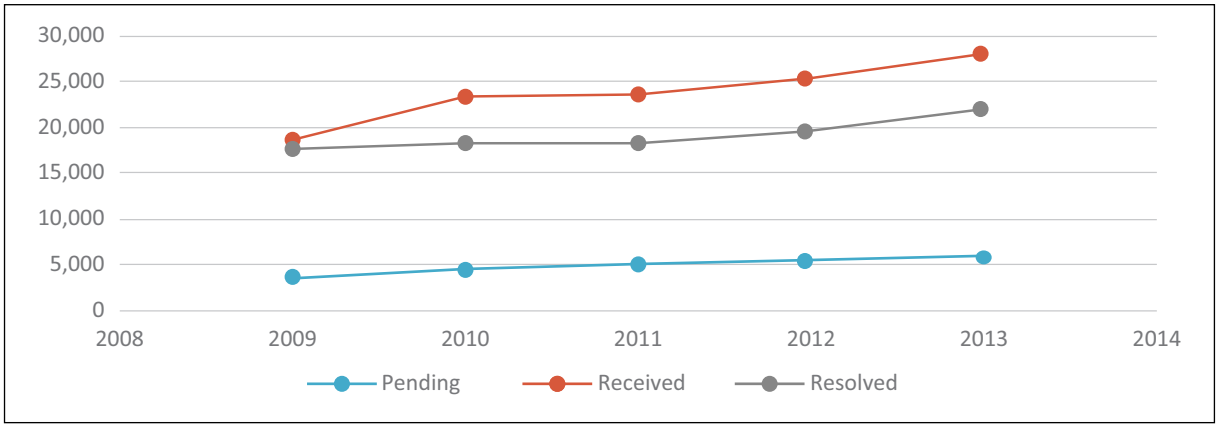
8.4.7 Appeals *(Cámara Nacional de Apelaciones del Trabajo)*

TABLE 8.40 Pending, received and resolved appeals—second instance, CABA, 2009–2013

Year	Pending	Received	Resolved
2009	3,794	18,656	17,682
2010	4,549	23,325	18,293
2011	5,030	23,638	18,249
2012	5,389	25,291	19,464
2013	5,827	27,958	22,035

Source: Authors' elaboration based on Poder Judicial de la Nación (2021).

FIGURE 8.9 Pending, received and resolved appeals—second instance, CABA, 2009–2013



Source: Authors' elaboration.

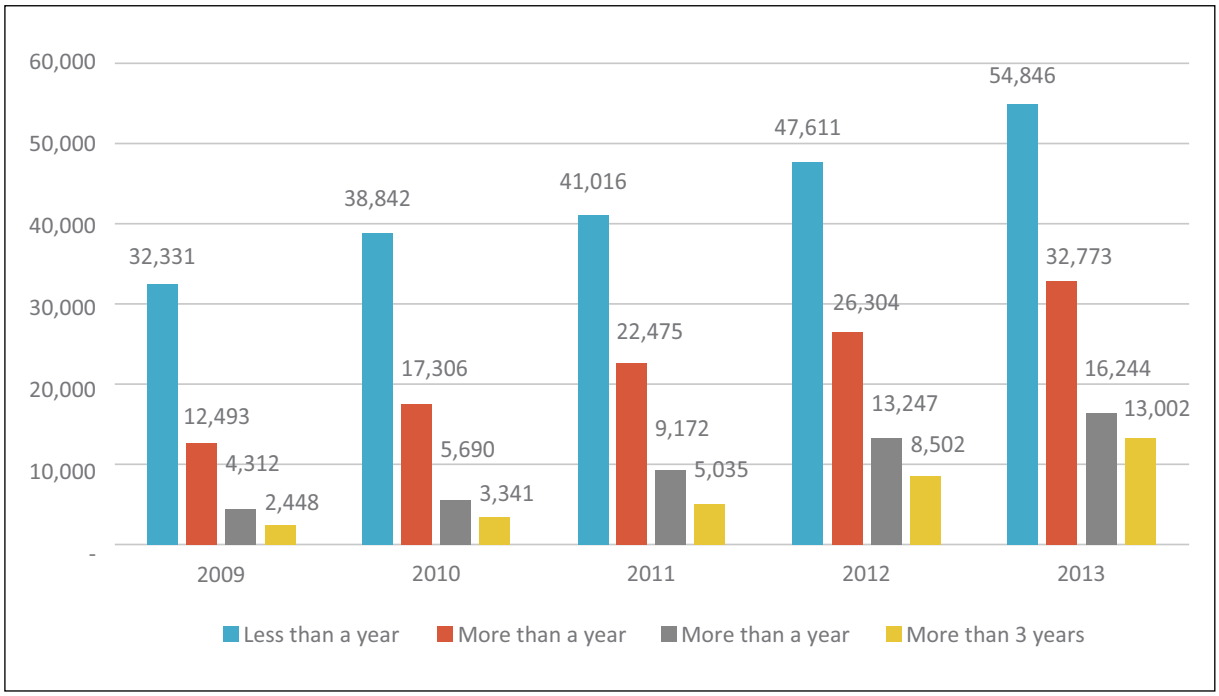
The observations for CABA's first instance court also apply here, as the data source is the same. From 31 August 2014 to 31 December 2019, *the Cámara Nacional de Apelaciones del Trabajo* issued 72,705 rulings (Cámara Nacional de Apelaciones del Trabajo—Prosecretaría General, 2020).

TABLE 8.41 Average duration of first instance lawsuits

Year	Less than a year	More than a year	More than 2 years	More than 3 years
2009	32,331	12,493	4,312	2,448
2010	38,842	17,306	5,690	3,341
2011	41,016	22,475	9,172	5,035
2012	47,611	26,304	13,247	8,502
2013	54,846	32,773	16,244	13,002

Source: Authors' elaboration based on (Poder Judicial de la Nación (2021).

FIGURE 8.10 Average duration of first instance lawsuits



Source: Authors' elaboration.

A further observation is necessary regarding disputes arising from accidents at work and occupational diseases. In 2017, Córdoba adhered to the complementary Law No. 27.348 through Law No. 10.456: as a result, labour disputes related to accidents at work and professional diseases decreased in the last quarter of that year (the law entered into force in September) by 77 per cent compared to the last quarter of 2016 (Centro de Estudios y Proyectos Judiciales, Tribunal Superior de Justicia del Poder Judicial de Córdoba, 2021).

8.4.8 Geographical distribution

TABLE 8.42 Geographical distribution of labour disputes—first instance, CABA, 2009–2013

Court No.	2009				2010				2011				2012				2013			
	Pend.	Received		Solv.	Pend.	Received		Solv.	Pend.	Received		Solv.	Pend.	Received		Solv.	Pend.	Received		Solv.
		New	Prev.			New.	Prev.			New	Prev.			New	Prev.			New	Prev.	
1	390	531	4	368	557	606		502	661	643	1	564	741	684	4	500	929	795	5	542
2	550	515	3	418	650	624	5	490	789	635	2	469	957	671	2	406	1,224	796	3	400
3	467	515	9	403	588	599	4	403	788	633	4	448	977	670	8	405	1,250	780	2	476
4	590	519	6	413	702	608	6	455	861	626	3	433	1,057	688	14	444	1,315	784	23	545
5	526	523	2	370	681	614	2	427	866	646	6	445	1,073	684	7	463	1,301	795	12	578
6	408	513	4	411	513	597	9	465	654	657	8	548	771	696	2	546	923	686	13	361
7	513	521		311	723	601	3	404	923	622		463	1082	676	4	422	1,340	802	5	475
8	606	532	8	345	801	616	5	391	1,031	647	8	448	1,238	681	2	419	1,502	799	7	530
9	703	523	6	371	861	620	4	384	1,101	625	7	384	1,349	660	4	393	1,620	803	6	713
10	583	521	11	383	732	603	13	416	932	645	24	543	1,058	680	13	460	1,291	797	8	549
11	616	525		380	761	593	1	404	951	622	3	480	1,096	651		429	1,318	785	4	532
12	394	530	4	392	534	607	1	454	688	642	8	492	846	672		448	1,070	803	10	537
13	500	522		369	653	595		408	840	666	2	424	1,084	671	9	439	1,325	804	16	536
14	584	515	2	385	716	618	1	385	950	584	2	416	1,120	775	7	462	1,440	789	14	436
15	481	513	26	467	553	578	30	504	657	624	31	497	815	603	9	493	934	812	8	640
16	543	525	11	443	636	616	4	472	784	642	5	485	946	642	8	562	1,034	797	8	540
17	415	524	2	371	570	563	6	570	569	656	11	570	666	636	11	497	816	794	19	691
18	428	502	1	355	576	605	4	411	774	648	1	406	1,017	667	2	440	1,246	792	8	513
19	503	508	3	378	636	597	1	430	804	650		486	968	673	2	463	1,180	787	4	474
20	398	508	4	412	498	592	13	495	608	626	4	590	648	692	3	593	750	783	4	634
21	195	504	27	464	262	604	33	594	305	594	28	617	310	703	29	549	493	791	14	681
22	386	521	6	469	443	600	8	503	548	650	10	595	613	681	13	470	837	804	19	682
23	670	507		335	842	602	4	338	1,110	577	7	330	1,364	758	11	424	1,709	794	43	515
24	505	502	1	374	634	600	8	453	789	633	5	461	966	683	6	502	1,153	803	2	535
25	455	531	9	383	612	610	9	424	807	671	6	332	1,152	648	4	372	1,432	825	2	447
26	360	540	6	410	496	613	1	438	670	557	8	437	798	779	2	550	1,029	802	10	566
27	356	513	1	366	504	613	1	426	692	573	8	578	695	770	5	623	847	793	9	610
28	610	519	8	305	832	606	15	430	1,023	626	8	383	1,274	660	15	391	1,558	793	18	422
29	560	528	3	335	756	604	4	394	970	645	1	440	1,176	681	4	406	1,455	810	7	476
30	637	525	3	599	566	621	4	576	615	574	11	450	750	839	11	422	1,178	765	12	390
31	518	512		357	673	602	6	391	890	591	4	389	1,096	760	3	447	1,412	795	3	536
32	406	527	3	441	495	607	7	511	598	658	6	536	726	687	9	549	873	789	7	589
33	548	526	6	323	757	614	2	394	979	625	6	478	1,132	679	1	430	1,382	803	12	488
34	698	527	4	325	904	610	1	352	1,163	571	3	387	1,350	761	2	455	1,658	806	3	524
35	417	519	3	345	594	605	2	414	787	572	2	420	941	572	2	574	941	1174	5	484
36	674	529	5	402	806	618	8	431	1,001	655	7	457	1,206	692	6	473	1,431	795	18	622
37	505	504	6	380	635	591	17	420	823	621	7	389	1,062	666	17	396	1,349	792	6	438
38	627	516	1	323	821	605	2	335	1,093	561	3	382	1,275	756	2	464	1,569	799	1	486
39	372	529	7	398	510	598	6	507	607	552	5	440	724	785	6	523	992	787	4	524
40	731	529	1	347	914	625	1	404	1,137	642	1	374	1,406	680	1	426	1,661	822		456
41	418	525	2	361	584	604	7	439	756	647	4	589	818	664	6	499	989	804	15	586
42	621	539	7	365	802	633	6	392	1,049	663		392	1,320	693	4	372	1,645	792	6	1,044
43	720	528	2	437	813	610	7	405	1,024	661	4	532	1,157	684	4	478	1,367	790	9	570
44	585	528	4	462	655	607	2	467	797	656	6	524	935	681	7	484	1,139	798	8	494
45	608	509	1	354	764	597	6	404	963	650	7	500	1,120	693	5	533	1,285	800	7	607
46	298	541	19	437	421	627	8	479	577	688	21	571	715	698	10	412	1,011	792	54	571
47	568	542	1	433	678	628	5	520	791	663	1	533	922	690	3	518	1,097	828	7	529
48	542	523	2	393	674	604	3	413	868	647	6	447	1,074	639	4	409	1,308	789	37	575
49	628	518	14	420	740	589	27	472	884	666	14	468	1,096	648	6	415	1,335	793	5	524
50	598	524	9	436	695	573	3	358	913	659	2	462	1,112	679	5	430	1,366	791	12	471
51	709	512	5	337	889	621	4	374	1,140	663	3	778	1,028	680	10	555	1,163	804	34	676
52	561	520	4	373	712	586	2	410	890	692	1	453	1,130	674	8	442	1,370	799	7	581
53	306	519	5	373	457	621	6	491	593	667	14	483	791	688	2	487	994	794	15	556

→

Court No.	2009				2010				2011				2012				2013			
	Pend.	Received		Solv.	Pend.	Received		Solv.	Pend.	Received		Solv.	Pend.	Received		Solv.	Pend.	Received		Solv.
		New	Prev.			New.	Prev.			New	Prev.			New	Prev.			New	Prev.	
54	369	528	2	442	457	619	2	446	632	660	7	600	699	689	6	576	818	796	9	659
55	444	530	6	347	633	599	1	413	820	652	5	700	777	682	13	607	865	800	9	637
56	244	507	2	381	372	593		434	531	655		480	706	707	8	504	917	781	2	556
57	565	503	15	434	649	602	18	422	847	635	44	515	1,011	671	34	551	1,165	767	47	566
58	539	526	5	395	675	608	7	451	839	677	3	467	1,052	686	9	496	1,251	809	8	411
59	638	524	5	372	795	608	7	410	1,000	665	1	499	1,167	678	1	482	1,364	796	5	491
60	487	527	4	404	614	603	4	411	811	680	5	532	964	690	1	519	1,136	796	10	560
61	402	510	5	400	517	618	11	466	680	669	4	552	801	698	11	490	1,020	784	8	544
62	441	511	10	421	541	602	7	459	691	656	9	531	825	681	3	527	982	793	12	538
63	552	528	5	317	768	611	1	447	933	661	3	517	1,080	677	1	404	1,354	796	3	517
64	534	527	7	347	721	632	12	427	938	646	9	491	1,102	674	5	499	1,282	805	1	390
65	469	530	27	420	606	616	47	485	784	700	85	535	1,034	714	134	706	1,176	820	106	725
66	248	514	6	381	400	557	7	473	491	651	17	575	584	698	7	602	687	786	25	675
67	375	535	1	381	530	615		462	683	662	2	498	849	698		465	1,082	794		542
68	736	523	4	348	915	608	2	411	1,114	583	1	346	1,352	762	3	371	1,746	792	13	466
69	410	501	4	388	527	633		418	742	594		343	993	760	9	441	1,321	798	20	521
70	338	533	3	398	476	604	4	487	597	568	5	451	719	763	3	514	971	798	2	477
71	471	527	8	400	606	619	5	435	795	566	5	439	927	778	1	471	1,235	800	5	517
72	218	530	1	435	314	597	6	494	423	575	5	523	480	755	3	578	660	792	11	514
73	641	525	4	392	778	601	4	407	976	580	3	568	991	768	4	591	1,172	797	5	626
74	718	508	2	296	932	606	2	358	1,182	568	2	457	1,295	768	5	518	1,550	790	1	533
75	531	542	2	431	644	619		454	809	537	3	384	965	789	6	435	1,325	819		462
76	425	511	2	446	492	606	4	482	620	588	1	450	759	769	5	549	984	796	6	578
77	258	524	4	474	312	613	4	487	442	545	2	525	464	782	4	596	654	765	8	662
78	808	534	3	357	988	607	6	406	1,195	570		418	1,347	766	1	528	1,586	776	4	494
79	790	508	10	354	954	599	20	434	1,139	563	8	428	1,282	732	18	462	1,570	806	1	431
80	404	520	10	438	496	619	7	474	648	581	8	507	730	762	13	550	955	802	26	601

Source: Authors' elaboration based on Poder Judicial de la Nación (2021).

TABLE 8.43 Córdoba's resolution rate—first instance, 2015–2020

Year	Res. Rate
2015	86.8%
2016	44.2%
2017	95.3%
2018	121.2%
2019	91.5%
2020	68.3%

Source: Authors' elaboration.

TABLE 8.44 CABA´s resolution rate–first istance, 2009–2013

Year	Res. Rate
2009	74.0%
2010	71.7%
2011	75.9%
2012	68.3%
2013	67.3%

Source: Authors' elaboration.

TABLE 8.45 CABA's resolution rate—second instance, 2009–2013

Year	Res. Rate
2009	94.8%
2010	78.4%
2011	77.2%
2012	77.0%
2013	78.8%

Source: Authors' elaboration.

Regarding appeals, see the observations above.

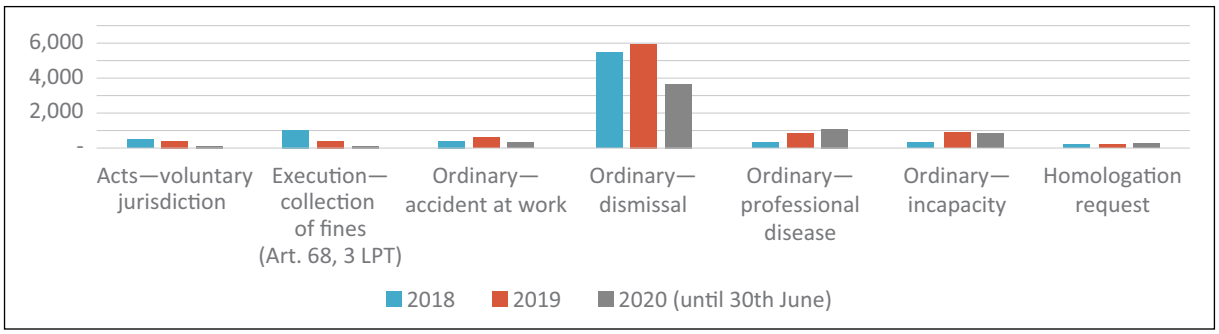
No data could be found regarding the disposition times (and there are no available data to calculate them).

TABLE 8.46 Córdoba's labour disputes, disaggregated by the seven most frequent types of lawsuit

	2018	2019	2020 (until 30 June)
Acts—voluntary jurisdiction	482	418	140
Execution—collection of fines (Art. 68, 3 LPT)	1,000	399	146
Ordinary—accidents at work	424	605	370
Ordinary—dismissal	5,459	5,936	3,638
Ordinary—occupational diseases	347	829	1,087
Ordinary—incapacity	353	850	803
Homologation request	215	206	262

Source: Authors' elaboration based on (Centro de Estudios y Proyectos Judiciales, Tribunal Superior de Justicia del Poder Judicial de Córdoba (2020).

FIGURE 8.11 Córdoba's labour disputes disaggregated by the seven most frequent types of lawsuit, 2018–2020



Source: Authors' elaboration.

TABLE 8.47 Percentage of disputes arising from Law No. 24.557 relative to the total number of cases, 2017–2020

Year	2017	2018	2019	2020
Disputes arising from Law No. 24.557 relative to the total number of cases	24%	10%	16%	13%

Source: Centro de Estudios y Proyectos Judiciales, Tribunal Superior de Justicia del Poder Judicial de Córdoba (2021).

TABLE 8.48 CABA's labour disputes, by category

	Categories	
Items	**First instance *(Juzgados)***	**Appeals *(Salas)***
Item A	Dismissal, indemnity for death, indemnity Art. 212 LCT, prior notice, other indemnities in special legislation, wage collection and wage disparity, wage in the event of suspension, unfair competition, other non-codified claims, unfair practices, and homologation	Same contents plus trade union legislation and appeals
Item B	Accidents (civil suit), collection of taxes and contributions, appropriation and Law No. 22.250 (Construction Workers Regime)	Same
Item C	Accidents at work/occupational diseases, execution of labour credits, fiscal execution, precautionary execution, Ministry of Employment investigations, appeals for fines, Law No. 12.908 (Professional Journalist Regime), declarative action, eviction and execution of contributions	Same contents plus summary procedure
Item D	Amparos and fast summary procedure (*sumarísimo*)	Same
Item E	Precautionary measures and preliminary procedures	Same

Source: Authors' elaboration.

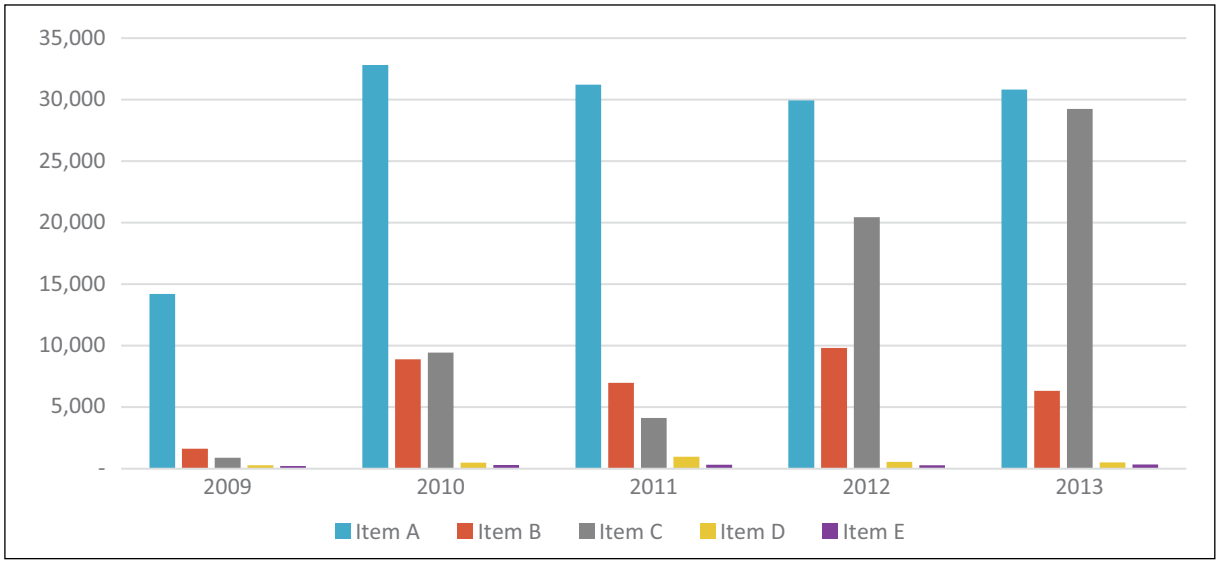
8.4.9 National Chamber of Labour Appeals

TABLE 8.49 Labour disputes by category—first instance, CABA, 2009–2013

	2009	2010	2011	2012	2013
Item A	14,213	32,817	31,213	29,931	30,821
Item B	1,621	8,892	6,982	9,819	6,335
Item C	894	9,445	4,132	20,435	29,253
Item D	276	487	980	552	514
Item E	212	305	321	281	344

Source: Authors' elaboration based on Poder Judicial de la Nación (2021).

FIGURE 8.12 Labour disputes by category—first instance, CABA, 2009–2013



Source: Authors' elaboration.

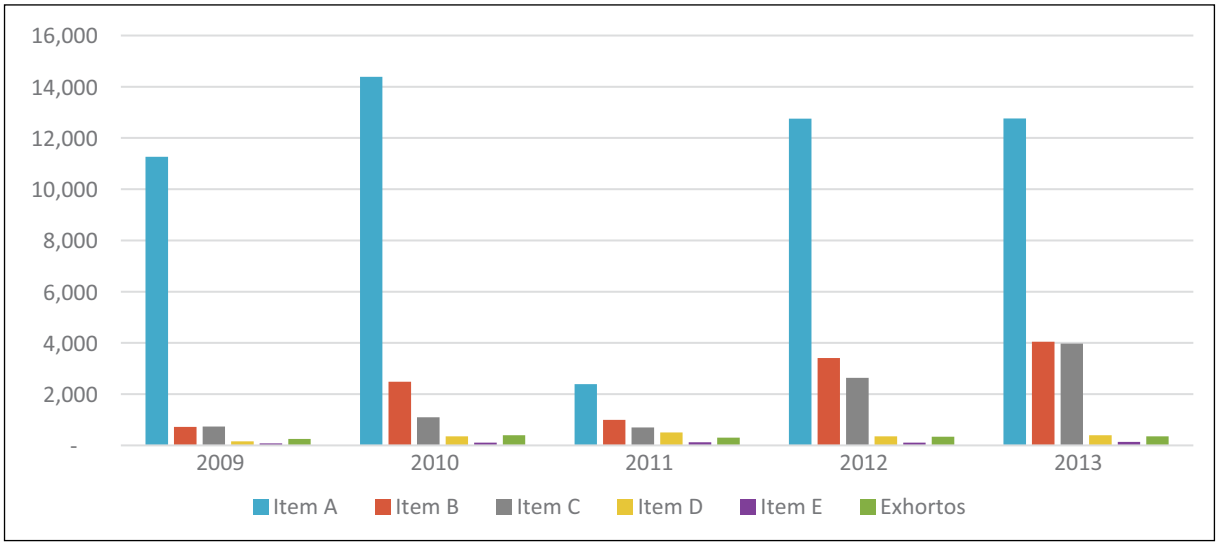
8.4.10 National Labour Appeals Chamber

TABLE 8.50 Appeals by category—second instance, CABA, 2009–2013

	2009	2010	2011	2012	2013
Item A	11,263	14,387	2,389	12,755	12,762
Item B	721	2,485	998	3,412	4,044
Item C	740	1,096	698	2,640	3,971
Item D	156	352	506	356	395
Item E	79	111	124	108	137
Exhortos	255	398	302	341	352

Source: Authors' elaboration based on Poder Judicial de la Nación (2021).

FIGURE 8.13 Labour appeals by category—second instance, CABA, 2009–2013



Source: Authors' elaboration.

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CHAPTER 9. CASE STUDY: SOUTH AFRICA

9.1 EMPLOYMENT PROTECTION

9.1.1 Origins and evolution of labour legislation, employment protection and trade unions

A dramatic mineworkers' strike in 1922 was followed by South Africa's first comprehensive but primitive labour legislation: The Industrial Conciliation Act of 1924.

This Act provided for job reservations for whites, excluded blacks from membership of registered trade unions and prohibited registration of black trade unions. By 1941, the Factories, Machinery and Building Works Act placed a cap on skilled workers' overtime hours. While this provision was meant to preserve skilled labour, it had the unintended effect of reducing the net income of these skilled workers. The Act also established minimum safety standards and working conditions. Factory owners were required to allocate racially-segregated work, recreation and eating areas for employees and safeguard their physical, moral and social welfare. It is beyond dispute that these 'protective' mechanisms were implemented in the interest of racial segregation.

In 1948, the National Party government deepened job reservation and policies for lower quality education for the 'natives'. These were designed to hamstring the indigenous population's chances in the job market.

The government was also aware of the inevitable need to address growing political agitation. One of the reforms included new provisions for the establishment of closely monitored trade unions, to channel workers' dissent.

The Industrial Conciliation (Natives) Bill (1947) received support from employers' organisations drawn from secondary industry. It provided for some recognition to African trade unions. However, the bill precluded them from affiliating with any political organisation and participating in political activities, as well as from joining any trade union confederations. These unions were 'inescapably political'.

With the Bantu/Native Building Workers Act (Act No. 27 of 1951), the apartheid government made a marginal move towards including non-whites, by allowing them to be trained as artisans in the building industry, something previously reserved for whites. The primary goal of the Act was to protect white and coloured workers against the threat of competition from black workers. Africans who performed skilled jobs without special permission, except for that had been allocated, were guilty of an offence.

The Industrial Conciliation Amendment Act of 1956 introduced single-race trade unions. This Act was a direct attack on the growing multi-racial trade unions. In a bid to separate labour issues from political ones, the Industrial Conciliation Further Amendment Act No. 61 (1966) prohibited strikes and lockouts for any purpose unconnected with the employee/employer relationship.

The Occupational Diseases in Mines and Works Act No. 78 (1973) sought to compensate workers who developed certain occupational lung diseases. This Act was only deracialised by the Amendment Act in 1993.

The Industrial Conciliation Amendment Act No. 94 (1979) repealed the job reservation provision in the 1953 Act and provided for blacks to be allowed to join unions. The exclusion of migrant workers, which were by then a permanent fixture of the South African labour force, and frontier commuters remained in force, until it was lifted by the Government Gazette No. 6679, of 28 September 1979. The South African Communist Party and the Congress of South African Trade Unions (COSATU) were crucial in overthrowing apartheid, and retained power and influence into the 1990s.

In terms of legal doctrine, the human rights of workers in South Africa have improved with the advent of constitutional democracy. The legal doctrine of any jurisdiction can arguably be gleaned from the Constitution, statutes, and judicial precedent. It is therefore important to trace the status of labour rights in these sources of South African law.

The 1993 Constitution ushered in the concept of 'constitutional supremacy'. For the first time in South African history, labour rights became part of the bill of rights entrenched in supreme law. This was a legal-political victory for employees (embodied in labour unions such as COSATU) who had been so influential in the fight against apartheid.

A. Protests and trade unions in South Africa

O'Connor (2017) points out that after the Rivonia trial in 1964, most of the African National Congress's (ANC) leaders were imprisoned or forced into exile. The ANC's active presence inside the country's borders was limited to periodic and generally unsuccessful incursions of its armed wing, Spear of the Nation (MK), which engaged in a sabotage campaign and armed acts of propaganda. However, the apartheid regime was violently contested by an array of social movements—or 'civics', as they were known—in the townships. In 1983, this led to the formation of the United Democratic Front (UDF). Since the early 1970s, extensive labour militancy rendered the broader trade union movement a formidable opponent to the regime. This period was an upsurge in worker's mobilisation in the Durban area, with over 100,000 workers engaging in strike actions in 1973 alone.

The participatory democratic union culture that emerged in those years ensured the horizontal democratic practices of striking workers, making repression and co-optation difficult by refusing to nominate leaders or bargaining teams. The protests resulted in notable gains for workers and the establishment of the Wiehahn Commission in 1979, which proposed the recognition of black unions as a means of co-opting and controlling them.

Early union militancy tended to be workerist in character, meaning they prized class-based, 'shop floor' concerns over the broader goal of nationalist, anti-colonial struggle.
In 1979, workerist unions joined to form the Federation of South African Trade Unions (FOSATU). They placed participatory democracy in the workplace at the top of their agenda to build their power base. However, unionism was not limited to those with a workerist perspective. Other federations adopted a form of social movement unionism based on the view that political and economic liberation were inseparable and that the working class had to assert its leadership within the liberation movement.

There was a massive growth in union membership across all unions between 1979 and 1983, rendering organised labour a key site of opposition to apartheid. Despite the growing political tumult led by social movements, political unionism became the dominant labour union approach. This transformation to an overtly anti-apartheid repertoire was evidenced by FOSATU's participation in a two-day stay at the Transvaal, organised by the Congress of South African Students (COSAS) in 1984. In 1985, COSATU was established, incorporating some workerist principles and a strong commitment to fight apartheid at the national level. Its advent changed the style of working-class politics, heralding a new unionism with overt ties to the nationalist movement.

Political resistance to apartheid was somewhat fragmented until the Soweto uprising against the imposition of Afrikaans as the language of instruction in 1976 gave new momentum to the struggle. The late 1970s were characterised by growing political unrest, fragmented and organised by 'civics' at the local level. Protests usually targeted local black authorities that governed the townships at the behest of the apartheid government and consisted of campaigns against rents hikes and poor housing. These fragmented protests gained more coherence with the foundation of the United Democratic Front (UDF) in 1983, to protest against the government's proposed new constitution. It united civics, church groups, student associations and workers, totalling 600 organisations and over two million people. In 1985, mass protests responded to a call by the ANC to render the townships ungovernable, leading to widespread public disorder and the declaration of martial law in over 155 municipalities, which forced the government into negotiations. The UDF's success symbolised an ethos of people's power, self-government and participatory democracy that informed popular protests in the post-apartheid era.

After a long and often violent struggle, apartheid was brought down by the strength of unions and grassroots movements, in conjunction with the ANC. The 1994 election, which had a remarkable

voter turnout of 86 per cent, was a massive success for the ANC. The party obtained over 60 per cent of the votes. In preparation for the election, the Triple Alliance was formed between the ANC, the South African Communist Party (SACP) and COSATU to nominate candidates for the ANC party list. COSATU had enjoyed considerable growth, from 462,000 members in 1985 to 1,317,000 members in 1994, heavily influencing the ANC's early economic policies.

The ANC initially fulfilled radical promises after coming into power, implementing the 1995 Labour Relations Act and pro-union legislation, which provided for economic democracy at the workplace and was popularly viewed as having adjusted the balance of forces to reflect the more significant influence of organised labour in the new post-apartheid scenario. Is also established the National Economic Development and Labour Council (NEDLAC), which allowed union participation in macro-economic policymaking.

However, according to O'Connor (2017), the commitment to social justice and redistribution shifted from policy implementation to empty rhetoric with the adoption of a new macro-economic policy, known as the Growth, Employment and Redistribution Plan (GEAR) in 1996. It aimed at achieving sustainable long-term economic growth based on fiscal and monetary discipline and the reduction of government debt. Criticised by both COSATU and the SACP, it adhered to neoliberal dictates of wage restraint, relaxed labour regulations, strict fiscal targets, and widespread privatisations of state assets.

The close relationship between the ANC and COSATU began to deteriorate with the consolidation of South Africa's budding democratic system. However, through the Triple Alliance, COSATU was itself "ensconced in the corridors of power", and this radically altered the capacity of the labour movement to confront the governing establishment. Union leaders became detached from their roots and identified more with those in power than with the workers they ostensibly represented, weakening and atrophying the labour movement.

The implementation of the Black Economic Empowerment (BEE) programme promoted the transfer of shares, which were acquired disproportionately by a small number of prominent, politically-connected black figures. Many beneficiaries were from the trade union movement. The transformation of trade unionists into businesspeople also reached more modest, local levels, with hundreds of regional and local activists becoming small business owners. It led to a decisive depoliticisation of the movement, with many shop stewards joining their respective unions to enhance their above-ground career prospects.

These developments led to a crisis of representation within the labour movement. It made little progress in mobilising informal workers or addressing issues of rural poverty. Unions became synonymous with corruption after the establishment of union investment companies. In less than a decade, COSATU had gone from being one of the main actors in the defeat of apartheid to "little more than a futile counterweight to the ANC's neoliberalism". It was surpassed by the emergence of a new wave of social movements in the early 2000s.

O'Connor (ibid.) argues that the contradictions ingrained in the transition that brought the ANC to power were readily apparent: it was impossible to constantly endure compromising political participation for socioeconomic justice.

However, trade unions continued to support this situation, and the masses repeatedly endorsed the ongoing institutional arrangement by voting for the ANC. The author offers two explanations for this situation. First, there was considerable overlap in membership between union militants and the ANC, a complementary dual identity bolstered by emotional commitments, mutual bonds and interpersonal loyalties. Second, the ANC successfully presented a dichotomous identity: rigidly enforcing the GEAR program and harking back to its revolutionary heritage, and at the same time presenting itself as radically opposed to neoliberalism.

COSATU remained loyal to the ANC because of the legacy of the shared struggle against apartheid. It felt that rupturing its link to the government would result in isolation and deprive it of its dwindling influence. However, in the long term, this cautious approach radically undermined COSATU and delegitimised it in the eyes of the workers it claims to represent.

9.1.2 Constitutional protection of labour

As mentioned, the origins of labour rights relate to the struggle against apartheid. Generous labour rights were included in both the Interim (1993) and Final Constitutions (1997),[1] and barely two years after the 1994 elections a new set of labour statutes were enacted, giving effect to these fundamental rights (Van Eck 2010). In its recent Constitution, South Africa not only guarantees the traditional first generation of liberal rights, but also several second-generation socioeconomic rights, such as access to adequate housing, health and care services, sufficient food and water, and social security.

Concerning labour rights and principles, the Constitution provides that "no one may be subjected to slavery, servitude or forced labour" (section 13); "everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions" (section 16); "everyone has the right to freedom of association" (section 18); and "every citizen has the right to choose their trade, occupation or profession freely" (section 22).

Under the heading "Labour Rights", it is specified that everyone has the right to fair labour practices (section 23(1)); every worker has the right to form and join a trade union and to strike (section 23 (2)); every employer has the right to form and join an employer's organisation (section 23(3)(a)); and every trade union, employer's organisation and employer has the right

1. The Interim Constitution established the procedures for the negotiation of the Final Constitution, which was signed by Nelson Mandela in 1996 and came into effect on 4 February 1997.

to engage in collective bargaining (section 23(5)). Also, "national legislation may recognise union security arrangements contained in collective agreements" (section 23 (6)).

Van Eck (ibid.) argues that there is great potential to protect workers' rights under this constitutional framework, both due to its broad scope of coverage and its direct horizontal application. In addition to public service employment relationships, employment in the private sector is directly covered by the Constitution's application. It also strengthens labour standards as current and future governments may find it challenging to erode workers' rights without meeting a constitutional challenge.

South Africa's Constitution is the only one, in addition to Malawi's, to include the right to fair labour practices and not the right to work. While according to the constitutional court it is impossible to precisely define this right, Van Eck (2010) posits that it should protect against unfair labour practices relating to work security (unfair dismissal, suspension and the failure to re-employ or reinstate) and employment opportunities (promotion, demotion, probation, training, benefits, and victimisation arising from whistleblowing) (as codified in the Labour Relations Act); it should also ensure the minimum conditions guaranteed in the Basic Conditions of Employment Act.

In this sense, the Labour Relations Act (LRA) defines unfair labour practices as an act or omission that arises between an employer and employee involving:

a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for reasons relating to probation) or training of an employee or relating to the provision of benefits to an employee;

b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal;

c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act of 2000, on account of the employee having made a protected disclosure defined in the Act.

9.1.3 Substantive labour law

The introduction of a new framework for labour marker regulation has been cited as one of the most significant achievements of South Africa's post-apartheid government (Benjamin 2016).

The process of social dialogue over labour legislation that emerged in the late apartheid era was institutionalised by creating the NEDLAC in 1994. It became the forum for negotiations of the leading South African trilogy of labour laws: the Labour Relations Act of 1995 (LRA); the Basic Conditions of Employment Act of 1997 (BCEA); and the Employment Equity Act of 1998 (EEA).[2] The overall goal of these laws was to establish core worker rights, facilitate South Africa's reintegration into the world economy, and transform a labour market marked by low skilled jobs and high inequality and unemployment rates.

One of the mains problems to be solved was eliminating the differences between population groups, which originated with the colonisation process and deepened during the apartheid regime. The preamble of the EEA recognises "that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws." The purpose of the Act was to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workforce.

The EEA determines that no person may be unfairly discriminated, directly or indirectly, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth. This list is not definitive and, as stated by the Constitutional Court, there "will be discrimination on an unlisted ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner" (Harksen v Lane, 1997).

The Act's affirmative action provisions encompass a substantive concept of inequality embodied in the Constitution and are applied only to designated employers. In the original 1998 text, they encompassed employers with 50 or more employees, employers with fewer than 50 employees but with specific turnover, and all municipalities and state organs. An Amendment Act in 2013 expanded this definition to include employers bound by a collective agreement declaring them a 'designated employer'.

Affirmative actions are defined in the Act as measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in a designated employer's

2. The LRA and the BCEA are further analysed in the next sections.

workforce. These measures include preferential treatment and numerical goals but exclude quotas. The designated employers must prepare and implement an employment equity plan to achieve employment equity in the workforce.

South Africa's post-apartheid labour laws have retained the standard employment relationship as the normative model for employment. As Benjamin (2016) points out, the "key definition of an employee, which determines the ambit of the labour legislation, was imported without significant changes from its apartheid-era predecessor. While the definition was open to a broad purposive interpretation, the courts tended to interpret it narrowly and formalistically.

Non-standard employment had emerged during apartheid, but its significant growth after 1994 has impacted negatively on the capacity of the post-apartheid legislation to achieve its goals."

Despite the protective norms listed above, the South African labour market has experienced a large increase in informality. Non-standard forms of employment have increased through the deployment of labour brokers and the rise of outsourcing in the public and private sectors. Firms have been restructured to reduce standard employment, leading to an increase in self-employment in both the formal and informal sectors of the economy.[3] In addition, 'disguised employment'—employees who were 'converted' into independent contractors by contractual stipulations to avoid labour legislation—intensified after 1995.

In 2002, a rebuttable presumption of employment was introduced into the LRA and the BCEA to help vulnerable workers assert their rights as employees. It is applied irrespective of the form of the employment relationship, "emphasising that a court must inquire into the realities of an employment relationship rather than being content to scrutinise the wording of the contract" (Benjamin 2016). Once the employee establishes that one of seven factors stipulated in the legislation is present, the employer must present evidence about the nature of the employment relationship to show that the claimant is not an employee. In 2006, NEDLAC issued the 'Code of Good Practice: Who is an Employee', seeking practical guidance to distinguish employment from self-employment.

South African labour courts have adopted a purposive approach about the classification of a worker as an employee. While the presumption does not apply to employees earning above the threshold of earnings established by the Ministry of Labour, the courts have taken the listed factors into account when analysing the employment of high-earning employees. Moreover, the broader interpretation of the definition of 'employee' often emerges in cases involving traditionally difficult categories of employment on the cusp between employment and self-employment, such as real estate agents. However, vulnerable 'non-standard' workers

3. Since 2008, with the introduction of the Quarterly Labour Force Survey (QLFS), Statistics South Africa (STATS SA) has considered that informal employment includes those people working in the informal sector as well as those displaying informal characteristics working in the formal sector (Yu 2012).

have been brought into the statutory net by judicial fiat. In this sense, the courts have rejected arguments that the definition of employee excludes employment relationships that are tainted by illegality in some regard. This has resulted in the expansion of statutory protection to foreign employees hired without the requisite permits, refugee, and sex workers.

A. Employment contracts and freedom of negotiation

The BCEA regulates the right to fair labour practices conferred by Article 23(1) of the South African Constitution and gives effect to obligations incurred by the country as a member state of the International Labour Organization (ILO). The BCEA is applied to all employees and employers, except members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service; and unpaid volunteers working for an organisation serving a charitable purpose. This Act also applies to persons undergoing vocational training, except to the extent that the provisions of any other law regulate any term or condition of their employment. The BCEA forbids the employment of children under 15 years old, or who are under the minimum school-leaving age and forced labour.

The Act defines a basic condition of employment as a term of any contract of employment, except to the extent that: a) any other law provides a term that is more favourable to the employee; b) the basic condition of employment has been replaced, varied, or excluded by the provisions of the Act; or c) a term of the contract of employment is more favourable to the employee than the basic condition of employment.

Regulation of working time

An employer may not require or allow an employee to work more than 45 hours a week and nine hours a day if the employee works for five days or fewer a week, or eight hours a day if the employee works more than five days a week. The ordinary hours of work may be extended, by agreement, by up to 15 minutes a day, but no more than 60 minutes a week to accommodate an employee whose duties include serving members of the public.

The BCEA does not allow overtime work, except under an agreement, and it is limited to three hours a day and ten hours a week. The employer must pay an employee at least 1.5 times the employee's wage for overtime worked. By agreement, the employer may pay no less than the employee's ordinary wage for overtime worked and grant the employee at least 30 minutes off on full pay for every hour worked above the limit or grant at least 90 paid minutes off for each hour of overtime worked. These payments should be made within one month of the employee becoming entitled to them. A written agreement may increase this period to 12 months. Furthermore, the BCEA allows a compressed work week, regulated by written agreement. In this case, the employee can work up to 12 hours a day, including meal breaks, without receiving overtime pay.

The employer must grant employees who work continuously for more than five hours a meal interval of at least one continuous hour. During this time, the employee may only be required to perform duties that cannot be left unattended and cannot be performed by another person. Employees must be remunerated for meal intervals when required to work or required to be available to work, and for any portion of meal interval that is over 75 minutes unless they live on the premises where the workplace is located. A written agreement may reduce the meal interval to no less than 30 minutes or dispense it altogether for a employees who work fewer than six hours a day.

Employees have the right to a daily rest period of at least twelve consecutive hours between ending and recommencing work, and a weekly rest period of at least 36 consecutive hours, including Sunday. The daily rest can be reduced to ten hours, by written agreement, for employees who live on the workplace premises and whose meal interval lasts for at least three hours. Similarly, a written agreement may establish a weekly rest of 60 consecutive hours every two weeks or reduce it by up to eight hours in any week if the rest period in the following week is extended by the same length of time. Sunday workdays should be remunerated at double rate for each hour worked, unless the employee usually works on Sundays, in which case the employer must pay 1.5 times the employee's hourly wage rate.

The BCEA defines 'night work' as performed between 18:00 and 06:00, and it is allowed by agreement. In this case, the employee is compensated by the payment of an allowance, which may be payment for a shift, a reduction of working hours, or the offer of transportation between the employee's residence and workplace at the beginning and the end of the shift. If the employee regularly needs to work after 23:00 and before 6:00, the employer must inform the worker in writing, or orally if the employee is not able to understand written communication, of any health and safety hazards associated with the tasks that must be carried out, as well as the employee's right to undergo a medical examination before and during the work.

By agreement, an employer may require the employee to work on a public holiday. If it falls on a workday, the employer must, at least, double the regular daily wage or, if it is better for the employee, pay the average salary plus the amount earned for the time worked that day. If the public holiday falls on a day when the employee does not usually work, the employer must pay an amount equal to the employee's ordinary daily wage, plus the amount earned for the work performed that day.

Annual leave

According to the BCEA, an 'annual leave cycle' is a 12-month period of employment with the same employer. The employer must grant the employee at least 21 consecutive days with full remuneration, or, by agreement, one day of annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid. An agreement between

the parties defines the period of the annual leave. However, if a deal is not achieved between the parties, it is determined by the employer.

Sick leave

BCEA defines a 'sick leave cycle' as 36-month period of employment with the same employer, during which the employee is entitled to an amount of paid sick leave equal to the number of workdays in six weeks. During the first six months of employment, the employee has a right to one day of sick leave for every 26 days worked.

Maternity leave

An employee is entitled to at least four consecutive months of maternity leave, which may start at any time from four weeks before the expected date of birth unless otherwise agreed, or on a date which a medical practitioner or a midwife certifies that is necessary for the employee's health or that of her unborn child. In the case of a miscarriage during the third semester of pregnancy or stillbirth, the employee is entitled to maternity leave for six weeks.

Remuneration

Wages are calculated according to the number of hours worked. Monthly remuneration is four and one-third times the weekly wage. If calculated on a basis other than time, or if the employee's remuneration or wage fluctuates from period to period, any payment must be calculated in reference to the preceding 13 weeks or, if employed for a shorter period, that time interval. An employer may not deduct money from an employee's remuneration unless there is a written agreement concerning the deduction or a specific debt, a collective agreement, law, court order or arbitration award. A deduction regarding damages or losses caused by the employee may only be made through agreement and after a fair procedure.

The national minimum wage (NMW)[4] came into effect on 1 January 2019 at R20 per hour. It applies to all workers, and established transition rules were established for those still earning less than this value. A new NMW rate of R20.76 started on 1 March 2020. However, some categories have a different rate. Farm workers are entitled to a minimum wage of R18.68 per hour; domestic workers, R15,57; and workers employed on an expanded public works programme, R11.42.

A collective agreement reached by a bargaining council may replace or exclude any basic condition of employment, except the following:

- the duty to arrange working time with regard to the health and safety and family responsibilities of employees;

4. National Minimum Wage Act OF 2018: <https://bit.ly/3H7ArGM>.

- reducing the protection afforded to employees on night shifts;
- reducing annual leave to less than two weeks;
- reducing entitlements to maternity leave;
- reducing entitlements to sick leave (to the extent permitted); and
- prohibiting child and forced labour.

Collective agreements and individual agreements may only replace or exclude basic employment conditions to the extent permitted by the Act or a sectoral determination. The Minister of Labour may decide to vary or exclude a basic condition of employment. This can also be done through the request of an employer or employer organisation. A determination may not be granted unless a trade union representing the employee has consented to the variation or has had the opportunity to make representations to the Ministry.

B. Employment relationship and special forms of employment

According to the LRA and the BCEA, a person who works for or renders services to any other person, regardless of the form of the contract, is considered an employee if one or more of the following factors are present:

a) the manner in which the person works is subject to the control or direction of another person;

b) the person's hours of work are subject to the control or direction of another person;

c) in the case of a person who works for an organisation, the person forms part of that organisation;

d) the person has worked for the other person for an average of at least 40 hours per month over the last three months;

e) the person is economically dependent on the other person for whom he or she works or renders services;

f) the person is provided with tools of the trade or work equipment by another person; or

g) the person only works for or renders services to one person.

These factors do not apply to any person who earns above the amount established periodically by the Minister of Labour in terms of section 6(3) of the BCEA.[5]

For the LRA and other employment legislation, "employer includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law". If more than one person is determined to be the employer under these terms, they are jointly liable for any failure to comply with employers' obligations.

In 2006, NEDLAC issued the "Code of good practice: who is an employee", sets out guidelines for determining whether persons are employees. Its purpose includes (section 2):

a) promoting clarity and certainty as to who is an employee for the LRA and other labour legislation;

b) establishing the interpretive principles contained in the Constitution, labour legislation and binding international standards that apply to the interpretation of labour legislation, including the determination of who is an employee;

c) ensuring that a proper distinction is maintained between employment relationships that are regulated by labour legislation and independent contracting;

d) ensuring that employees—who are in an unequal bargaining position relative to their employer—are protected through labour law and are not deprived of those protections by contracting arrangements;

e) to assist persons in applying and interpreting labour law to understand and interpret the variety of employment relationships present in the labour market including disguised employment, ambiguous employment relationships, atypical (or non-standard) employment and triangular employment relationships.

The Code establishes that the presumption of who is an employee applies regardless of the form of the contract. The nature of a labour contract cannot be determined merely by referencing either the obligations stipulated in it or a 'label' attached to the relationship. What matters is the actual nature of the employment relationship. The Code also details all the seven factors mentioned previously.

5. "The Minister must, on the advice of the Commission, make a determination that excludes the application of this Chapter or any provision of it to any category of employees earning in excess of an amount stated in that determination."

1. "The manner in which the person works is subject to the control or direction of another person". The control or direction factor will generally be present if the applicant is required to obey the lawful and reasonable commands, orders or instructions of the employer or the employer's personnel (for example, managers or supervisors) as to how they are to carry out their work. It is present in a relationship in which a person supplies only labour, and the other party directs the way he or she works. In contrast, control and direction are not present if a person is hired to perform a particular task or produce a particular product and is entitled to determine how the task is to be performed or the product produced. It indicates an employment relationship in which the employer retains the right to choose which tools, staff, raw materials, routines, patents, or technology are used. Likewise, the fact that an employer is entitled to take disciplinary action against the person because of the way he or she works is a strong indication of an employment relationship.

2. "The person's hours of work are subjected to the control or direction of another person". This factor will be present if the person's hours of work are a term of the contract, and the contract permits the employer or person providing the work to determine at what times work is to be performed. However, the fact that the contract does not determine the exact times of commencing and ending work does not entail that it is not a contract of employment. Sufficient control or direction may be present if the contract between the parties determines the total number of hours that the person is required to work within a specified period. Flexible working time arrangements are not incompatible with an employment relationship.

3. "In the case of a person who works for an organisation, the person forms part of that organisation". This factor may apply in respect of any employer that constitutes a legal entity. It does not apply to individuals employing, for instance, domestic workers. This factor will be present if the applicant's services form an integrated part of the employer's organisation or operations. A person who works for or supplies services to an employer to conduct their own business does not form part of the employer's organisation. Factors indicating that a person operates their own business are that they bear risks such as bad workmanship, poor performance, price hikes and time overruns. In the case of employment, an employer will typically bear these types of risks.

4. "The person has worked for the other person for an average of at least 40 hours per month over the last three months". If the applicant is still in employment, this should be determined over the three months before the start of the case. If the relationship was terminated, it should be measured according to the three months preceding termination.

5. "The person is economically dependent on the other person for whom he or she works or renders services". Economic dependence will generally be present if the applicant

depends upon the person for whom they work for the supply of work. An employee's remuneration will generally be his or her sole or principal source of income. On the other hand, economic dependence will not be present if the applicant is genuinely self-employed or runs their own business. A self-employed person generally assumes the financial risk attached to performing work. An important indicator that a person is genuinely self-employed is that he or she retains the capacity to contract with others to work or provide services. In other words, an independent contractor is generally free to build a multiple concurrent client base while an employee is bound to a more exclusive relationship with the employer. An exception to this is the position of part-time employees. The fact that a part-time employee can work for another employer in the periods in which he or she is not working does not affect his or her status as an employee. Likewise, the fact that a full-time employee may take on other employment that does not conflict with the interests of their employer in their spare time is not an indication of self-employment.

6. "The person is provided with the tools of the trade or work equipment by the other person". This provision applies regardless of whether the tools or equipment are supplied free of cost, or their cost is deducted from the applicant's earnings, or the applicant is required to repay the costs. The term 'tools of the trade' is not limited to 'tools' in a strict sense and, as such, includes items required for work, such as books or computer equipment.

7. "The person only works for or renders services to one person". This factor will not be present if the person works for or supplies services to any other person. It is not relevant whether that work is permitted in terms of the relationship or 'moonlighting' contrary to the relationship's terms.

In cases in which the presumption is not applicable, because the person earns more than the threshold amount, the factors listed in the presumption (and discussed above) may be used as a guide to determine whether a person is in an employment relationship or is self-employed.

When deciding whether a person is an employee rather than an independent contractor, South African courts follow an approach usually referred to as the "dominant impression" test. This approach evaluates all aspects of the contract and relationship and then makes a classification based on the "dominant impression" formed in that evaluation. Accordingly, there is no single factor that decisively indicates the presence or absence of an employment relationship. In this regard, the approach differs from the one used when applying the presumption, as that comes into play if one of the listed criteria is present. The fact that there is no single decisive criterion that determines the presence or absence of an employment relationship does not mean that all factors should be attributed the same weight.

To determine whether a person is an employee, South African courts seek to discover the real relationship between the parties. In some instances, their legal relationship may be gathered from an aspect of the contract that the parties have agreed to. However, in practice, an interpretation of the contract's wording will only determine the matter definitively if the parties expressly admit that it is consistent with the realities of the relationship or choose not to lead evidence concerning the nature of the relationship.

However, the contractual relationship may not always reflect the real relationship between the parties. In these cases, the court must regard the realities of the relationship, irrespective of how the parties have chosen to describe it in the contract. Adjudicators should look beyond the form of the contract to ascertain whether there is an attempt to disguise the true nature of the employment relationship or whether there is an attempt by the parties to avoid regulatory obligations, such as those under labour law or the payment of taxes. South African courts have frequently noted that the inequality of bargaining power within an employment relationship may lead employees to agree to contractual provisions that are not in accordance with the realities of the employment relationship. This is particularly important in the case of low paid workers who may have agreed to be classified as 'independent contractors' because of a lack of bargaining power.

Disguised employment is a significant reality in the South African labour market and has been dealt with in several decisions. It is an established principle of South African law that the label attached to a contract is of no assistance where it is chosen to disguise the relationship. A contract that designates an employee as an independent contractor, but under which the employee is in a subordinate or dependent position, remains a service contract. In other cases, employers have claimed that a person who was formerly an employee has been 'converted' into an independent contractor. If the person has previously performed the same or similar work as an employee, this is a reliable indication that he or she remains an employee. Likewise, the fact that other employees employed by the same employer, or by other employers in the same sector, to perform the same or similar work under similar conditions are classified as employees may be a factor indicating that the person is an employee.

It is consistent with the LRA's purposes and other labour legislation to classify as employees workers who have agreed to contracts purporting to classify them as independent contractors. The fact that a person provides services through a legal entity such as a company or a closed corporation does not prevent the relationship from being an employment relationship covered by labour legislation. It is necessary to look beyond the legal structuring to ascertain the reality of the employment relationship and determine if the purpose of the arrangement was to avoid labour legislation or other regulatory obligations.

A key defining feature of an employment relationship is that the employee must perform services personally when required to do so by the employer. The courts described this as the employee being "at the beck and call" of the employer. An independent contractor needs not

to personally perform the service and may use other people's services unless the contract expressly provides otherwise. Accordingly, a contractual provision requiring a contractor to perform personally does not always signify an employment relationship. Similarly, the fact that an employee may be permitted or required to arrange a substitute during absences does not in itself imply he or she is an independent contractor.

The fact that a person employs, or is entitled to employ, other people to assist in performing the allocated tasks will not always be inconsistent with an employment relationship. However, it is an indication that the relationship is one of independent contracting. In some sectors of the South African economy, it is a common practice for sub-contractors to be engaged to work and required to recruit other workers to assist them. This requirement does not in itself exclude the sub-contractors from the possibility of being classified as employees. It will still be necessary to examine the relationship between the principal and sub-contractor and the relationship between the principal and the persons engaged by the sub-contractor, to ascertain if the relationship is one of employment. Depending upon an examination of all the factors, including, for instance, the extent of control exercised by the principal sub-contractor, it is feasible that both the sub-contractor and the workers he or she has engaged may be employees of the principal contractor. A relevant factor would be the extent to which the employer exercises control over a decision to terminate the services of persons engaged by the sub-contractor.

A worker's remuneration and benefits may assist in determining their employment status. The fact that an employee receives a fixed payment at regular intervals regardless of output or result tends to be a strong indication of an employment relationship.
This type of payment regime would generally be inappropriate for genuinely self-employed persons. Likewise, the fact that a person is a member of the same medical aid or pension scheme as other employees of the same employer indicates that they are also an employee. Other factors which may be indicative of an employment relationship are (a) the inclusion in a contract of in-kind payments for items such as food, lodging or transport; b) the inclusion in a contract of provisions for weekly rest periods and annual leave will usually be consistent with an employment relationship; and c) the provision of benefits that are designed to reward years of service with the employer. Many employees receive variable payments that depend on performance, such as commissions or bonuses based on productivity, attendance, or other factors. The receipt of variable payments in this form is not inconsistent with an employment relationship.

The provision by an employer of training in the their methods or other aspects of its business is generally an indication of an employment relationship. Usually, a genuinely self-employed person would be responsible for their own training. However, the provision of training as part of a contractual arrangement is not necessarily inconsistent with a relationship of independent contracting.

The place at which the work takes place may sometimes be considered as a factor determining the nature of an employment relationship. However, great caution needs to be taken when using this factor. The fact that a person regularly works at the employer's premises and has no other workplace can indicate an employment relationship. However, this might not be the case where the work is of such a nature (for instance, repairs to machinery or equipment) that it must be performed at the employer's premises or if the contractor leases premises from the employer independently of its contract for work or services. The fact that a person does not work at the employer's premises is not necessarily inconsistent with an employment relationship. It is conceivable that home workers, working from their premises or those of fellow employees, are employees because of factors such as the extent of control that the employer exercises over how they work.

C. Domestic and rural work

In 1993, the BCEA was amended to include domestic and farm workers. However, there were some differences concerning other employees. The same happened with the LRA in 1995. Later, in 1997 and 1998, these norms were amended to extend the other worker rights to these categories.

In addition, the employment of domestic workers is further regulated by the "Sectoral Determination 7: Domestic worker sector" made by the Minister of Labour in 1997 in terms of section 51(1) of the BCEA[6] and continuously updated since then. That provisions came into force in 2002 and are applied to all domestic workers in South Africa, including those employed or supplied by employment services or employed as independent contractors. However, this Determination does not apply to domestic workers employed on farms where employees performing agricultural work are employed; covered by another sectoral determination; or covered by an agreement of a bargaining council in terms of the LRA. The provisions of the BCEA apply to all domestic workers subsumed to this Determination and their employers regarding any matter not regulated by it.

The wage of a domestic worker must be calculated based on the ordinary hours of work. An employer may not receive any payment directly or indirectly or withhold any amount from a domestic worker in respect of a) the employment or training; b) the supply of any work equipment or tools; c) the supply of any work-related clothing; d) any food supplied during working hours or at the workplace. The Determination also prohibits the employer from requiring the domestic worker to purchase any goods from the employer or any person, shop or business nominated by the employer; to levy a fine against the domestic worker; to require or permit the domestic worker to repay any remuneration except for overpayment previously

6. "The Minister may make a sectoral determination establishing basic conditions of employment for employees in a sector and area."

made by the employer resulting from a clerical error; and to acknowledge the receipt of an amount greater than the income received.

An employer may deduct any amount from a domestic worker's pay except for:

a) one calculated based on the worker's wage, proportionate to any period that the domestic worker has been absent from work, other than paid leave or at the behest of the employer;

b) a deduction of not more than 10 per cent of the wage value for a room or other accommodation supplied by the employer if it is weatherproof and generally kept in good condition, has at least one window and lockable door, and has a toilet and bath or shower if the worker does not have access to another bathroom;

c) the written consent of the worker, a deduction of any amount which the employer has paid or has undertaken to deliver to any holiday, sick, medical, insurance, savings, provident or pension fund of the worker; to any registered trade union in respect to subscriptions; to any banking institution, building society, insurance business, registered financing institution or local authority in respect of payment of a loan granted to the domestic worker to secure a dwelling; or to any person or organisation regarding the rental of a residence or accommodation occupied by the worker;

d) a deduction, not exceeding one-tenth of the wage on the pay-day concerned to the repayment of any amount loaned or advanced to the domestic worker by the employer; and

e) a deduction of any amount which an employer is required to make by law or in terms of a court order or arbitration award.

Domestic workers are entitled to a limit of 45 working hours a week, but they have more extensive overtime: 15 hours a week and 12 hours a day. Also, the Determination provides for 'standby', which means any period between 20:00 and 06:00 when a domestic worker is required to be at the workplace and is permitted to rest or sleep but must be available to work if necessary. This needs to be agreed in writing and compensated by the payment of an allowance and is limited to tasks that need to be done without delay. An employer may not require or permit a domestic worker to be in standby more than five times per month or 50 times per year.

"Sectoral determination 13: farm work" regulates the employment of workers in all farming activities in South Africa. This includes primary and secondary agriculture, mixed farming, horticulture, aquafarming, animal products, and field crops, excluding the forestry sector.

The 'farm work' category comprises domestic workers employed in a home on a farm and security guards hired to guard a farm or other premises where farming activities are conducted and who are not employed in the private security industry.

In general, provisions for farm worker are similar to those for domestic workers, but there are some particularities. An employer may only make a deduction relative to accommodation and food if they are provided free of charge to the farm worker; provided on a consistent and regular basis as a condition of employment; no additional deduction for this purpose is made, and it does not exceed the employer's supply costs Moreover, in the case of accommodation, the employer can make no deductions relative to electricity, water, or other services, and it needs to conform to the following requirements:

a) the house has a roof that is durable and waterproof;

b) the house has glass windows that can be opened;

c) electricity is available inside the home if the infrastructure exists on the farm;

d) fresh water is available inside the house or close by (no further than 100 m from the house);

e) a flush toilet or pit latrine is available in, or near the home; and

f) the house is not less than 30 squares meters in size.

Deductions for accommodation are not allowed for farm workers under 18 years of age and for those farm workers dealing with grazing livestock. In addition, when two or more farm workers reside in communal housing, the maximum deduction that can be made in total is 25 per cent of the applicable minimum wage payable to each individual worker. Farm workers under 18 years old may not work more than 35 hours a week. Also, the night shift in the farm sector occurs after 20:00 and before 04:00.

D. Types of employment relationship

Labour brokering in South Africa

In 1983, South African law recognised agency work, introducing the concept of "labour broker" in the Labour Relations Act 28 of 1956, and the obligation to register with the Department of Labour. Labour brokers "were deemed to be the employers of individuals whom they placed to work with their clients, provided that they were responsible for paying their remuneration" (Benjamin 2016). This change was motivated by the fact that firms

were structuring employment relationships to prevent these workers from receiving the protection of statutory wage-regulating measures and other minimum conditions of employment.

According to Benjamin (ibid.) "this approach clarified who the employer of a placed employee is, it left employees vulnerable to abuse by fly-by-night labour brokers, colloquially known as the bakkie brigade, as the risk of non-compliance by labour brokers rested on the employers and not on the client" The LRA of 1995 retained the responsibility of labour brokers (or Temporary Employment Services—TES) for the employment relationship if they were responsible for remunerating the employees. However, the client became jointly liable for breaches of primary statutory conditions of employment and minimum wages, collective agreements, and arbitration awards (section 198 of the LRA).

The broad legislative definition of a TES implies that the range of persons and organisations that fall within its terms vary greatly, from large multinational corporations and well-established firms that employ skilled workers to informal recruits performing seasonal farm work. The combination of lax regulation of labour broking, patriarchal employment relations in agriculture and high rural unemployment have resulted in the widespread use of TES for purposes of exploitation and labour law avoidance in rural areas A report from CCMA (2009) concluded that where employers outsource operations, whether to labour brokers or independent contractors, there is usually inequity between the contracted workers and permanent employees regarding job security, treatment, pay, and benefits (ibid.).

In the collective sphere, trade unions have directed and processed through the statutory conciliation system demands that have led to the agreement of public- and private-sector employers to phasing out the use of labour brokers. In some sectors, collective agreements in bargaining councils have restricted the share of the workforce that employers can enroll through temporary employment services.

A policy process to review labour legislation commenced at NEDLAC in 2011 and draft legislation was submitted to Parliament in 2012. This process culminated in significant law changes dealing with non-standard employment and came into effect in 2015. These amendments have left the framework for regulating temporary employment services introduced in 1995, although the provisions dealing with joint liabilities have been strengthened. A new set of protections was introduced for lower-paid employees, restricting the employment of these workers by TES.

Temporary employment

'Temporary employment services' entail any person who, for a reward, procures for or provides to a client another person who a) performs work for the client; and b) is remunerated by the temporary employment service. Temporary workers are employees of temporary

employment services. However, the client and the temporary employment service are jointly and severally liable if the latter, regarding any of its employees, violates:

a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;

b) a binding arbitration award that regulates terms and conditions of work;

c) the Basic Conditions of Employment (BCEA); or

d) a sectoral determination made in the terms of the BCEA.

In this case or if the client is deemed to be the employer:

a) the employee may institute proceedings against the temporary employment service, the client, or both;

b) a labour inspector acting in terms of the BCEA may secure and enforce compliance against the temporary employment service or the client as if it were the employer or both;

c) any order or award made against a temporary employment service or client may be enforced against either.

An employer may not be employed by a temporary employment service on terms and conditions not allowed by the LRA, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services.

The LRA defines "temporary service" as work by an employee for a client a) for a period not exceeding three months; b) as a substitute for a client's temporarily absent employee; c) in a category of work and for any period determined to be a temporary service by a collective agreement concluded in a bargaining council, sectoral determination or a notice published by the Minister of Labour.

Fixed-term employment

A fixed-term contract is a contract of employment that is terminated on:

a) the occurrence of a specific event;

b) the completion of a specified task or project; or

c) a fixed date, other than an employee's regular or agreed retirement age.

The LRA's provisions of fixed-term jobs do not apply to:

a) employees earning above the threshold prescribed by the Minister of Labour in terms of section 6(3) of the BCEA;

b) an employer that employs less than ten employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless the employer conducts more than one trade or if the business was formed by the division or dissolution of an existing business;

c) an employee employed under the terms of a fixed-term contract permitted by any statute, sectoral determination, or collective agreement.

A fixed-term contract or successive contracts for longer than three months are allowed if a) the nature of the work is of limited or definite duration, or b) the employer can demonstrate any other justifiable reason for fixing the contract term. On the other hand, the conclusion of a fixed-term contract is justified if the employee:

a) is replacing another employee who is temporarily absent from work;

b) is employed on account of a temporary increase in the volume of work which is not expected to last over 12 months;

c) is a student or recent graduate who is employed to be trained or to gain work experience to enter a job or profession;

d) is employed to work exclusively on a specific project with a limited or definite duration;

e) is a non-citizen who has been granted a work permit for a defined period;

f) is employed to perform seasonal work;

g) is employed in an official public works scheme or similar public job creation scheme;

h) is employed in a position funded by an external source for a limited period;

i) has reached the normal or agreed retirement age applicable in the employer's business.

Employment in terms of a fixed-term contract concluded or renewed in contravention of the Act's limits is considered indefinite. Fixed-terms employees must not be treated less favourably than a permanent employee performing the same or similar work unless there is a justifiable reason for different treatment.

An employer who employs a fixed-term worker for a period exceeding 24 months (in the cases allowed by the LRA) must, subject to the terms of any applicable collective agreement, pay the employee, on expiry of the contract, one week's remuneration for each completed year of the contract. The employee is not entitled to this payment if, before the expiration of the fixed-term contract, the employer offers employment or procures one with a different employer on the same or similar terms, beginning at the end of the contract.

Part-time employment

For LRA purposes, a part-time employee is "an employee who is remunerated wholly or partly by reference to the time that employee works and who works less hours than a comparable full-time employee". An employer must:

a) treat a part-time employee overall no less favourably than a comparable full-time employee doing the same or similar job, unless there is a justifiable reason for different treatment; and

b) provide a part-time employee with access to training and skills development overall not less favourable than the access applicable to a comparable full-time employee.

In addition to the same type of employment relationship and performing the same or similar work, a comparable full-time employee must work in the same workplace as a part-time employee or, if there is none, at another of the same employer's workplaces. Part-time work rules do not apply to:

c) employees who earn more than the threshold determined by the Minister of Labour in terms of section 6(3) of the BCEA;

a) employers who employ less than ten employees or who employ less than 50 employees and whose business has been in operation for less than two years, unless the employer conducts more than one company or the business was formed by the division or dissolution, for any reason, of an existing one.

E. Contract termination regulations

The BCEA regulates the termination of employment for employees who work 24 or more hours in a month. The party who wants to terminate the contract should give a notice of no less than one week if the employee has been employed for four weeks or less; two weeks if the employee has been employed for more than four weeks but no more than one year; and four weeks if the employee has been employed for one year or more or is a farm worker or domestic worker who has been employed for more than four weeks. A collective agreement may permit a shorter notice period. However, it is not allowed to extend the notice of employees further than their employers'. The notice of termination of a contract by an employer must not be given during any leave period and not run concurrently with any leave period, except for sick leave.

Instead of giving an employee notice, an employer may pay the remuneration relative to the period. The same happens when the employee gives notice, and the employer waives any part of it unless they agree otherwise. If an employee resides in the employer's premises or premises supplied by the latter, the employer must provide accommodation for one month, or until the employment contract could be lawfully terminated.

The BCEA provides for severance pay in dismissals due to the employer's operational requirements—based on economic, technological, structural, or similar needs—equal to at least one week's remuneration for each completed year of continuous service with that employer. An unreasonable employee who refuses to accept the employer's offer of alternative employment is not entitled to severance pay.

The LRA establishes the right not to be unfairly dismissed and defines 'dismissal' in the terms below:

a) An employer has terminated a contract of employment with or without notice.

b) An employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms or did not renew it.

c) An employer refuses to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment; or was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child.

d) An employer who dismissed several employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another.

e) An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

f) An employee terminated a contract of employment with or without notice because the new employer, after a transfer, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by their former employer.

According to the LRA, a dismissal is automatically unfair if reasons include:

a) That the employee participated in or supported, or indicated an intention to participate in or support, a strike, or protest action.

b) That the employee refused, or indicates an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike or was locked out unless that work is necessary to prevent an actual danger to life, personal safety or health.

c) To compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee.

d) That the employee took action, or indicated an intention to take action, against the employer by exercising any right conferred by the LRA, or participating in any proceedings in terms of the LRA.

e) The employee's pregnancy, intended pregnancy, or any reason related to her pregnancy.

f) That the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

g) A transfer or a reason related to a transfer of a business.

h) A contravention of the Protected Disclosures Act, 2000[7] by the employer, on account of an employee having made a protected disclosure defined in that Act.

Moreover, a dismissal may be considered unfair if the employer fails to prove that the reason is a fair one related to the employee's conduct or capacity or based on the employer's operational

7. The Protected Disclosures Act 26 of 2000 intends "to make provisions for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employers in the employ of their employers". <https://www.gov.za/documents/protected-disclosures-act>.

requirements and that was effected in accordance with a fair procedure. Nevertheless, a dismissal may be fair if its reason is based on an inherent requirement of the job; if the employee has reached normal or agreed retirement age for persons employed in that capacity.

The LRA also provides for dismissals based on operational requirements in a more detailed way than the BCEA. First, if there is a collective agreement, the employer must consult the person required under its terms. If such an agreement does not exist, the employer must consult a workplace forum, when it exists, and registered trade unions whose members are likely to be affected by the proposed dismissals. When none of them exists, the employer must consult the affected employees, or their representatives nominated for that purpose. This consultation aims to reach a consensus regarding appropriate measures to avoid the dismissals; minimise their number; change their timing; and mitigate their adverse effects. It should also define the method for selecting employees to be dismissed as well as the severance pay. A facilitator may be nominated in dismissals based on operational requirements by employers with more than 50 employees.

If the Labour Court or an arbitrator, appointed in terms of the LRA, finds that a dismissal is unfair, the Court or the arbitrator may

a) order the employer to reinstate the employee from any date not earlier that the dismissal;

b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms from any date nor earlier that the dismissal; or

c) order the employer to pay compensation to the employee.

The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless:

a) the employee does not wish to be reinstated or re-employed;

b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

d) the dismissal is unfair only because the employer did not follow a fair procedure.

If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances such as an interdict obliging the employer to stop discriminatory practices.

The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove the fair reason relating to the employee's conduct or capacity, or the employer's operational requirements, or the employer did not follow a fair procedure, or all of those, must be just and equitable in all circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration at the date of dismissal. In case of automatically unfair dismissal, the compensation is limited to 24 months' remuneration. Moreover, the compensation foreseen on LRA does not substitute any other amount to which the employee is entitled to in terms of any law, collective agreement, or contract of employment.

F. Industrial relations: trade unions, collective bargaining and agreements, industrial action

The Labour Relations Act recognises the right of employees to freedom of association, which means that employees can form a trade union or federation of trade unions and join one. In addition, every disclosure of information does not apply to the member of a trade union has the right to participate in its lawful activities; the election of its office-bearers, officials, or trade union representatives; to stand for election and be eligible for appointment as an officer-bearer of official and, if elected or appointed, to hold office; to stand for election and be eligible for appointment as a trade union representative. The members of trade unions have the same rights before federations.

The LRA also establishes the employer's right to freedom of association. Employers that are members of an organisation have the right to participate in lawful activities; to participate in the election of office-bearers or officials and, if they are natural persons, to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office. Legal entities have the right to have a representative for election. The same applies to federations. Neither employees nor employers can be discriminated for exercising these rights.

Trade unions and employers' organisations can determine their constitution and rules; hold elections for their office-bearers, officials, and representatives; plan and organise their administration and lawful activities; participate in the formation and join a federation; affiliate with and participate in the affairs of any international worker's or employer's organisation or the ILO and contribute to or receive financial assistance from them.

The LRA provides for 'representative trade unions', which means registered trade unions, or two or more registered trade unions cooperating, that are sufficiently representative of a workplace's employees. Their office-bearers or officials are entitled to enter the employer's premises to recruit members; communicate with members; to serve members' interests or hold meetings with employees outside their working hours. Members of representative trade unions are entitled to vote at the employer's premises in any election or ballot contemplated in their constitution. However, these rights are subjected to any reasonable and necessary conditions of time and place to safeguard life or property or prevent the undue working arrangements.

Employees that are members of majority trade unions may authorise their employers, in written form, to deduct subscriptions or levies payable to those organisations from their wages. This authorisation can be revoked through a one-month written notice for employers and trade unions, or three months in civil service.

According to LRA, the constitution of representative trade unions governs the nomination, election, term of office and removal from office of their representatives. At the employee's request, these delegates can assist and represent this person in grievance and disciplinary proceedings. They can also monitor the employer's compliance with the Act's workplace-related provisions, any law regulating terms and conditions of employment and any collective agreement binding the employer and report any contravention to the employer, the trade union and responsible authority or agency. In this sense, trade unions representatives have the right to take reasonable time off with pay during work to perform their functions and be trained about the function's relevant matters.

Employers must disclose to trade union's representatives all relevant information that permits to engage effectively in consultation or collective bargaining, notifying their confidentiality. Employers are not required to disclose information a) that is legally privileged; b) that cannot be disclosed without contravening a prohibition imposed by any law or any court; c) that is confidential and may cause substantial harm to an employee or the employer; or d) that is private personal information relating to an employee, unless with consent.

Domestic workers have some restrictions to the LRA's rights on representative trade unions (section 17). The right of access to the employer's premises by an office-bearer or official of a representative trade union does not include the right to enter the employer's home unless agreed on. Also, the right to information disclosure does not apply to the domestic sector.

Collective agreements

A collective agreement binds a) the parties; b) the members of a registered trade union or an employer's organisation that are party to the collective agreement if it regulates terms and conditions of employment or the conduct of employers regarding their employees and vice-versa; c) employees who are not members of a registered trade union or trade union

party to the agreement if they are identified in the agreement; it expressly binds them. The trade union or trade unions have the majority at the workplace. Moreover, a collective agreement binds for its entire duration every person who was a member when it became binding or who becomes a member after it came into force, whether that person continues to be a member of a registered trade union or employer's organisation for its duration. Unless agreed otherwise, parties to a collective agreement with indefinite period must give a written notice to terminate it.

Agency shop agreements

A majority trade union and an employer or employer's organisation may conclude a collective agreement known as an 'agency shop' agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership. An agency shop agreement is binding only if it provides that:

a) employees who are not members of the representative trade union are not compelled to become members;

b) the agreed agency fee must be equivalent to, or less than (i) the value of the subscription payable by members of the representative trade union; (ii) if subscription for the representative trade union is calculated as a percentage of an employee's salary, that percentage; or, (iii) if there are two or more registered trade unions party to the agreement, the highest amount of the subscription that would apply to an employee;

c) the amount deducted must be paid into a separate account administered by the representative trade union; and

d) no agency fee deducted may be (i) paid to a political party as an affiliation fee; (ii) contributed in cash or kind to a political party or a person standing for election to any political office; or (iii) used for any expenditure that does not advance or protect the socioeconomic interest of employees.

Despite the provisions of any law or contract, an employer may deduct the agreed agency fee from an employee's wages without the employee's authorisation.

Closed shop agreements

A representative trade union and an employer or employer's organisation may conclude a collective agreement known as a 'closed shop' agreement, requiring all employees covered by the agreement to be members of that trade union. A close shop agreement is binding only if:

a) a ballot has been held of the employees to be covered by the agreement;

b) two-thirds of the employees voted in favour of the agreement;

c) there is no provision in the agreement requiring membership of the representative trade union before the employment commences; and

d) it provides that no membership subscription or levy deducted may be (i) paid to a political party as an affiliation fee; (ii) contributed in-cash or in-kind to a political party or a person standing for election to any political office; or (iii) used for any expenditure that does not advance or protect the socioeconomic interests of employees.

Bargaining councils

One or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector and area. The State may be party to any bargaining council established if it is an employer in the sector and area. A bargaining council may be established for more than one sector.

The power and functions of a bargaining council concerning its registered scope include the following:

a) to conclude collective agreements;

b) to enforce those collective agreements;

c) to prevent and resolve labour disputes;

d) to perform dispute resolution functions;

e) to establish and administer a fund to be used for resolving disputes;

f) to promote and establish training and educational schemes;

g) to establish and administer pension, social security, medical aid, sick pay, holiday, unemployment and training schemes or funds any similar schemes or funds to the benefit of one or more of the parties to the bargaining council or their members;

h) to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area;

i) to determine by collective agreement the matters which may not be an issue in dispute for a strike or lock-out at the workplace;

j) to confer to workplace forums additional matters for consultation;

k) to provide industrial support services within the sector;

l) to extend the bargaining council's services and functions to workers in the informal sector and home workers.

A collective agreement concluded in a bargaining council binds:

a) the parties to the bargaining council who are also parties to the collective agreement;

b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party;

c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is also a party of the collective agreement regulates terms and conditions of employment or the conduct of the employer with their employees or the conduct of the employees concerning their employers.

A bargaining council may ask the Minister of Labour in writing to extend a collective agreement established in the bargaining council to any non-parties that are within its registered scope and are identified in the request, if at a meeting of the bargaining council:

a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and

b) one or more registered employer's organisations, whose members employ most of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

The Minister of Labour may at the request of a bargaining council appoint any person as the designated agent of that council to promote, monitor and enforce compliance with any collective agreement concluded in it. A designated agent may

a) secure compliance with the council's collective agreement by publicising the contents of the agreements, conducting inspections, investigating complaints, or any other means the council may adopt; and

b) perform any other functions that are conferred or imposed on the agent by the council.

The LRA provides for a bargaining council for the South African public service, known as the Public Service Co-ordinating Bargaining Council. It may perform all the functions of a bargaining council concerning matters that:

a) are regulated by uniform rules, norms and standards that apply across the board for public service;

b) apply to terms and conditions of service that apply to two or more sectors; and

c) are assigned to the State as an employer regarding the public service not assigned to the State as an employer in any sector.

The Public Sector Co-ordinating Bargaining Council may, in terms of its constitution and by resolution:

a) designate a sector of the public service for the establishment of a bargaining council; and

b) vary the designation of, amalgamate or disestablish bargaining councils so established.

Statutory councils

A representative trade union or representative employers' organisation may apply to the registrar to establish a statutory council in a sector and area in respect of which no council is registered. The power and functions of a statutory council are:

a) to perform dispute resolution functions;

b) to promote and establish training and education schemes;

c) to establish and administer pension, provident, medical aid, sick pay holiday, unemployment schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the statutory council and their members; and

d) to conclude collective agreements.

Workplace forum

A workplace forum may be established in any workplace with more than 100 employees. Its general functions are

a) to promote the interests of all employees in the workplace, whether they are trade union members or not;

b) to enhance efficiency in the workplace;

c) to be consulted by the employer, to reach consensus about the matters referred to in section 84 of the LRA;[8]

d) to participate in joint decision-making about the matters referred to in section 86 of LRA.[9]

Strikes and lockouts

The LRA ensures the employee's right to strike[10] and the employer's recourse to lock-out[11] if:

8. 84. Specific matters for consultation

(1) Unless the matters for consultation are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to be consulted by the employer about proposals relating to any of the following matters—

(a) restructuring the workplace, including the introduction of new technology and new work methods;
(b) changes in the organisation of work;
(c) partial or total plant closures;
(d) mergers and transfers of ownership in so far as they have an impact on the employees; (e) the dismissal of employees for reasons based on operational requirements;
(f) exemptions from any collective agreement or any law;
(g) job grading;
(h) criteria for merit increases or the payment of discretionary bonuses;
(i) education and training;
(j) product development plans; and
(k) export promotion.

9. 86. Joint decision-making

(1) Unless the matters for joint decision-making are regulated by a collective agreement with the representative trade union, an employer must consult and reach consensus with a workplace forum before implementing any proposal concerning—

(a) disciplinary codes and procedures;

(b) rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees;
(c) measures designed to protect and advance persons disadvantaged by unfair discrimination; and
(d) changes by the employer or by employer-appointed representatives on trusts or boards of employer-controlled schemes, to the rules regulating social benefit schemes.

10. Strike is the partial or complete concerted refusal to work, or the retardation of obstruction of work, by persons who are or have been employed by the same employer or by different employers, for remedying a grievance or resolving a dispute concerning any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether voluntary or compulsory.

11. Lock-out means the exclusion by an employer or employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether the employer breaches those employee's contracts of employment for the purpose of that exclusion.

a) the issue in dispute has been referred to a council or Commission as required in the LRA, and a certificate has been issued stating that the dispute remains unresolved, or a period of 30 days or any extension of that period agreed between the parties, has elapsed since the council or the Commission received the referral; and after that

b) in the case of a proposed strike, at least a 48-hour written notice of its commencement has been given to the employer, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council, or the employer is a member of an organisation that is a party to the dispute, in which case notice must have been given to that employers' organisation; or

c) in the case of a proposed lock-out, at least a 48-hour written notice of its commencement has been given to any trade union that is a party to the dispute, or, if there is none, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case notice must have been given to that council; or

d) in the case of a proposed strike or lock-out where the State is the employer, at least a seven-day notice of its commencement has been given to the parties.

No person may take part in a strike or a lock-out if

a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;

b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

c) the issue in dispute is one that a party has the right to refer to arbitration or the Labour Court in terms of the LRA or any other employment law; or

d) the person is engaged in an essential service[12] or maintenance service.[13]

12. 'Essential services' are those whose interruption endangers the life, personal safety, or health of the whole or any part of the population, including the Parliamentary service and the South African Police Services. The LRA provides for the establishment of an Essential Services Committee by the Minister of Labour in consultation with NEDLAC.

13. A service is considered to be a 'maintenance' service if its interruption has the effect of material physical destruction to any working area, plant or machinery.

The LRA defines "secondary strikes" as a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand. No person may take part in a secondary strike unless:

a) the strike that is to be supported complies with the provisions of the LRA;

b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days before its commencement; and

c) the nature and extent of the secondary strike are reasonable concerning the possible direct or indirect effect of the secondary strike on the primary employer's business.

A "protected strike" and a "protected lock-out" mean collective actions that comply with the LRA provisions. In this sense, a person does not commit a delict or a breach of contract by taking part in:

a) a protected strike or lock-out;

b) any conduct in contemplation or furtherance of protected strike or lock-out.

Regardless, an employer is not obliged to remunerate an employee for services not rendered during a protected strike or lock-out. However,

a) if the employee's remuneration includes payment in kind concerning accommodation, provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue payment;

b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the employee's request by way of civil proceedings instituted in the Labour Court.

An employer may not dismiss an employee for participating in a protected strike or conduct in contemplation or furtherance of a protected strike. However, this does not preclude the employer's right to dismiss an employee following the provisions of the LRA for reasons related to the employee's conduct during the strike or based on operational requirements.

A registered trade union may authorise a picket by its members and supporters to peacefully demonstrate support of any protected strike or in opposition to any lock-out. Despite any law regulating the right of assembly, a picket may be held in any place to which the public has access but outside the employer's premises, or inside those premises if authorised.

An employer is not allowed to take into employment any person to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service or for performing the work of any employee who is locked-out unless the lock-out is a response to a strike.

Every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action[14] if

a) the protest action has been called by a registered trade union or federation;

b) the registered trade union or federation has served a notice on NEDLAC stating the reasons for the protest action and its nature;

c) the matter giving rise to the protest action has been considered by NEDLAC or any other appropriate forum in which the parties concerned can participate in resolving the matter; and

d) at least 14 days before the protest action, the registered trade union or federation has served a notice on NEDLAC of its intention.

9.1.4 Employment and labour market indicators, trade unions, industrial action in (2015–2019)

A. Employment and the labour market

The South Africa labour market has faced considerable changes since 1994 due to the elimination of many statutory restrictions on access and participation: "This has led to a rapid growth in the labour force,[15] which exceeded the growth in the working-age population.[16]

14. 'Protest action' means the partial or complete concerted refusal to work, or the retardation of obstruction of work, for the purpose of promoting or defending the socioeconomic interests of workers, but not for a purpose referred to in the definition of strike.

15. The labour force comprises the number of people that are employed plus those who are unemployed and are trying to find work.

16. The working-age population comprises everyone aged 15–64 years who fall into each of the three labour market categories (employed, unemployed, not economically active).

Although the growth in employment managed to keep up with the growth in the working-age population, it was unable to keep up with the labour force, resulting in a rapid increase in the unemployment rate" (Stats SA 2018). Nationally, 67,7 per cent of the working-age population live in the urban area, followed by 28,7 per cent in traditional areas, and 3,6 per cent on farm areas (2018).

TABLE 9.1 Working-age population (in thousands)

	2015	2016	2017	2018	2019
Total	38 981	39 725	40 512	41 196	41 916
Male	18 816	19 199	19 594	19 937	20 294
Female	20 165	20 526	20 918	21 259	21 622

Source: ILOSTAT (2020).

TABLE 9.2 Labour force (in thousands)

	2015	2016	2017	2018	2019
Total	21 280	21 735	22 427	22 724	23 166
Male	11 674	11 955	12 277	12 430	12 680
Female	9 606	9 780	10 150	10 294	10 485

Source: ILOSTAT (2020).

TABLE 9.3 Labour force participation rate

	2015	2016	2017	2018	2019
Total	62%	62.30%	62.70%	62.30%	62.50%
Male	47.60%	47.60%	48.50%	48.40%	48.50%
Female	54.60%	54.70%	55.40%	55.20%	55.30%

Source: ILOSTAT (2020).

TABLE 9.4 Employment by economic activity (in thousands)

	Agriculture	Non-agriculture	Industry	Services	Not classified	Total
2015	892,7044	15035,65	3794,186	11238,24	3,2194	15928,35
2016	888,8293	15078,75	3724,835	11352,77	1,1387	15967,58
2017	864,0957	15499,70	3819,116	11678,49	2,0937	16363,8
2018	856,9348	15752,83	3840,932	11907,89	4,0111	16609,76
2019	875,2046	15695,78	3965,430	11996,45	3,8978	16570,98

Source: ILOSTAT (2020).

Despite the decline of its relative importance, the manufacturing sector continues to occupy a significant share of the South African economy. Nevertheless, the finance, real estate and

business services sectors grew in relative importance, reaching 24 per cent in 2012. The country experienced an average growth rate of approximately 5 per cent in real terms between 2004 and 2007. However, due to the global economic recession, it declined to 2 per cent between 2008 and 2012. Gauteng, Kwazulu-Natal, and Western Cape are the provinces that most contribute to the country's value-added, over 60 per cent (Stats SA 2020).

TABLE 9.5 Economic distribution by economic activity, 2019

Agriculture	5.10%
Manufacturing	16.30%
Construction	7.40%
Mining/quarrying, electricity, gas, water supply	0.80%
Trade, transportation, accommodation and food, business and administrative services	44.40%
Public administration, community, social and other services and activities	25.60%
Not classified	0.40%

Source: ILOSTAT (2020).

TABLE 9.6 Employment distribution by economic activity, 2019 (in thousands)

A. Agriculture, hunting and forestry	866,949
B. Fishing	8,255
C. Mining and quarrying	413,432
D. Manufacturing	1784,916
E. Electricity, gas and water supply	139,2096
F. Construction	1357,872
G. Wholesale and retail trade; repair of motor vehicles, motorcycles, and personal and household goods	2828,595
H. Hotels and restaurants	583,5023
I. Transport, storage, and communications	1010,822
J. Financial intermediation	437,2703
K. Real estate, renting and business activities	2118,039
L. Public administration and defence; compulsory social security	801,9692
M. Education	993,347
N. Health and social work	1030,354
O. Other community, social and personal services, and activities	880,348
P. Activities of private households as employers and undifferentiated production activities of private households	1306,977
Q. Extraterritorial organizations and bodies	5,2246
X. Not elsewhere classified	3,8978
Total	**16570,98**

Source: ILOSTAT (2020).

Between 2015 and 2019, South Africa had an increase in the number of own-account workers, which accounted for 10.10 per cent of its working population at the time. Also, part-time jobs

increased between 2015 and 2018, with a small decrease in 2019. The same happened with informal work. On the other hand, the share of temporary employees has been declining since 2015.

TABLE 9.7 Employment distribution by status

	2015	2016	2017	2018	2019
Employees	85.40%	84.90%	8.450%	8.440%	8.370%
Employers	5.20%	5.50%	5.50%	5.20%	5.70%
Own-account workers	8.90%	9.10%	9.40%	9.80%	10.10%
Contributing family workers	0.60%	0.50%	0.50%	0.50%	0.60%

Source: ILOSTAT (2020).

TABLE 9.8 Share of temporary employees

2015	2016	2017	2018	2019
14.70%	14%	13.60%	13.60%	13.30%

Source: ILOSTAT (2020).

TABLE 9.9 Incidence of part-time employment

2015	2016	2017	2018	2019
14.80%	15.00%	15.70%	15.80%	15.30%

Source: ILOSTAT (2020).

TABLE 9.10 Informal employment and informal sector as a percent of employment

2015	2016	2017	2018	2019
34.80%	34.30%	34.70%	35.30%	35.20%

Source: ILOSTAT (2020).

B. Trade union density

According to Franz Rautenbach (2014), the South African trade union density is very much a function of legislation. It was only after the introduction of the Labour Relations Act in 1979, which extended the legal protection for trade unions to black workers, that union membership in South Africa truly started escalating. Previously, there were unprotected black trade unions for a minority of black workers and some white trade unions. Under the new legislation in 1979, trade union membership escalated from a shallow base of a few percentage points to a very high percentage. Between 1980 and 2003, union density grew very steeply until 1993, when it levelled off until reaching another peak of 26 per cent in 1998. After that, a gradual

decline followed, with density reaching 20 per cent in 2003. Historically, mining has a had high level of union membership, as can been seen in Table 11.[17]

ILO's report "Trade Unions in the Balance" (2019) points out that South Africa is among the countries where one-third or more of all union members work in industry, which includes mining, manufacturing, utilities, and construction. For 2016, the union density rate in manufacturing (including mining) was between 40 and 50 per cent (ILO 2019).

TABLE 9.11 Trade Union Density in South Africa, 2000

Industry	Union density (%) (2000)	COSATU membership as % of formal employment (2000)
Mining	90	51
Manufacturing	45	38
Transport	25	24
Trade	20	7,4
Finance	26	7
Construction	15	4,8
Utilities	74	-

Source: South Africa Can Work, 2014.

For 2015-2016, union density rates in social and community services in South Africa are much higher than in commercial services. Social and community services include public administration, social security, policy and security forces, education, health, arts and entertainment, and other social and personal services.

TABLE 9.12 Trade union membership in Oct-Dec of each year (in thousands)

	2015	2016	2017	2018	2019
Both sexes	13.739	13.645	13.777	13.992	13.868
Yes	3.835	3.849	3.990	4.041	4.071
No	9.559	9.437	9.339	9.587	9.363
Don't know	345	359	448	363	434
Women	6.182	6.168	6.194	6.360	6.313
Yes	1.604	1.665	1.705	1.707	1.780
No	4.442	4.377	4.331	4.506	4.364
Don't know	137	126	157	147	170
Men	7.556	7.477	7.584	7.631	7.555
Yes	2.232	2.184	2.285	2.334	2.291
No	5.117	5.060	5.008	5.081	4.999
Don't know	207	234	291	216	265

Source: QLFS Trends, Stats SA.

17. In this table, trade union density was measured as a percentage of the economically active population.

In emerging economies such as South Africa, agricultural workers represent less than 5 per cent of all union members. Between 2015 and 2019, union membership remained stable, with slight growth over the years. However, when considered separately, male workers experienced a short drop in their membership between 2018 and 2019.

C. Striking

The LRA defines a strike as "the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and worker, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory" (Section 213). According to the Industrial Action Report 2018, published by the Department of Labour of South Africa, there was a consistent increase in the number of strikes in the country in the last years. In 2018, there were 165 strikes, which represents a growth of 87,5 per cent compared to 2014.

TABLE 9.13 Number of work stoppages[18] in South Africa, 2014–2018

2014	2015	2016	2017	2018
88	110	122	132	165

Source: Industrial Act Report, 2018.

TABLE 9.14 Strikes and lockouts in South Africa, 2015–2019

	Strikes and lockouts recorded	Working hours lost (total amount of time "lost" by workers involved)	Employess involved	Working days per 1,000 workers (all workers)	Wages lost duo to strikes
2015	110	8,294,795	91,072	903,921	116,546,293
2016	122	7,613,267	90,228	910,323	161,049,109
2017	132	6,054,446	125,125	960,489	251,409,542
2018	165	9,694,563	137,712	1,158,945	266,898,061
2019	157	20,051,572	143,575	2,495,878	447,554,053

Source: Departamento de Emprego e Trabalho, 2019.

However, the number of strikes and lockouts decreased in 2019, with 157 actions recorded. Despite that reduction, the number of employees involved, working hours and wages lost were higher than in previous years.

18. A 'work stoppage' is made up of a series of events, all relating to the same issue. Work stoppages have two characteristics, type and degree. The type of action is either a strike (action initiated by an employee) or a lockout (action initiated by an employer).

TABLE 9.15 Distribution of employee's participation in work stoppages by industry, 2018

Industry	Workforce in 2018	Employees involved in 2018	Percentage distribution of employees involved
Agriculture	4,525	3,646	80.6
Mining	3,147	2,499	79.4
Manufacturing	28,022	19,761	70.5
Utilities	48,444	6,102	12.4
Construction	17,002	5,193	30.5
Trade	162,665	45,118	27.7
Transport	53,409	19,550	36.6
Finance	1,035	365	35.3
Community	332,985	35,568	10.7
Total	651,234	137,712	21.1

Source: Industrial Act Report, 2018.

TABLE 9.16 Distribution of work stoppages by their nature, 2014–2018

	2014	2015	2016	2017	2018
Strike in company only	44	73	69	85	102
Picketing[19]	1	1	1	0	0
Secondary action[20]	1	0	1	0	0
Stay-away/ Protest[21, 22]	2	11	11	11	25
Greve com diversos empregadores	14	4	8	6	14
Lockout	26	21	32	30	24

Source: Industrial Act Report (2018).

In 2018, 137,712 employees were involved in strikes, which represents 21.1 per cent of the labour force of the industries engaged in work stoppages in that year. It represents an increase of 9 per cent over 2017. The strike determination among workers was most pronounced between employees from agriculture (80.6 per cent), mining (79.4 per cent) and manufacturing industries (70.5 per cent).

19. Picketing: Action by employees or other persons to publicise the existence of a labour dispute by patrolling or standing outside or near the location where the dispute is taking place, usually with placards indicating the nature of the dispute. The aim of picketing might simply be to communicate the grievance to the public or persuade other employees in that workplace not to work and to take their side in the dispute, to deter scab labour, to persuade or pressure customers not to enter the workplace, to disrupt deliveries, or garner public support.

20. Secondary strike: This refers to a strike in support of another strike by other employees against their employer. The strikers have no issue with their employer, but that employer might be in a strong position (due to there being a close business relationship as either an important customer or supplier) to pressure the employer who is in dispute.

21. Stay-away protest: When employees absent themselves from work without permission in support of some socio-political or socioeconomic issue which does not relate to their employment situation.

22. Protest action: The partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socioeconomic interests of workers, but not for a purpose referred to in the definition of strike (LRA, section 213).

The Department of Labour makes a distinction between the different types of strikes, as can be seen in Table 15. In 2018, near 62 per cent of work stoppages took place in "companies only", followed by 15 per cent of workers who stayed away from work and 14 per cent of employees who were locked-out from the workplace.

Wages, bonus, and other compensation are the main causes of dispute between employers and employees. The government hopes to reduce this impact with The National Minimum Wage (NMW), which came into effect on 01 January 2019 at a level of ZAR20 per hour. It applies to all workers, and transition rules were established for the ones that still earn below this value. A new NMW rate started to be applicable on 1 March 2020. In the new determination, the wage for each ordinary worker is ZAR20.76. However, some categories have a different rate. Farm workers are entitled to a minimum wage of ZAR18.68 per hour; domestic workers, ZAR15.57; and workers employed on an expanded public works programme, ZAR11.42.

TABLE 9.17 Distribution of working days lost[23] by principal cause of dispute, 2014–2018

Principal cause	2014	2015	2016	2017	2018
Wages, bonus, and other compensation	10 121 273	697 810	778 874	540 966	789 198
Working conditions	1 776	26 226	60 747	50 292	128 890
Disciplinary matters	38 129	52 460	4 748	10 120	22 729
Grievances	25 625	43 992	50 882	177 605	139 762
Socioeconomic and political conditions	167	9 448	8 380	26 156	15 708
Secondary action	3 500	2 812	1 385	0	0
Retrenchment/ redundancy	201	4 145	3 359	12 865	11 840
Refusal to bargain	8 784	7 228	21 351	132 219	13 313
Trade union recognition	0	55 624	16 461	10 266	11 304
Other reasons	65 320	4 2 46	1 135	0	26 201
Total	10 264 775	903 921	946 323	960 489	1 158 945

Source: Industrial Act Report (2018).

In the first place, most salary increases are determined solely by the employer for both sexes, without negotiation. Second are negotiations between unions and employers. When men and women are considered in aggregate, bargaining councils appear in third place in the negotiation of salary increases. However, when analysed separately, the negotiation between employee and employer rises to third place concerning men. As for female workers, there is a similarity in salary increases negotiated in bargaining councils and between individuals and employers.

23. Working days lost are calculated by multiplying the number of workers involved in each stoppage by the duration of stoppage in days lost and adding the totals for all stoppages during the reference period.

TABLE 9.18 How annual salary increment is negotiated—thousands in Oct-Dec of each year

	2015	2016	2017	2018	2019
Both sexes	**13,739**	**13,645**	**13,778**	**13,992**	**13.868**
Individual and employer	13,739	13,645	13,778	13,992	13,868
Union and employer	1,236	1,036	1,032	1,176	1,336
Bargaining council	2,955	2,969	3,023	3,102	3,084
Employer only	1,133	1,086	1,140	1,069	1,117
No regular increment	7,691	7,676	7,702	7,592	7,448
Other	683	798	777	964	807
Women	**6,182**	**6,168**	**6,194**	**6,360**	**6,313**
Individual and employer	529	454	476	520	570
Union and employer	1,167	1,238	1,218	1,232	1,276
Bargaining council	583	533	552	555	594
Employer only	3,578	3,504	3,565	3,564	3,473
No regular increment	313	403	346	459	375
Other	14	36	38	31	27
Men	**7,556**	**7,477**	**7,584**	**7,631**	**7,555**
Individual and employer	707	582	557	656	766
Union and employer	1,789	1,731	1,805	1,870	1,808
Bargaining council	550	553	588	514	524
Employer only	4,113	4,172	4,137	4,028	3,975
No regular increment	370	395	432	505	432
Other	28	44	65	58	49

Source: QLFS Trends, STATSSA.

TABLE 9.19 Distribution of work stoppages by industry, 2014–2018

	2014	2015	2016	2017	2018
Agriculture	6	5	9	7	5
Mining	5	16	11	18	7
Manufacturing	26	17	16	18	23
Utilities	2	1	5	1	2
Construction	6	7	11	5	15
Trade	6	8	6	9	21
Transport	5	22	14	13	12
Finance	2	0	3	3	3
Community	30	34	47	58	77

Source: Industrial Act Report (2018).

In 2018, 74 per cent of the strikes lasted for an average of 11 working days. More than one million working days lost were related to 165 industrial disputes, an increase of 20,7 per cent compared to 2017. The strike determination—the number over days lost over the amount of

the workers involved in the strike—in 2014 shows that a single striker was on strike for 86.57 days on average, compared to 84.1 days in 2018. This means that striker determination has decreased over time.

TABLE 9.20 Percentage distribution of how disputes were resolved, 2017–2018

	2017	2018
Resolved internally	88.6%	81.8%
Externally: CCMA, other bodies	9.1%	10.9%
Bargaining council	0.8%	7.3%
Unknown	1.5%	0.0%

Source: Industrial Act Report (2018).

TABLE 9.21 Trends in working days lost in South Africa, 2014–2018

2014	2015	2016	2017	2018
10 264 775	903 921	946 323	960 489	1 158 945

Source: Industrial Act Report (2018).

TABLE 9.22 Working days lost per 1 000 employees due to strikes, 2014–2018

2014	2015	2016	2017	2018
670	57	32	65	76

Source: Industrial Act Report (2018).

Between 2014 and 2018, there was a considerable decrease in lost wages. The impact on workers involved in strike activities was estimated at more than ZAR266 million in 2018 in payments lost. The transport industry alone recorded a wage loss of ZAR131 million in that year, the highest one yet.

TABLE 9.23 Wage lost due to work stoppages in South Africa, 2014–2018

2014	2015	2016	2017	2018
ZAR6 176 768 282	ZAR116 546 293	ZAR161 049 109	ZAR251 409 542	ZAR266 898 061

Source: Industrial Act Report (2018).

TABLE 9.24 Percentage distribution of protected and unprotected strikes in South Africa, 2014–2018

	2014	2015	2016	2017	2018
Protected	52%	45%	41%	52%	41%
Unprotected	48%	55%	59%	48%	59%

Source: Industrial Act Report (2018).

D. Violence and industrial action in South Africa

During apartheid, there was a high incidence of strikes, many of them illegal and violent. Benjamin (2016) highlights as the main reasons for this phenomenon: the frustration with the complex and technical pre-strike procedures, including onerous ballot procedures, which previously had rendered the protection of strikes largely theoretical; the non-acceptance by employers of employees' right to strike; the frequent presence of police at strikes; the levels of poverty of the population's; and the lack of political power, which rendered striking as a means of political expression.

One of the LRA's purposes was to reduce the number of unprocedural and violent strikes by obtaining buy-in from employees. It gives effect to this aim by protecting strikes that conform with the Act's substantive provisions and simplified procedures. Compliance with these requirements protects striking workers from dismissal, breaches of contract and civil and criminal liability. Also, although non-compliance is no longer a criminal offence, it can lead to dismissal and civil liability of the union and striking members.

However, Benjamin (ibid.) suggests that a downside of the LRA's simple procedures is that many disputes are referred to conciliation without extensive negotiation between the parties. Also, there is a tendency for trade unions to give strike notices before exhaustive bargaining has taken place, and a marked trend for the certification of a dispute to be regarded as 'tactical measure' as many parties obtain a certificate and threaten industrial action to strengthen their bargaining position.

He also points out that some strikes have been marked by significant violence and lawlessness, such as the 2006 security industry strike, the large public sector strikes and the Marikana strikes in 2012. Besides the socioeconomic conditions and the government's failure to address the backlog in service delivery, it has also been argued that certain features of the labour relations landscape tend to encourage violence in strikes: perceived collusion between the police and the employer or the State; the apparent intransigence of management and the protracted duration of strikes.

Chinguno (2013) argues that the new democratic dispensation in South Africa has been characterised by the proliferation of work fragmentation and precariousness. Labour has been severely fragmented, while employer control and flexibility regarding workers' organisations have been improved. Central to these changes is the sustenance of a cheap labour regime. Democracy is associated with broadening political participation, balancing political rights, and promoting nonviolence in making claims. However, South African democracy is significantly characterised by the persistence of violence in claim-making. Violence has remained an essential phenomenon in the polity since the country's democratic transition. Violent outbursts often bring simmering social tensions to the fore.

In the 1980s, black people attained industrial citizenship, but had no political citizenship. The South African Constitution and labour relations regime adopted after the demise of apartheid guarantees both industrial and political citizenship. Nevertheless, violence in industrial conflict remains an important phenomenon. A 2012 survey by COSATU shows that 60 per cent of the workers interviewed believed that violence is a necessary strategy in strikes (Chinguno 2013).

ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) expressed concern "about the persistence, on the one hand of violent incidents, leading to injuries and death, resulting from police intervention during strike actions and, on the other hand, of allegations of arrests of peaceful striking workers." The Marikana massacre is often cited in the literature as an example of violent action by both the state and employers, unions, and strikers. South Africa is the world's largest exporter of platinum in the world. Between 1994 and 2009, platinum output increased by 67 per cent. This sector has proved relatively impervious to mechanisation. The most efficient way to extract platinum is through handheld machines operated by rock drill operators (RDO). As a result, unlike other mining sectors, where mechanisation has radically diminished the necessity of a large workforce, platinum extraction remains labour intensive. This dependence on labour has ensured that workers in the platinum sector have substantial bargaining power. Lonmin Plc has operated the Marikana mine since 1971.

The workers' grievances preceding the massacre were related to workplace issues associated with pay, recruitment practices and safety, along with discontent regarding the unfulfilled commitments by Lonmin in its Social and Labour Plan (SLP). The primary demand of Marikana strikers was an increase in wages to ZAR12,500 a month, a significant increase from the average wages of ZAR5,000. Also, they were unsatisfied with the actions of the National Union of Mineworkers (NUM) officials. There was broad dissatisfaction with corruption in the allocation of company housing with which NUM was tasked and with corruption in worker's recruitment. The workers decided to protest outside of formal bargaining structures and without NUM's support.

After days without success in the negotiations and many violent episodes, heavily armed Special Paramilitary units were designated to disarm the strikers, resulting in the killing of 34 mineworkers. The mass violence and the killings of many strikers' leaders did not discourage the miners, forcing Lonmin to negotiate with them outside the NUM's formal channels. The final agreement granted a pay rise to ZAR11,000. O'Connor (2017) affirms that the protests at Marikana "are illustrative examples of the government's abandonment of its commitment to workers and, in more general terms, its left-wing-roots; the distance between the National Union of Mineworkers (NUM) and its grassroots members; a re-appropriation of the self-organized participatory practices of labor in the 1970s and 1980s; state violence and the fragmentation of the trade union movement encapsulated by the at times violent rivalry between the NUM and the Association of Mineworkers and Construction Union (AMCU)."

The LRA grants basic organisational rights to majority trade unions. Nevertheless, the threshold for obtaining these rights has been a contested issue. The main problems are the meaning of the term 'sufficiently representative' and the workplace concept, which determine representativeness for acquiring organisational rights and the extension of collective agreements. The LRA does not attach a percentage to define sufficient representativeness, but Benjamin (2016) observes that conventional wisdom is that a threshold of 30 per cent should be used. However, "a closer scrutiny of CCMA practice shows that organisational rights are often granted at levels of representation lower than 30% and arbitrators are generally unsympathetic to employers who resist reasonable demands for such rights." In this sense, the application of this principle remains uncertain. The decline of COSATU's dominance has led to increased disputes, litigation, and strikes over the acquisition of organisational rights.

The LRA requires commissioners to minimise the proliferation of trade union representation in the workplace by encouraging a single representative trade union system and considering the nature and organisational history of the workplace, organisational rights sought, and the workforce's composition, including non-standard employees. The Act permits an employer and a registered trade union representing more than 50 per cent of employees in the workplace or the parties to a bargaining council to conclude a collective agreement setting the thresholds regarding rights of access, stop orders and time off for union activities. These agreements have undermined the balance between inclusivity and stability of the initial model and allow employers and trade unions to collude for protecting a majority trade union against competition from rivals. It also may prevent trade unions representative of specific groups of workers within a workplace from acquiring organisational rights. A provision allowing an arbitrator to override a threshold agreement came into effect in 2015.

Benjamin (ibid.) affirms that many experts have called for legal reform to ensure that collective bargaining structures do not deprive minority groups and smaller trade unions of a voice in the collective bargaining process. He highlights that although the LRA promotes a single representative trade union's emergence, it does not compel it.

The LRA grants organisational rights for a workplace, and its definition for the private sector is the place(s) where employees of an employer work. This definition of a workplace is sufficiently elastic to allow for large national employers to argue that their entire business constitutes a single workplace. It does not account for bargaining units within a workplace, making it difficult for unions that represent limited categories of workers to establish their presence.

The Labour Court ruled that the definition of a 'workplace' requires focusing exclusively on whether the operations carried out by the employer in different places are 'independent' of one another. Independence must be determined only by reference to the size, function or organisation of the operations concerned, as stated in the definition. Once the employer's identity is established, the places where its employees work, even if geographically disparate, constitute the workplace. The Court also stated that the majoritarian principle, which underlies

section 23(1)(d), could result in a minority being bound by the majority's decision, and that it is "patently democratic" and promotes orderly collective bargaining. Also, it protects the interests of the minority by imposing constraints on the extent to which a collective agreement can be extended (Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd & others v Association of Mineworkers & Construction Union & others, 2014).

9.2 LABOUR DISPUTE RESOLUTION SYSTEM

9.2.1 Organisation of the dispute resolution system, jurisdiction and territorial distribution

Following the Wiehahn Commission's recommendations, the Industrial Court was established on 1 October 1979. Its predecessor was the Industrial Tribunal, which consisted of retired officials from different areas. There was no court building, and the tribunal travelled all over the country, including South-West Africa, to settle labour disputes. On the other hand, the Industrial Court had countrywide jurisdiction and a permanent seat. Until 1985, it operated from Pretoria. In 1986, a permanent court was established in Cape Town and another in Durban. In 1991, another one was created in Port Elizabeth. The Court also went on circuit to rural areas.

The Industrial Court Consisted of the president, the deputy president and five permanent members in Pretoria, three in Durban and one in Port Elizabeth. For the rest, ad hoc members were used, mainly practising advocates and academics. It had no inherent jurisdiction and could only exercise the powers conferred upon it by the Labour Relations Act and had quasi-judicial and advisory functions. Also, it was qualified as a court of equity, which means that it considered principles of fairness when considering a status quo application or an unfair labour practice determination and was not primarily concerned with the enforcement of legal rights.

Besides the apartheid regime, the Industrial Court used its unfair labour practice powers to fashion a modern labour law for all employees. It articulated an unfair dismissal jurisprudence that required employers to comply with standards of procedural and substantive fairness. It placed unprecedented limitations on the exercise of managerial prerogatives and introduced security of employment to an unprecedented level. The Court also evolved the beginnings of an unfair discrimination jurisdiction. It held that unfair labour practice powers covered both individual and collective disputes and established rules concerning trade union recognition and the conduct of collective bargaining (Benjamin 2013).

In the early 1990s, intense pressure from the independent trade union movement led to the extension of the labour relation system to public servants, educators, and agricultural workers. However, the statutory dispute resolution procedures that were introduced were described as lengthy, complex, and pitted with technicalities. Instead of reducing the number of

disputes, it caused their proliferation and intensified industrial action. The Industrial Court was understaffed throughout its existence, leading to lengthy delays in dispute resolution. By 1994, it was estimated that some 3,000 unfair labour practice cases were referred to the Court annually, with an average of three years for their resolution.

Statutory conciliation was provided by conciliation boards appointed by the Department of Labour and by industrial councils. A conciliation board's appointment was a precondition to referring unfair labour practise dispute to the Industrial Court. The discretion to establish conciliation boards rested with the Minister of Labour, and this gave rise to extensive review litigation contesting the Minister's refusal to appoint conciliation boards, especially as refusals frequently appeared to be politically motivated. Parties all too often regarded conciliation boards as an unwelcome hurdle to litigation rather than a viable means of resolving disputes, and negotiation was often perfunctory. It has been estimated that less than 30 per cent of disputes referred to industrial councils and only some 20 per cent of referrals to establish conciliation boards resulted in a settlement.

The shortcomings of the statutory dispute resolution system led to the growth of independent dispute resolution. It became a widespread practice for employers and trade unions to agree, through a collective agreement, to refer contested dismissal cases and sometimes other categories of grievances to expedited arbitration. The evolution of 'just cause' dismissal protection predates Industrial Court's establishment, being included in crucial plant-level collective agreements in the 1970s. The model of 'just cause' arbitration owes much to the American approach. Also, widespread use was made of conciliators to help parties resolve collective bargaining disputes and improve relationships in the workplace. The Independent Mediation Service of South Africa emerged as the major private dispute resolution agency, establishing mediators and arbitrators' training panels. This development has been credited with establishing formal mediation in South Africa.

The LRA of 1995 comprehensively restructured the legal and institutional basis of collective labour law and unfair dismissal law. The Act also created, for the first time, a single legal framework for labour relations applicable to all sectors of the economy, including the public service. The Labour Relations Act created two new institutions for dispute resolution and adjudication: a parastatal Commission for Conciliation, Mediation and Arbitration (CCMA) and a specialist labour court system with an exclusive labour law jurisdiction. In addition, sectoral bargaining councils perform collective bargaining and dispute resolution functions in many economic sectors. The South African labour dispute resolution system is relatively complex. The nature of the dispute determines how the dispute resolution institutions come into play. Different disputes follow different routes in a manner that makes navigating through the various institutions a preserve for technicians. Also, sectoral bargaining councils perform collective bargaining and dispute resolution functions in many economic sectors.

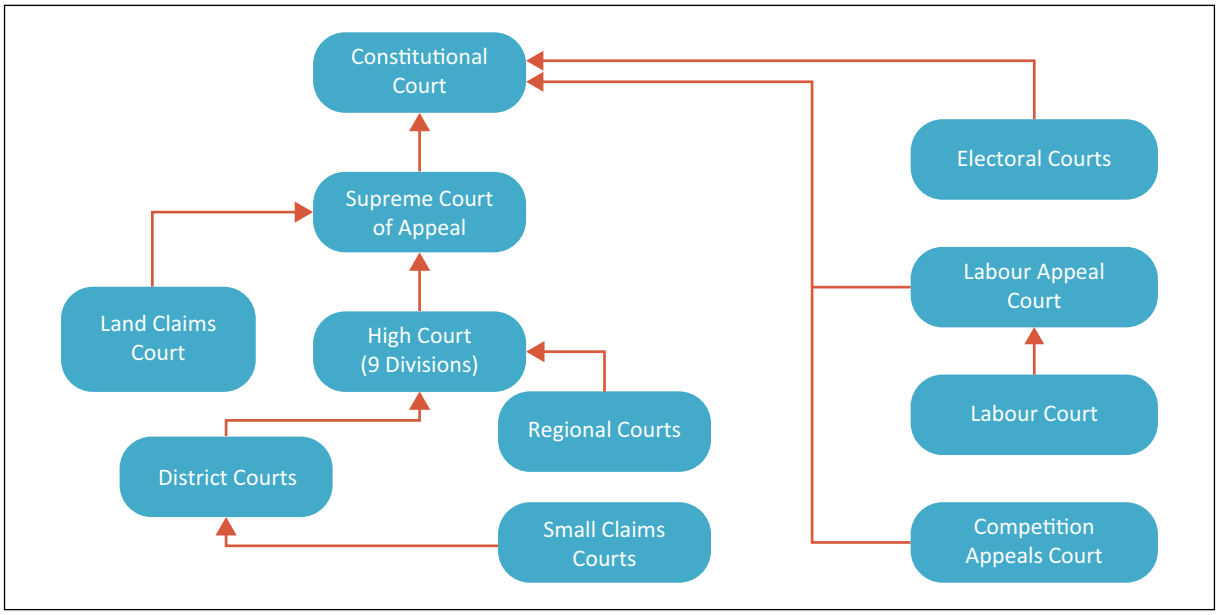
A. The South African Labour Justice

According to section 166 of the Constitution, the South African Judiciary is composed by i) The Constitutional Court; ii) The Supreme Court of Appeal; iii) The High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; and iv) The Magistrates' Courts and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.

The Labour Court is composed of a Judge President, a Deputy Judge President, and as many judges as the President may consider necessary, acting on the advice of NEDLAC and in consultation with the Minister of Justice and the Judge President of the Labour Court (Labour Relations Act, section 152). A judge of the Labour Court must be appointed for a period determined by the President at the time of the appointment. Currently, the Labour Court has 14 Judges, and the chair of the Deputy Judge President is vacant.

The Labour Appeal Court consists of: (a) the Judge President of the Labour Court, who by virtue of that office is Judge President of the Labour Appeal Court (b) the Deputy Judge President of the Labour Court, who by virtue of that office is Deputy Judge President of the Labour Appeal Court; and (3) a number of other judges (who are judges of the High Court) as may be required for the effective functioning of the Labour Appeal Court. The Labour Appeal Court is composed of ten judges.

FIGURE 9.1 South African Judiciary



Source: South African Judiciary (2019).

There are four Labour Courts (Johannesburg, Durban, Cape Town, and Port Elizabeth) and one Labour Appeal Court (Johannesburg) in South Africa.

B. Commission for Conciliation, Mediation and Arbitration (CCMA)

Central to the LRA was the establishment of the independent parastatal Commission for Conciliation, Mediation and Arbitration (CCMA) as the entity responsible for an alternative to formal litigation dispute resolution in specific categories of disputes. It is a statutory body stablished in terms of Section 112 of the LRA, and its constitutional mandate is drawn directly from Section 23 of the Constitution of the Republic of South Africa that deals with the right to fair labour practices.

The CCMA is a legal entity independent of the State, any political party, trade union, employer, employers' organisation, federation of trade unions or federation of employer's organisations (Section 113 of the LRA). The Commission has jurisdiction in all provinces of South Africa and must maintain at least one office in each. The CCMA has a governing body composed of a chairperson and nine other members, each nominated by NEDLAC and appointed by the Minister of Employment and Labour to hold office for three years. NEDLAC is also responsible for nominating one independent chairperson.

The role and responsibilities of the Governing Body are stipulated in the LRA as well as being derived from the Public Finance Management Act (PFMA) and National Treasury Regulations. In terms of section 117 (2) of LRA, the Governing Body can appoint as many commissioners as it considers necessary, on either a full-time or part-time basis; and to be either a commissioner or a senior commissioner. When making appointments, it is necessary to consider an independent, competent, and gender- and race-representative commission. The Governing Body is responsible for determining the commissioners' remuneration and allowances.

The director of the CCMA, appointed by the Governing Body, should be a person skilled and experienced in labour relations and dispute resolution and who has not been convicted of any offence involving dishonesty. Committees may be established to assist the Commission. They may consist of a combination of a member of the Governing Body, the director, a commissioner, a staff member of the Commission and any other person. The Governing Body may delegate some of its functions to its committees or to the director, except for the appointment and removal of commissioners; appointment of the director; and accreditations and subsidisation of bargaining councils and private agencies.

The CCMA's mandatory functions are to:

a) conciliate workplace disputes;

b) arbitrate certain categories of disputes that remain unresolved after conciliation;

c) establish picketing rules in respect of protected strikes and lock-outs;

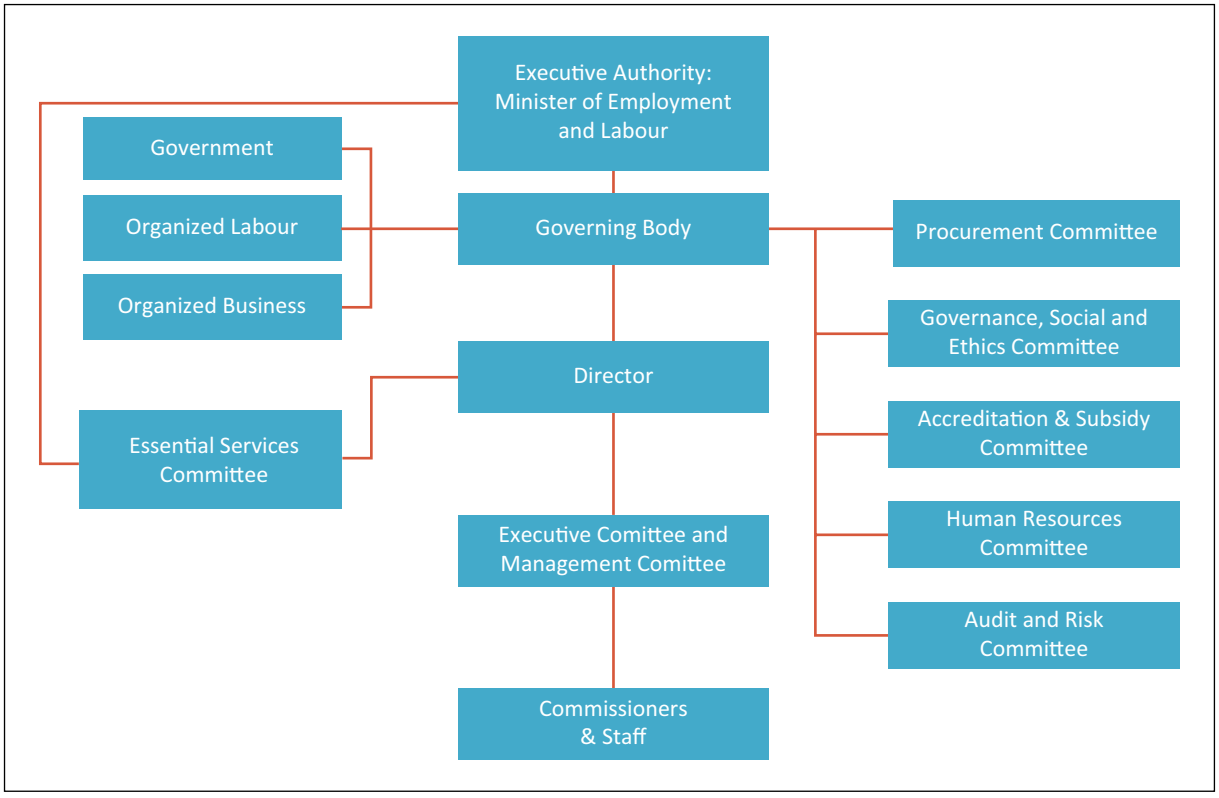
d) consider applications for accreditation and subsidies of bargaining councils and private agencies;

e) administer the Essential Services Committee;

f) facilitate the establishment of workplace forums and statutory councils; and

g) compile and publish statistics and information about its activities.

FIGURE 9.2 CCMA Organogram



Source: Authors' elaboration.

The CCMA also has important discretionary functions, including:

a) supervising ballots for unions and employer organisations;

b) providing training and information relating to the primary objective of the LRA;

c) advising a party to a dispute about the procedures to follow;

d) offering to resolve a dispute that has not been referred to the CCMA;

e) publishing guidelines on any aspect of the LRA and to make rules;

f) conducting and publish research;

g) providing training and advice on the establishment of collective bargaining structures, workplace restructuring, consultation processes, termination of employment, employment equity programmes and dispute prevention;

h) providing assistance of an administrative nature to an employee earning less than the BCEA threshold; and

i) determining fees that the CCMA can charge and regulate practice and procedure for conciliation and arbitration hearings.

Any council or private agency can apply for accreditation to perform the functions of resolving disputes through conciliation and arbitrating disputes that remain unresolved after conciliation if it is foreseen in the LRA. These organisations may apply for a subsidy to perform these dispute resolution functions and to train persons to perform them.

Any party to an employment contract who is dissatisfied with its outcome or procedural irregularities must invariably refer the matter for conciliation or arbitration (alternative dispute resolution).

Conciliation. The Act determines that a case must be conciliated within 30 days of the date of referral. This is when a third party (a commissioner from the CCMA) assists the disputing parties to reach a settlement. The commissioner must determine the process to be followed, which can include mediation, fact-finding, recommendations, and advisory arbitration.

Arbitration. The LRA specifically determines when a dispute must go for arbitration or adjudication. *Arbitration* is the route for adjudicating disputes about dismissals for reasons related to the employee's conduct or capacity, as well as disputes concerning trade union organisational rights, the interpretation of collective agreements and certain individual unfair labour practices. The LRA gives broad procedural discretion to the arbitrator to determine the dispute expeditiously in a non-technical and non-legalistic manner. There is an obligation by the arbitrator to deal with the substantial merits of the dispute with the minimum of legal formalities. The award by the arbitrator is final. It can only be taken on review and not on appeal.

The CCMA is funded by the national government; there are no charges for referring disputes to it. The CCMA only charge fees for (1) resolving disputes which are referred to it in the circumstances allowed by the LRA; (2) conducting, overseeing, or scrutinising any election

ballot at the request of a registered trade union or employers' organisation; and (3) providing advice or training.

The CCMA has 23 offices spread over the nine provinces of South Africa. It also provides technical support in the case management system to 21barganing councils and one neighbouring country (Eswatini).

C. Bargaining council

Bargaining councils (previously known as industrial councils) are joint employer and union bargaining institutions. Their primary function is to negotiate collective agreements that regulate terms and conditions of employment in the sectors in which they operate. Typically, these agreements deal with issues such as minimum wages, hours of work, overtime, leave pay, notice periods and retrenchment pay. Many bargaining council agreements also establish 'social wage' funds, such as a pension. The LRA provides for the extension of bargaining council agreements to cover non-parties who fall in the same bracket with the parties to the agreement.

D. Labour inspectorate

The Basic Conditions of Employment Act (BCEA) provides for the Minister of Labour to appoint labour inspectors to promote, monitor and enforce compliance with the BCEA as well as other employment laws such as Section 64(1) of the LRA. Labour inspectors have extensive powers to enter workplaces, question persons and inspect documents to monitor and enforce compliance with labour laws. This inspectorate represents the central government's supervisory role in the labour market. Thus, while the executive branch does not actively resolve disputes, it remains the compliance officer of the labour landscape.

9.2.2 Labour dispute resolution system process(es)

A. Proceedings before the CCMA

Conciliation

The LRA establishes that any party of a dispute about a matter of mutual interest may refer it in writing to the CCMA if the parties are, on one side, trade unions, employees, or trade unions and employees, and on the other side employers' organisations, employers, or employers' organisations and employers. Once the dispute is referred to the Commission, it must appoint

a commissioner to attempt to resolve the dispute through conciliation within 30 days of receipt of the referral. The director can extend term by up to 5 days to ensure a meaningful conciliation process.

The commissioner should determine a process to resolve the dispute, which may include (a) mediating, (b) conducting a fact-finding exercise, and (c) making a recommendation to the parties, which may be in the form of an advisory arbitration award (section 135, (3), of LRA). If the conciliation process fails, or at the end of the 30 days, the commissioner must issue a certificate stating whether the dispute has been solved.

Arbitration

The CCMA must appoint a commissioner to arbitrate a dispute if (a) a commissioner has issued a certificate stating that the dispute remains unresolved; and (b) within 90 days after the date on which that certificate was issued, any party has requested arbitration (section 136 of LRA). However, the Commission may allow a request for arbitration after 90 days.

The commissioner appointed to arbitrate the dispute may be the same who attempted to resolve the dispute through conciliation. The parties may object to the permanence of the same commissioner. In this case, the CCMA must appoint another one. Also, the parties may appoint a commissioner of their preference to the extent that this is reasonably feasible or request a senior commissioner to attempt to solve the dispute.

According to the LRA, the commissioner may conduct the dispute appropriately to determine it fairly and quickly but must deal with the substantial merits through minimum legal formalities. Subject to the commissioner's discretion and the appropriate form of the proceedings, a party may give evidence, call witnesses, question the witnesses of any other party and address concluding arguments to the commissioner. If all the parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.

If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party (a) referred the dispute do the CCMA, the commissioner may dismiss the matter; or (b) did not refer the dispute to the Commission, the commissioner may continue the arbitration proceedings in the absence of that party or remit the arbitration proceedings to a later date (section 138, (5), of LRA).

The commissioner must issue an arbitration award with brief reasons within 14 days of the conclusion of the arbitration proceedings and serve a copy of it to each party or representative. If good cause is demonstrated, the director may extend this period.

The commissioner may make any appropriate arbitration award in terms of the LRA, including but not limited to an award (a) that gives effect to any collective agreement; (b) that gives effect to the provisions and primary objects of LRA; (c) that includes, or is in the form of, a declaratory order (section 138, (9), of LRA). The commissioner may make an order for the payment of costs according to the requirements of law and fairness following rules made by CCMA and having regard to any relevant Code of Good Practice issued by NEDLAC and any relevant guideline issued by the Commission (section 138, (10) of LRA).

The CCMA must arbitrate a dispute if it remains unresolved after conciliation and would be referred to the Labour Court for adjudication, and all the parties agree to that in writing. In this case, the commissioner may make an award that the Labour Court could have made. Any party of the arbitration agreement may apply to the Labour Court at any time for modification or annulment.

The LRA establishes that if a party to an arbitration agreement commences proceedings in the Labour Court against any other party about any matter that they agreed to refer to arbitration, any of them can ask the Court (a) to suspend proceedings and refer the dispute to arbitration; or (b) with the consent of the parties and where it is expedient to do so, continue with the proceedings with the Labour Court acting as arbitrator, in which case the Court may only make an order corresponding to the award that an arbitrator could have made (section 141, (5), of LRA). If the Labour Court considers sufficient reason for the dispute to be referred to arbitration, it may stay suspend the process.

Commissioners' powers

When attempting to resolve disputes are establishes in section 142 of LRA, a commissioner may

a) Order to appear and question any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help resolve the dispute;

b) order any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the commissioner to be questioned or to produce that book, document or object;

c) call, and if necessary order, any expert to appear before the commissioner to give evidence relevant to the resolution of the dispute;

d) call any person present at the conciliation and arbitration proceedings or who was or could have been ordered to appear for any purpose set out in this section, to be questioned about any matter relevant to the dispute;

e) administer an oath or accept an affirmation from any person called to give evidence or be questioned;

f) at any reasonable time, but only after obtaining the necessary written authorisation, enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the dispute is to be found or is suspected on reasonable grounds of being found there;

g) examine, demand the production of, and seize any book, document or object that is in those premises and that is relevant to the resolution of the dispute;

h) take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement; and

i) inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the CCMA.

The Commission must pay the prescribed witness fee to each person who appears before a commissioner in response to an order to appear. Any person who requests the CCMA to issue an subpoena must pay the prescribed witness fee to each person who appears before a commissioner in response to it. However, the Commission, on good cause shown, may waive this obligation and pay the witness.

Effects of arbitration awards

The CCMA may, by agreement between the parties or on application by a party, make any settlement agreement in respect of a dispute that has been referred to the Commission an arbitration award. Section 142A, (2), of LRA, states that "a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitrator or to the Labour Court".

An arbitration award is final and binding and may be enforced as it were an order of the Labour Court regarding which a writ has been issued unless it is an advisory arbitration award. For this to happen, there must be a certification from the director.

If a party fails to comply with a certified arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court. If the arbitration award requires a party to pay a sum of money, it must enforce or execute that award as if it were an order of the Magistrate's Court.

Review of arbitration awards

A party to a dispute who alleges a defect in any arbitration proceedings may apply to the Labour Court for an order setting aside the arbitration award within six weeks of the date it was served to

the applicant or the date of discovery of an offence of the Prevention and Combating of Corrupt Activities Act of 2004. The Labour Court may, on good cause, accept a late filing of the application.

A defect in an arbitration award means that the commissioner (i) committed misconduct concerning the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; (iii) overstepped their powers; or (iv) improperly imparted an award.

The Labour Court may suspend the enforcement of the award pending its decision, and if so, may (a) settle the dispute in a manner it considers appropriate; or (b) make any order it considers appropriate about the procedures to be followed to determine the dispute.

Subject to the rules of the Labour Court, a party to a dispute who alleges a defect in any arbitration proceedings must apply for the matter to be heard within six months of the application's delivery, and the Court may, on good cause shown, accept a late application. Judgment must be handed down as soon as reasonably possible. The institution of review proceedings does not suspend the operation of an arbitration award unless the applicant furnishes security to the satisfaction of the Court. In the case of a reinstatement or re-employment order, the award should be equivalent to 24 months' remuneration, and in the case of an order of compensation, it must be equivalent to the amount of compensation awarded. A request to set aside an arbitration award interrupts prescription terms.

Advisory arbitration panel in the public interest

The director must establish an advisory arbitration panel to facilitate the resolution of a dispute when a commissioner issues a certificate of unresolved dispute or a notice of the commencement of the strike or lockout if directed to do so by the Minister; on request by a party to the dispute; if ordered to do so by the Labour Court; or by agreement of the parties.

The LRA's section 150A (3) states that the director may only appoint the panel when he has reasonable grounds to believe that:

a) the strike or lockout is no longer functional to collective bargaining in that it has continued for a protracted time and no resolution of the dispute seems imminent;

b) there is an imminent threat that constitutional rights may be or are being violated by persons participating in or supporting the strike or lockout through the threat or use of violence or the threat of or damage to property; or

c) the strike or lockout causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society.

The Labour Court may only make an order requiring the director to appoint the panel (a) on a request made by a person or association of persons that will be materially affected by any or more of the circumstances cited above; or (b) if the Court considers that there are reasonable grounds to believe that one or more of those circumstances exist.

An advisory arbitration award must be in the prescribed form and include: (a) a report on factual findings; (b) recommendations for the resolution of the dispute; (c) motivation for why the recommendations ought to be accepted by the parties; and (d) the seven-day period within which the parties to the dispute must indicate acceptance or rejection of the award. An advisory arbitration award is only binding for a party and its members to the dispute if one or more of the trade union parties has accepted or deemed to have accepted it.

B. Proceedings before the Labour Court and Labour Appeal Court

The Labour Court has exclusive jurisdiction regarding all matters that are to be determined by it in terms of LRA and any other law. Also, it has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution and arising from:

a) employment and labour relations;

b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

c) the application of any law for the administration of which the Minister is responsible.

d) Regarding the powers of the Labour Court, it may (Section 158 of LRA); and

e) make an appropriate order, including:

   i. the grant of urgent interim relief;

   ii. an interdict;

   iii. an order directing the performance of any particular act which order, when implemented, will remedy a tort and give effect to the primary objects of the LRA;

   iv. a declaratory order;

v. an award of compensation in any circumstance contemplated in the LRA;

vi. an award of damages in any circumstances contemplated in the LRA; and

vii. an order for costs;

f) order compliance with any provision of the LRA or any employment law;

g) make any arbitration award or any settlement agreement an order of the Court;

h) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

i) determine a dispute between a registered trade union or registered employers' organisation, and any one of the members or applicants for membership thereof, about any alleged non-compliance with the constitution of:

i. that trade union or employers' organisation (as the case may be); or

ii. the fairness of the reason to refuse or expel an employee from a trade union that is a party to a closed shop agreement (Section 26(5)(b) of LRA);

j) subject to the provisions of the LRA condone the late filing of any document with, or the late referral of any dispute to, the Court;

k) review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law;

l) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;

m) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act 85 of 1993); and

n) deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law.

The proceedings in the Labour Court must be carried out publicly. However, the Labour Court may exclude the members of the public, or specific persons, or categories of persons from the proceedings in any case where a court of a provincial division of the High Court could have done so.

The Labour Court has exclusive review powers over the awards by CCMA. Reviews occupy a significant portion of the Labour Court's workload. The Labour Court has exclusive jurisdiction to interpret the LRA and other labour legislation. This includes exclusive jurisdiction to interdict industrial action that does not comply with statutory requirements, as well as other unlawful conduct arising from a strike or lock-out. This exclusive jurisdiction of the specialist labour court does not extend to all employment matters, and claims arising from employment contracts may be brought to several different forums, including the civil courts.

Any decision, judgment or order of the Labour Court may be served and executed as if it were from the High Court. The Court, acting of its own accord or by request of any affected party may vary or rescind a decision, judgment or order:

a) erroneously sought or erroneously granted in the absence of any party affected;

b) in which there is an ambiguity, an obvious error or omission, but only to that extent; or

c) granted as a result of a mistake common to the parties to the proceedings.

The Labour Court may not review any decision or rule made during conciliation or arbitration proceedings before the issue in dispute has been finally determined by the CCMA or the bargaining council, except if the Court considers that it is just and equitable to do so. If it becomes apparent, at any stage, that a dispute referred to the Labour Court should have been referred to arbitration, the Court may:

a) stay the proceedings and refer to dispute arbitration; or

b) expediently continue the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.

A judgment of the Labour Court must be handed down as soon as reasonably possible.
Of its own accord or at the request of any party to the proceedings, the Court may reserve for the decision of the Labour Appeal Court any question of law that arises in those proceedings. This is only possible if this matter is decisive for the proper adjudication of the dispute. Pending the decision of the Labour Appeal Court on a reserved question, the Labour Court may make an interim order.

Any party to a proceeding before the Labour Court may apply to the Court to appeal to the Labour Appeal Court against any final judgement or final order. If the application to appeal is refused, the applicant may direct the request to the Labour Appeal Court. The request may

be granted subject to any conditions determined by the concerned Court. Subject to the Constitution and regardless of any other law, an appeal against any final judgement or final order of the Labour Court in any matter in respect of which the Labour Court has exclusive jurisdiction may be brought only to the Labour Appeal Court. A decision about which any two judges of the Labour Appeal Court agree is the decision of the Court.

The Labour Appeal Court has the power: (a) upon hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and (b) to confirm, amend or set aside the judgement or order that is the subject of the appeal and to give any judgement or make any order that the circumstances may require. Despite these provisions, the Judge President may direct that any matter before the Labour Court should be heard by the Labour Appeal Court sitting as a court of the first instance, in which case the Labour Appeal Court is entitled to make any order that the Labour Court would have been entitled to make.

The proceeding in the Labour Appeal Court must be carried out in open court. However, the Court may exclude the members of the public, or specific persons, or categories of persons from the proceedings in any case where a High Court have done so. Those who have the right to appear before the Labour Court also have the right to appear before the Labour Appeal Court. A judgement of the Labour Appeal Court is binding on the Labour Court. Subject to the Constitution and despite any other law, no appeal lies against any decision, judgement or order given by the Labour Appeal Court in respect of its exclusive jurisdiction or when it sits as a court of the first instance.

The Labour Appeal Court was established as the court of final instance in matters concerning the interpretation of the LRA and other matters within the exclusive jurisdiction of the Labour Court. It was anticipated that this would promote consistent interpretation and application of labour legislation. However, the 1996 Constitution has been interpreted to permit an intermediate level of appeal of all matters within the jurisdiction of the labour courts to the Supreme Court of Appeal (SCA). While the SCA has espoused the view that the primary responsibility for developing labour law jurisprudence lies with the LAC and that it will only be appropriate for it to intervene if "there are special considerations relating to issues of constitutional or legislative construction or important issues of principle", it has frequently overturned LAC decisions. According to the Constitution Seventeenth Amendment Act, 2012 ('CSAA'), the Constitutional Court is the highest in all matters, whether constitutional or not. The Supreme Court of Appeal is no longer the highest regarding matters of labour or competition. This restores the apex status of the Labour Appeal Court in labour matters. The Labour Appeal Court is thus the highest court of appeal for all labour matters.

9.2.3 Access to justice

In any proceeding before the Labour Court, a party may appear in person or be represented by a legal practitioner; a director or employer of the party; any member, office-bearer or official of that party's registered trade union or registered employers' organisation; a designated agent or official of a council; or an official of the Department of Labour.

The Labour Court may order the payment of costs, according to the requirements of law and fairness. When deciding whether to order the payment of costs, the Court may consider (a) whether the matter should have been referred to arbitration and, if so, the extra costs incurred in referring the matter to the Court; (b) the conduct of the parties in proceeding with or defending the matter before the Court, and during the proceedings before the Court. The Labour Appeal Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.

9.3 ADMINISTRATIVE ORGANISATION OF THE LABOUR DISPUTE RESOLUTION SYSTEM

9.3.1 Organisation of the justice system

According to Cachalia (2010), in terms of an Act of Parliament, for the Constitutional Court, the Minister appoints staff, such as a registrar and assistant registrars on the request of and in consultation with the Chief Justice. The Chief Justice on the other hand appoints research assistants in consultation with the Minister. An Executive Secretary helps to carry out administrative duties. Section 15 (2) of the Act establishes how the court's budget is to be determined. It provides that the funding needs of the court are determined by the Chief Justice after consultation with the Minister. Therefore, the Chief Justice must establish formal communication with the Minister after assessing the Courts' need for resources, and as established in 1st Paragraph of Art. 54 of the Superior Court Act, the Minister must consider and address the requests of the funds determined by the Chief Justice in consultation with the heads of the Courts. Furthermore, the expenditure in connection with the administration and functioning of the Superior Courts must be defrayed from moneys appropriated by the Parliament as stated in Art. 10 of the Act.

The administration of lower levels of the court system, such as the Supreme Court of Appeal and Provincial High Courts, remains under the control of the Department of Justice.

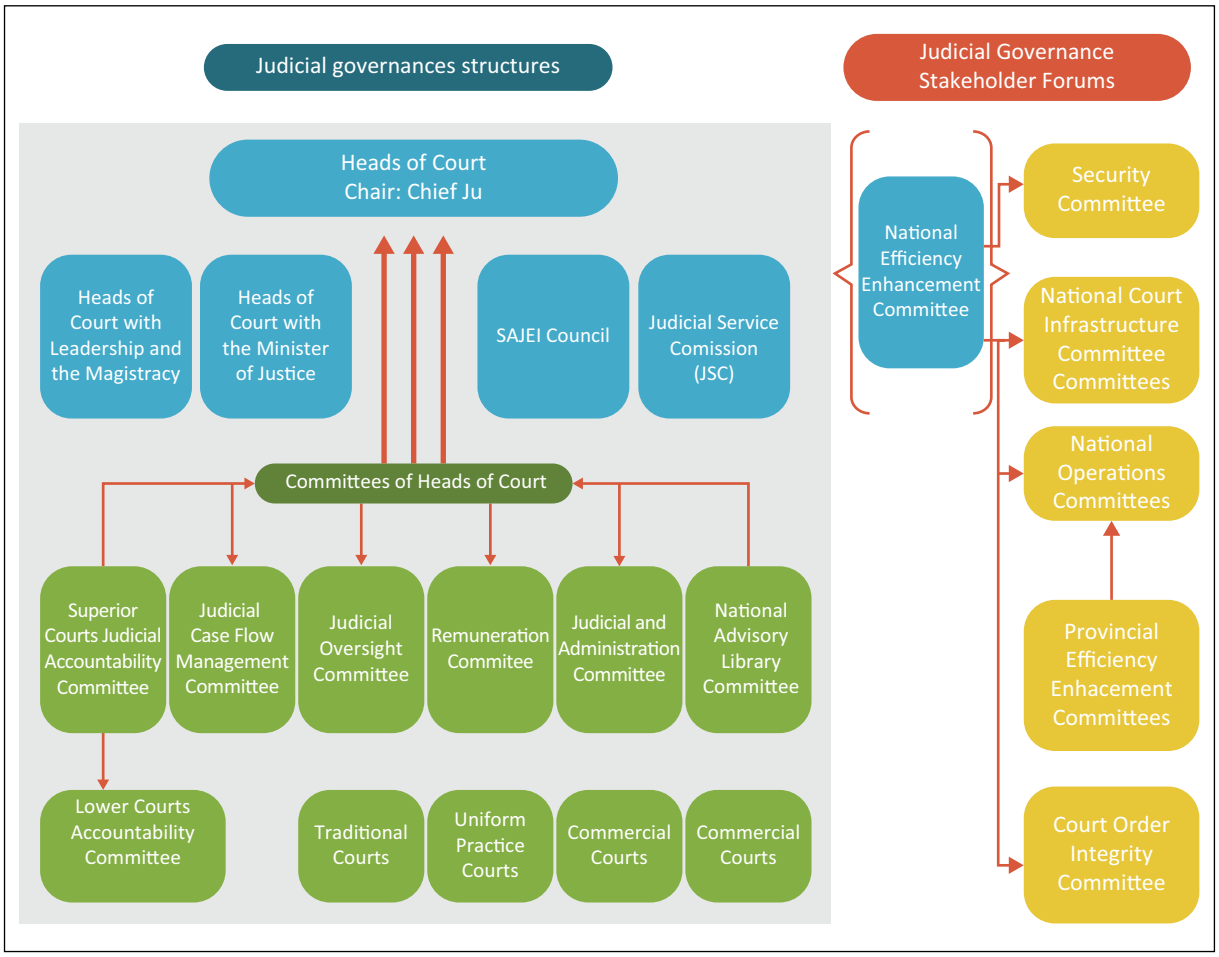
Cachalia (2010) points out that even though the Constitutional Court emphasises that "… institutional judicial independence itself is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights, the courts have no authority to develop or administer independently of government the court administration budget. The Chief Justice has no fiscal and operational responsibility that allows him or her to function independently of executive directives."

9.3.2 Human resources

A. Governance structure and magistrate composition of South Africa's labour justice system

In South Africa, Judges are not public servants. They are Public Office Bearers who are independent and report to no one except that they are required to apply the Constitution and the law impartially without fear, favour, or prejudice. The process of recruitment and evaluation is covered below in "Recruitment and qualification".

FIGURE 9.3 Governance framework of South Africa's Judiciary



Source: South African Judiciary (2019).

In terms of governance structure, the Chief of Justice has the overall responsibility for managing judicial functions and overseeing the implementation of norms and standards. The Superior Courts Act stipulates that the management of the judicial functions of each

court is the responsibility of the Head of that Court. The Judge President of a Division is also responsible for the coordination of the judicial functions of all Magistrates' Courts falling within the jurisdiction of that Division. The Heads of the various Courts manage the judicial functions and ensure that all Judicial Officers perform their functions efficiently.

TABLE 9.25 Employment and vacancies by programme, 31 March 2019

Programme	Number of posts approved on the establishment	Number of posts filled	Vacancy rate	Number of employees additional to the establishment
OCJ: Administration	182	166	8.8	0
OCJ: Superior Court Service	1 878	1 745	7.1	0
OCJ: Judicial Education & Support	39	36	7.7	0
Total	2 099	1 947	7.2	0

Source: OCJ (2019).

TABLE 9.26 Personnel expenditure by programme, 1 April 2018–31 March 2019

Programme	Total expenditure (ZAR thousands)	Personnel expenditure (ZAR thousands)	Training Expenditure (ZAR thousands)	Personnel and special services (ZAR thousands)	Personnel expenditure as a % of a total expenditure	Average compensation of employees cost per employee or Judge (ZAR thousands)
OCJ: Administration	222,059	87,777	3,491	0	39.5	529
OCJ: Superior Court Services	801,547	551,810	0	0	68.8	316
OCJ: Judicial Education & Support	68,413	23,377	0	0	34.2	649
Sub-total (Voted Fund)	1,092,019	662,964	3,491	0	60.7	341
Sub-total (Direct Charge against the NRF)	1,022,189	956,209	0	0	93.5	2 000
Grand total (Voted Funds and Direct Charge against NRF)	2,114,208	1,619,173	3,491	0	76.6	668

Source: OCJ (2019).

The Office of the Chief of Justice (OCJ) was established to ensure that he can adequately execute his mandate as both the Head of the Constitutional Court and the Head of the Judiciary; to enhance the institutional, administrative, and financial independence of the Judiciary; and to improve organisational governance and accountability, and the effective and efficient use of resources. Led by the Secretary-General, the OCJ provides court administration and support services to the Superior Courts to ensure their effective and efficient administration.

TABLE 9.27 Superior Courts Magistrates

Divisions	African		Coloured		Indian		White		Total	Vacancies
	Male	Female	Male	Female	Male	Female	Male	Female		
Constitutional Court	4	2	0	1	0	0	2	0	9	2
Supreme Court of Appeal	7	7	2	0	3	1	5	1	26	0
Northern Cape Division (Kimberley)	1	3	0	1	0	0	1	0	6	0
Eastern Cape Division (Grahamstown)	2	1	1	0	0	0	3	1	8	2
Eastern Cape Local Division (Port Elizabeth)	1	0	0	0	0	0	2	2	5	2
Eastern Cape Local Division (Bhisho)	1	0	0	0	0	0	1	2	4	1
Eastern Cape Local Division (Mthatha)	2	2	0	0	0	1	2	0	7	1
Western Cape Division (Cape Town)	5	3	6	5	2	1	7	3	32	1
North West Division (Mahikeng)	1	3	1	0	0	0	0	0	5	1
Free State Division (Bloemfontein)	5	2	1	0	0	1	3	3	15	1
Gauteng Division (Pretoria)	14	10	0	2	3	0	11	6	46	3
Gauteng Local Division (Johannesburg)	8	5	3	0	2	2	7	6	33	4
Limpopo Division (Polokwane)	3	1	0	0	0	0	1	0	5	0
Limpopo Local Division (Thohoyandou)	3	0	0	0	0	0	0	0	3	1
Mpumalanga Division (Nelspruit)	1	0	0	0	0	0	0	0	1	
KwaZulu-Natal Division (Pietermaritzburg)	3	2	1	0	2	1	6	0	15	2
KwaZulu-Natal Local Division (Durban)	4	2	1	1	1	3	1	1	14	0
Labour Court	3	3		1			3	2	13	1
Labour Appeal Court										
Land Claims Court	2			1	1	1			0	
Competition Appeal Court[24]									0	
Total	68	46	16	11	13	10	55	27	246	22

Source: South African Judiciary (2019).

24. The Judges of the Labour Appeal Court, Land Claims Court and Competition Appeal Court are seconded from the High Court and therefore their statistics are already included.

TABLE 9.28 Number of Judges in Magistrates Courts

Post class	African male	African female	Indian male	Indian female	Coloured male	Coloured female	White male	White female	Total
Regional Court President	5	2	0	0	0	1	0	1	9
Regional Magistrate	98	81	14	28	22	12	67	45	367
Chief Magistrate	3	6	1	1	1	1	2	1	16
Senior Magistrate	33	27	7	11	6	5	14	19	122
Magistrate	352	313	54	74	78	74	241	180	1366
Grand Total	491	429	76	114	107	93	324	246	1880
Percentages	26	23	4	6	6	5	17	13	100

Source: South African Judiciary (2019).

TABLE 9.29 Employment and vacancies by critical occupations, 31 March 2019

Critical occupations	Number of posts approved in the establishment	Number of posts filled	Vacancy rate (%)	Number of additional employees in the establishment
Administrative related	105	95	9.5	0
Attorneys	1	1	0	0
Bus and heavy vehicle drivers	2	2	0	0
Cleaners in offices, workshops, hospitals etc.	6	6	0	0
Client information clerks (switchboard, reception, inform clerks)	12	12	0	0
Communication and information related	9	7	22.2	0
Finance and economics related	63	56	11.1	0
Financial and related professionals	29	27	6.9	0
Financial clerks and credit controllers	34	31	8.8	0
Food services aids and waiters	14	14	0	0
General legal administration & related professionals	167	146	12.6	0
Historians and political scientists	1	1	0	0
Human resources & organisational development & related professionals	4	4	0	0
Human resources clerks	36	36	0	0
Human resources related	24	21	12.5	0
Language practitioners, interpreters & other communicators	49	45	8.2	0
Legal related	19	17	10.5	0
Librarians and related professionals	16	16	0	0
Library, mail, and related clerks	28	26	7.1	0
Light vehicle drivers	1	1	0	0
Logistical support personnel	1	1	0	0
Material-recording and transport clerks	16	16	0	0
Messengers, porters, and deliverers	145	135	6.9	0
Other administration & related clerks and organisers	711	682	4.1	0
Other administrative, policy and related officers	38	34	10.5	0
Other TI personnel	8	5	37.5	0
Secretaries & other keyboard operating clerks	406	371	8.6	0
Security guards	2	1	50	0
Security officers	58	54	6/9	0
Senior managers	38	35	7.9	0
Translators and air traffic communicators	56	49	12.5	0
Total	**2,099**	**1,947**	**7.2**	**0**

Source: South African Judiciary (2019).

Figure 9.3 presents South Africa's judicial governance structure, including the Committee of Heads of Courts, and the judicial governance stakeholder forums.

Table 29 presents the current number of administrative and operational staff in courts, including clerks and attorneys.

In February 2014, the Chief Justice, based on section 165 of the Constitution and section 6 of the Superior Courts Act, enacted norms and standards for the performance of judicial functions with the unanimous support of the Heads of Court. These norms and standards seek to enhance access to quality justice for all and affirm the dignity of all users of the court system by ensuring the effective, efficient, and expeditious adjudication and resolution of all disputes through the Courts, where applicable.

B. Labour justice staff structure and composition

As for the staff structure of labour justice, the President, acting on the advice of NEDLAC and the JSC and after consultation with the Minister of Justice, must appoint a Judge President of the Labour Court. After consulting them, the President must appoint the Deputy Judge President of the Court. Both must be judges of the High Court and have knowledge, experience, and expertise in labour law. The President is also responsible for appointing the judges of the Labour Court. They must be either a judge of the High Court or a person who is a legal practitioner with significant knowledge, experience, and expertise in labour law. The Minister of Justice, after consultation with the Judge President, may appoint one or more persons to serve as acting judges for a determined period.

The President, acting on the advice of NEDLAC, and in consultation with the Minister of Justice and the Judge President, may remove any other judge of the Labour Court from office for misbehaviour or incapacity. Despite the expiration of a judge's appointment period, they may continue to perform their judge functions to dispose of any proceedings in which they have taken part and which are still pending, or which, having been so disposed of before or after the expiration of that person's appointment, have been re-opened, and for so long as that person will be necessarily engaged in connection with the disposal of the proceedings so pending or re-opened.

The President, acting on the advice of NEDLAC and the JSC after consultation with the Minister of Justice and the Judge President of the Labour Appeal Court, must appoint three judges of the Labour Appeal Court. The Minister of Justice, after consultation with the Judge President of the Labour Appeal Court, may appoint one or more judges of the High Court to serve as acting judges of the Labour Appeal Court. A judge of the Labour Appeal Court must be appointed for a fixed term determined by the President at the time of appointment. Despite the expiration of a judge's appointment period, they may continue to perform their judge functions to dispose

of any proceedings in which they have taken part and which are still pending, or which, having been so disposed of before or after the expiration of that person's appointment, have been re-opened, and for so long as that person will be necessarily engaged in connection with the disposal of the proceedings so pending or re-opened.

The Rules Board for Labour Courts consists of the Judge President of the Labour Court (chairperson), the Deputy Judge President of the Labour Court and the following persons, to be appointed for three years by the Minister of Justice, acting on the advice of NEDLAC: a practising advocate with knowledge, experience and expertise in labour law; a practising attorney with knowledge, experience and expertise in labour law; a person who represents the interests of employees; a person who represents the interests of employers; and a person who represents the interests of the State.

The Board is responsible for regulating the conduct of proceedings in the Labour Court, including (i) the process by which proceedings are brought before the Court, and the form and content of that process; (ii) the period and process for noting appeals; (iii) the taxation of bills of costs; (iv) after consulting with the Minister of Finance, the feed payable and the costs and expenses allowable in respect of the service or execution or any process of the Labour Court, and the tariff of costs and expenses that may be allowed in respect of that service or execution; and (iv) all other matters incidental to performing the functions of the Court, including any matters not expressly mentioned in this subsection that are similar to matters about which the Rules Board may make rules.

C. Remuneration of Judges

The Judges Remuneration and Conditions of Employment Act 47 of 2001, with related regulations, govern the employment benefits of Judges. The salary, allowances and benefits of Judges are determined periodically by the President of the Republic of South Africa by notice in the Official Gazette, after taking into consideration the recommendation of the Independent Commission for Remuneration of Public Office-bearers. The total remuneration (annual salary plus allowance/benefits) of Judges (including acting Judges) consists of an annual cash salary component of 72, 24 per cent; plus, a non-cash component of 27,76 per cent (which includes a motor vehicle allowance and the employer's medical aid contribution). All judges are entitled to a non-taxable allowance of ZAR3,500.00 annually in addition to their salaries. A judge is not allowed to hold or perform any other office for profit or receive in respect of any service payments or remuneration apart from their salary, except with the express permission of the Minister. The salaries, allowances, and benefits of judges may not be reduced.

TABLE 9.30 Judges' remuneration levels, effective April 2018

Position	Total Remuneration (ZAR)	Total Remuneration (USD)[25]	Approximated total remuneration per month (USD)
Chief Justice	2,896,107	199,869.36	16,655.78
Deputy Chief Justice	2,606,428	179,877.71	14,989.81
President: Supreme Court of Appeal	2,606,428	179,877,71	14,989.81
Deputy President:Supreme Court of Appeal	2,461,674	169,887,78	14,157.32
Judge: Constitutional Court	2,316,919	159,897.79	13,324.82
Judge: Supreme Court of Appeal	2,316,919	159,897.79	13,324.82
Judge President: High/Labour Court	2,172,165	149,907.87	12,492.32
Deputy Judge President: High/Labour Court	2,027,241	139,906.21	11,658.85
Judge: High/Labour Court	1,882,486	129,916.22	10,826.35
Special Grade Chief Magistrate	1,436,913	99,165.84	8,263.82
Regional Court President	1,436,913	99,165.84	8,263.82
Regional Magistrate	1,289,294	88,978.19	7,414.85
Chief Magistrate	1,289,294	88,978.19	7,414.85
Senior Magistrate	1,068,699	73,754.24	6,146.19
Magistrate	971,649	67,056.52	5,588.04

Remuneration of CCMA staff

The CCMA's Governing Body must determine the remunerations and allowances of the Commission director, commissioners, and staff members. According to CCMA's Annual Report 2018-2019, the Governing Body and its Committees are remunerated under the annually approved National Treasury rates. Members are also paid a preparation fee and other reimbursements in addition to the approved daily fee as per the CCMA Policy or Financial Management. Representatives from the government are not entitled to such remuneration. The following factors determine the remuneration:

a) Financial health of the organisation.

b) Impact of inflation.

c) General rate of salary increases in the labour market.

d) Job type and outcome expectations.

25. In 2019 average USD values.

e) Bargaining Unit or Non-Bargaining Unit.

f) Performance.

TABLE 9.31 Remuneration of the Governing Body and Committee Members for the 2018–2019 financial year

Name	Remuneration (ZAR thousands)	Other Allowance (ZAR thousands)	Other re-imbursements (ZAR thousands)	Total (ZAR thousands)
Makhulu Ledwaba	192	None	3	195
Sifiso Lukhele	305	None	7	312
Lucio Trentini	111	None	2	113
Kaizer Moyane	188	None	4	192
Narius Moloto	183	None	4	187
Bheki Ntshalintshali	214	None	5	219
Geoffreu Esitang	83	None	5	88
Ntsoaki Mamashela	N/A	None	N/A	N/A
Aggy Moiloa	N/A	None	N/A	N/A
Virgil Seafield	N/A	None	N/A	N/A
Velile Pangwa	171	None	5	176
Ramona Clark	122	None	4	126
Charles Motau	130	None	5	135
Sandra Dimakatso Mahlalela	N/A	None	3	3

Source: CCMA (2019).

9.3.3 Recruitment, selection, and training

A. Recruitment and qualification

Labour justice

As previously mentioned, judges are Public Office Bearers, and are appointed by the President after taking into account recommendations of the Judicial Service Commission (JSC), which is a constitutional body consisting of the Chief Justice, President of the Supreme Court of Appeal, a representative of the Judges' President, Cabinet Minister responsible for the administration of justice, representatives of the Advocates and Attorneys profession, a Law Teacher, representatives of the National Assembly and National Council of Provinces, and persons designated by the President.

The JSC is a body established by the Constitution to interview candidates for judicial posts and make recommendations for judicial appointment by the President. In fulfilling its mandate, the

JSC must ensure that candidates are fit and proper for judicial office and that the Judiciary broadly reflects the racial and gender composition of South Africa to redress the imbalances of apartheid.

Commission for Conciliation, Mediation and Arbitration (CCMA)

According to Section 177 of the LRA, CCMA's commissioners are appointed by the Governing Body on a full-time or part-time basis, both for a fixed term. The Governing Body may remove a commissioner from office for serious misconduct, incapacity, or material violation of the commissioner's Code of Conduct.

Entry-level commissioners must have three to five years of experience in industrial relations, labour law, conducting conciliations, arbitrations and facilitations and relevant tertiary qualifications. Senior commissioners should have minimum of eight years of relevant experience, two of which must be at the senior level, relevant tertiary qualifications, knowledge and experience in labour law, and managerial experience (only for full-time positions).

B. Initial and continous training

Labour Justice

The South African Judicial Education Institute (SAJEI) was established to promote the independence, impartiality, dignity, accessibility, and effectiveness of the Courts through continuing judicial education as provided for in the South African Judicial Education Institute Act 14 of 2008. The Institute commenced with training in January 2012, and its functions are:

a) to establish, develop, maintain and provide judicial education and professional training for judicial officers;

b) to provide entry-level education and training for aspiring Judicial Officers to enhance their suitability for appointment to judicial office;

c) to research judicial education and professional training and to liaise with other judicial education and professional training institutions, persons and organisations in connection with the performance of its functions;

d) to promote, through education and training, the quality and efficiency of services provided in the administration of justice in South Africa;

e) to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts; and

f) to render such assistance to foreign judicial institutions and courts as may be agreed upon by the Council.

SAJEI is led by a council consisting of 24 members who are mainly from the Judiciary. Other stakeholders, such as advocates, attorneys, academics as well as traditional leaders form part of the Council. The Chairperson of the Council is the Chief Justice. The curriculum of SAJEI for aspirant and newly appointed Judicial Officers is designed to pay special attention to areas like judgement writing, civil and criminal trial management and motion court management, ethics, and constitutional litigation. It also has a programme for a wide range of soft skills for Judicial Officers.

CCMA

CCMA's commissioners are exposed to various continuous development programmes each year that focus on critical areas of the statutes and various skill-centred programmes. They also have access to mentorship and coaching. The Dispute Resolution Department also provides monthly case law monitoring sessions, where key new law cases are shared and discussed with them.

C. Evolution and promotion

Labour Justice

As the Head of the Judiciary, The Chief of Justice has the responsibility of monitoring and evaluating the performance of each Judicial Officer as well as the monitoring and implementation of norms and standards for the exercise of leadership and judicial functions of all courts. All judicial officers should submit data on their performance and case flow for collating and analysis, based on which a comprehensive report is compiled by the Head of Court.

The JSC has also established a Judicial Conduct Committee (JCC) to deal with complaints on Judicial Conduct. In terms of the JSC Act, charges against members of the Judiciary must be based on, among other things, performance statistics, and information regarding the performance of judicial functions can only be gathered through reporting and accountability.

CCMA

CCMA's commissioners have a defined career path, namely:

a) Candidate Commissioner.

b) Post-mentorship.

c) Operational.

d) Senior Commissioner.

The progression to senior commissioner it is not automatic, and should be based on a combination of knowledge, skills, and tenure.

9.3.4 Budget indicators of total cost, per inhabitant and resolved dispute

A. Labour Justice

The Office of The Chief of Justice (OCJ) maintains a programme for superior court services. This programme consists of five sub-programmes which are in line with the OCJ revised budget programme structure. The sub-programmes are: Administration of Superior Courts, Constitutional Court, Supreme Court of Appeal, High Courts and Specialised Courts (OCJ 2019).

The Office of the Chief Justice (OCJ) Annual Report 2018/2019 points out that the expenditure on the judicial education programme and support was of ZAR68,413. It also informs that a total of 142 judicial education training courses were carried out during the period, covering a total of 3,068 delegates. The training conducted included court-annexed mediation and case management, children's court skills, criminal court skills, civil court skills, competition law, maritime law, judicial management, judicial ethics as well as environmental crimes. There is no specific mention regarding the labour courts training in the report.

TABLE 9.32 Strategic objectives and annual performance, 2018/2019

Strategic objective	Objective indicators	Baseline 2017/18	Planned annual target 2018/19	Actual achievement 2018/19	Deviation from planned target to Actual achievement for 2018/19	Comments on deviations
Ensure the effective and efficient administration of the Superior Courts	Percentage achievement of quasi-judicial targets	92% (82 579 of 89 935)	90%	97% (98 122 of 101 342)	7%	Improved training and monitoring measures implemented to sustain achievements of targets

Source: OCJ (2019).

TABLE 9.33 Programme performance indicators and annual performance, 2018/2019

Performance indicators	Baseline 2017/18	Planned annual target 2018/19	Actual achievement 2018/19	Deviation from planned target to actual achievement for 2018/19	Comments on deviations
Sub-programme: Administration of Superior Courts					
Number of monitoring reports on Court Order Integrity Project produced	5	4	4	0	N/A
Percentage of default judgments finalised by Registrars per year	89% (48.509 de 54.563)	90%	96% (52.508 de 54.872)	6%	Improved training and monitoring measures implemented to sustains achievement of targets
Percentage of taxations of legal costs finalised per year	96% (33.961 de 35.261)	90%	98% (45.535 de 46.389)	8%	Improved training and monitoring measures implemented to sustains achievement of targets
Percentage of warrants of release delivered within one day of the release issued	98% (109 de 111)	98%	98% (79 de 81)	00	N/A
Number of case management workshops conducted for court officials per year	8	2	2	0	N/A

Source: OCJ (2018/2019).

TABLE 9.34 Programme expenditures

Sub-programmes	2018/19			2017/18		
	Final appropriation (R'000)	Actual expenditure (R'000)	(Over)/ Under expenditure (R'000)	Final appropriation (R'000)	Actual expenditure (R'000)	(Over)/ Under expenditure (R'000)
Administration of Superior Courts	11 960	11 150	810	11 725	11 312	413
Constitutional Court	57 136	55 780	1 356	68 982	68 615	367
Supreme Court of Appeal	34 453	34 191	262	33 693	32 477	1 216
High Courts	664 030	643 250	20 780	586 810	581 169	5 641
Specialised Courts	57 176	57 176	-	59 112	54 651	4 461
Total	824 755	801 547	23 208	760 322	748 224	12 098

Source: OCJ (2019).

TABLE 9.35 Judicial education expenditures

Sub-programmes	2018/19			2017/18		
	Final appropriation (ZAR thousands)	Actual expenditure (ZAR thousands)	(Over)/Under expenditure (ZAR thousands)	Final appropriation (ZAR thousands)	Actual expenditure (ZAR thousands)	(Over)/Under expenditure (ZAR thousands)
South African Judicial Education Institute	40,499	37,725	2,774	41,043	41,033	10
Judicial Policy and Research	23,488	23,488	-	24,691	24,686	5
Judicial Service Commission	7,200	7,200	-	15,909	15,905	4
Total	71,187	68,413	2,774	81,643	81,624	19

Source: OCJ (2019).

The tables below show the indicators from the OCJ Annual Performance Plan for 2019/20.

TABLE 9.36 OCJ 2019/20 expenditure estimates

Programmes	Audited outcomes			Appropriation	Medium-term expenditure estimates		
	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)
Programme 1: Administration	88,836	139,079	167,667	201,380	214,611	227,852	237,517
Programme 2: Superior Court Services	641,944	675, 647	748,224	845,252	900,110	965,784	1,029,837
Programme 3: Judicial Education and Support	36,894	40,918	81,624	73,115	82,971	88,234	91,776
Subtotal	767,674	855,644	997,515	1,119 747	1,197,692	1,281,870	1,359,130
Judges' salaries	887,682	930,704	998,355	1,022,091	1,098,546	1,180,937	1,257, 698
Total direct charge against the National Revenue Fund (NRF)	887,682	930,704	998,355	1,022,091	1,098,546	1,180,937	1,257,698
Total voted	1,655, 356	1,786,348	1,995,870	2,141 838	2,296,238	2,462,807	2,616,828

Source: OCJ (2019).

TABLE 9.37 Superior Court services 2019/20 Medium-Term Expenditure Framework expenditure

Sub-programmes	Audited outcomes			Appropriation	Medium-term expenditure estimates		
	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)
Administration of Superior Courts	7,645	11,083	11,312	16,200	30,421	34,827	35,699
Constitutional Court	52,348	45,188	68,615	61,400	64,665	69,083	83,122
Supreme Court of Appeal	23,083	32,393	32,477	36,981	38,608	41,278	43,280
High Courts	509,415	542,808	581,169	672,564	702,271	751,857	795,197
Specialised Courts	49,453	44,175	54,651	58,107	64,145	68,739	72,539
Total	641,944	675,647	748,224	845,252	900,110	965,784	1,029,837

Source: OCJ (2019).

TABLE 9.38 Judicial Education and Support Medium-Term Expenditure Framework expenditure estimates

Sub-programmes	Audited outcomes			Appropriation	Medium-term expenditure estimates		
	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)	(ZAR thousands)
South African Judicial Education Institute	25,952	26,490	41,033	51,428	48,576	51,736	53,846
Judicial Policy, Research and Support	4,690	4,492	24,686	13,407	26,471	28,224	29,285
Judicial Service Commission	6,252	9,936	15,905	8,280	7,924	8,274	8,645
Total	36,894	40,918	81,624	73,115	82,971	88,234	91,776

Source: OCJ (2019).

B. CCMA

The CCMA receives funding from the National Treasury through grant transfers from the Department of Employment and Labour; income generated from its services in terms of a tariff of fees and interest earned on investment outcome. Its primary source is the government, which provided a grant of ZAR966 million for 2018/2019. Other incomes came from the rendering of services and investments. An additional grant transfer of ZAR2.8 million was received for the implementation of the NMWA and the Employment Law Amendments (ELA).

TABLE 9.39 CCMA revenue collection for the 2018/19 financial year

Source of revenue	2018/19			2017/18		
	Estimate (ZAR thousands)	Actual amount collected (ZAR thousands)	(Over)/under collection (ZAR thousands)	Estimate (ZAR thousands)	Actual amount collected (ZAR thousands)	(Over)/under collection (ZAR thousands)
Government Grant	936,066	965,905	(2,839)	864,090	867,173	(3,083)
Rendering of services	6,101	5,715	386	6,877	, 290	587
Other income	-	283	(283)	-	176	(176)
Investment income	11,364	14,762	(3,398)	10205	11,763	(1,558)
Total	980,531	986,665	(6,134)	881,172	883,402	(4,230)

Source: CCMA (2019).

Table 40 details the budget of each of the CCMA's strategic objectives in 2018/2019.

TABLE 9.40 Strategic objectives of the CCMA, 2018/2019

Strategic objective	Budget (ZAR thousands)	Actual Expenditure (ZAR thousands)	(Over)/Under Expenditure (ZAR thousands)
(1) Enhancing labour market to advance stability and growth	12,451	11,274	1,177
(2) Advancing good practices at work and transforming workplace relations	15,448	8,232	7,216
(3) Building knowledge and skills	22,631	24,008	1,377
(4) Optimising the organisation	995,030	944,135	50,895

Source: CCMA (2019).

9.4 PERFORMANCE INDICATORS

9.4.1 Numbers of claim filed, processed, solved, and pending

A. Labour Justice

The 2018/2019 Annual Performance Plan (APP) for the Judiciary defines and identifies performance indicators and targets for the various courts. The performance indicators and targets are measures that allow for monitoring of performance on one or more aspects of the overall functions and mandates of the Judiciary. Constitutional provisions, Superior Courts acts, and legislative mandates and functions; judicial norms and standards; and strategic and operational priorities inform the performance indicators for the Judiciary.

The performance targets express a specific level of performance that the Courts should aim to achieve within a given period. They are informed by the baseline figures based on previous reports/current performance; available resources (budget, human resources, etc.); and the norms and standards. The purpose of the court performance monitoring report is to provide regular updates on the implementation of the Judiciary APP with specific reference to monitoring delivery against established quarterly performance targets.

About the performance of the Superior Courts for the period April 2018–March 2019, the APP reports that 5,915 cases were received by the Labour Court and the Labour Appeal Court, and 3,756 of them were finalised (63 per cent). The Judiciary Annual Report informs that between 2017 and 2018, the Labour Court and the Labour Appeal Court received 427 cases and finalised 287 (64 per cent). However, the institutional website of South African Labour Court informs that the Labour Court delivered 68 judgments and the Labour Appeal Court delivered 24 in 2019.

TABLE 9.41 Labour Court Judgments

	2015	2016	2017	2018	2019
Cape Town	31	24	31	23	9
Durban	20	7	11	9	4
Johannesburg	105	107	102	93	51
Port Elizabeth	13	7	7	5	4
Total	169	145	151	130	68

Source: South African Labour Courts

TABLE 9.42 Labour Appeal Court Judgments

	2015	2016	2017	2018	2019
Cape Town	3	8	4	5	5
Durban	3	3	6	3	1
Johannesburg	26	19	28	14	16
Port Elizabeth	2	2	0	1	2
Total	34	32	38	23	24

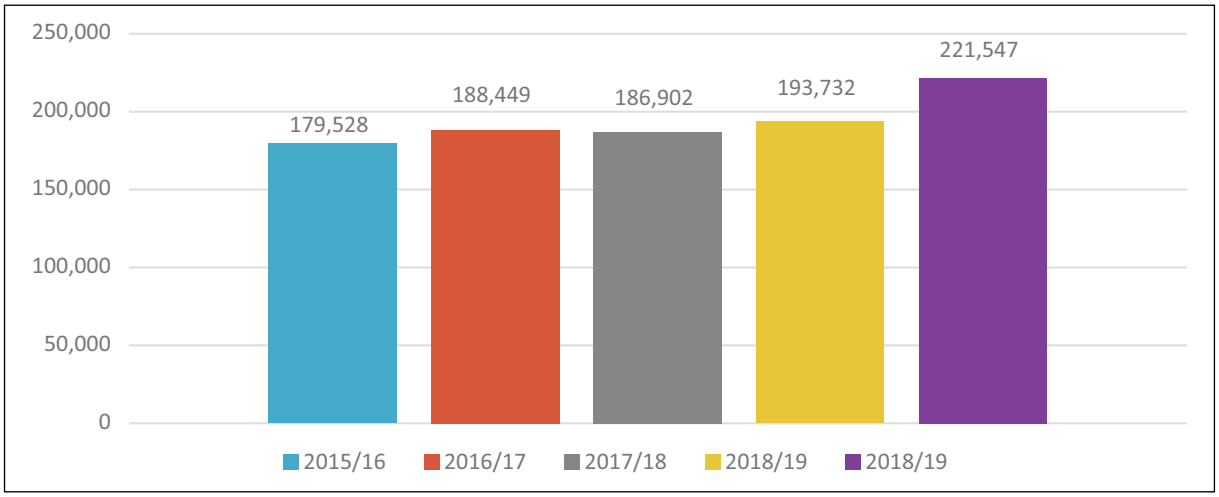
Source: South African Labour Courts.

B. CCMA

One of the CCMA's strategic priorities is to implement its legislated mandate effectively and efficiently. According to the CCMA Annual Report 2019/2020, the Commission supported a vast increase in referrals compared with the previous financial year, with a total of 221,547 matters referred in 2019/2020 compared to 193,732 in the 2018/2019 financial year. It represents a

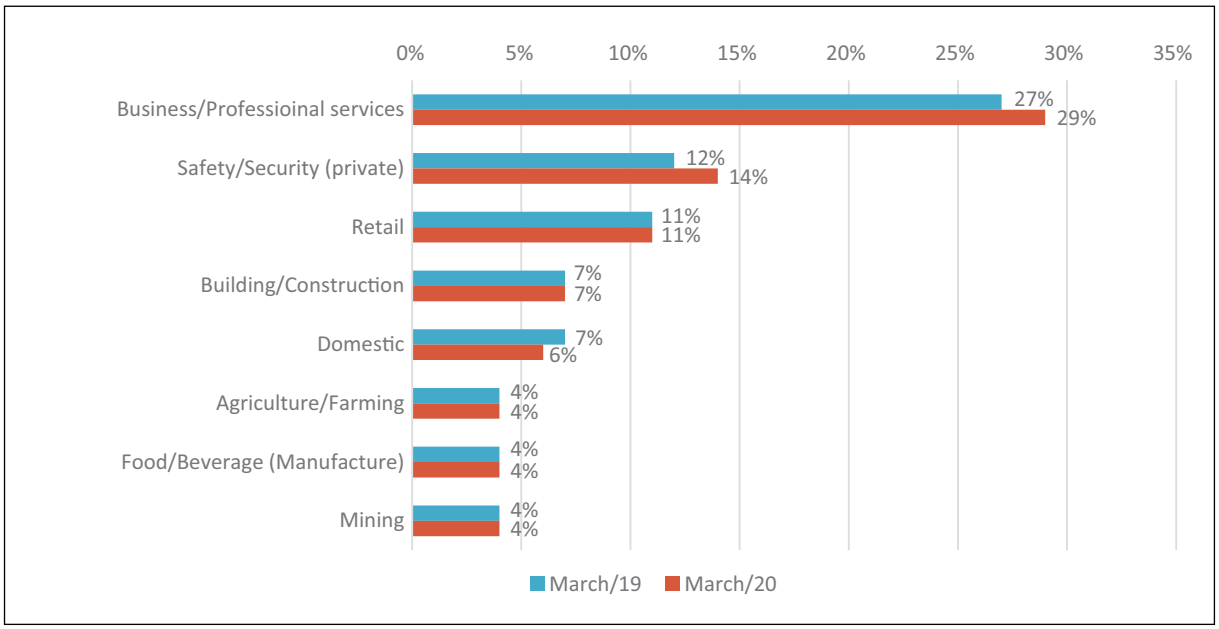
14 per cent year-on-year increase, amounting to 27,815 additional cases referred and an average of 879 new referrals every working day. The National Office registered the highest increase in referrals (57 per cent), followed by the Vryburg Office in the North West Region (47 per cent) and the Newcastle Office in the KwaZulu-natal Region (34 per cent).

FIGURE 9.4 CCMA case referral comparison, five-year period



Source: CCMA (2019).

FIGURE 9.5 CCMA referrals comparison per sector, two-year period



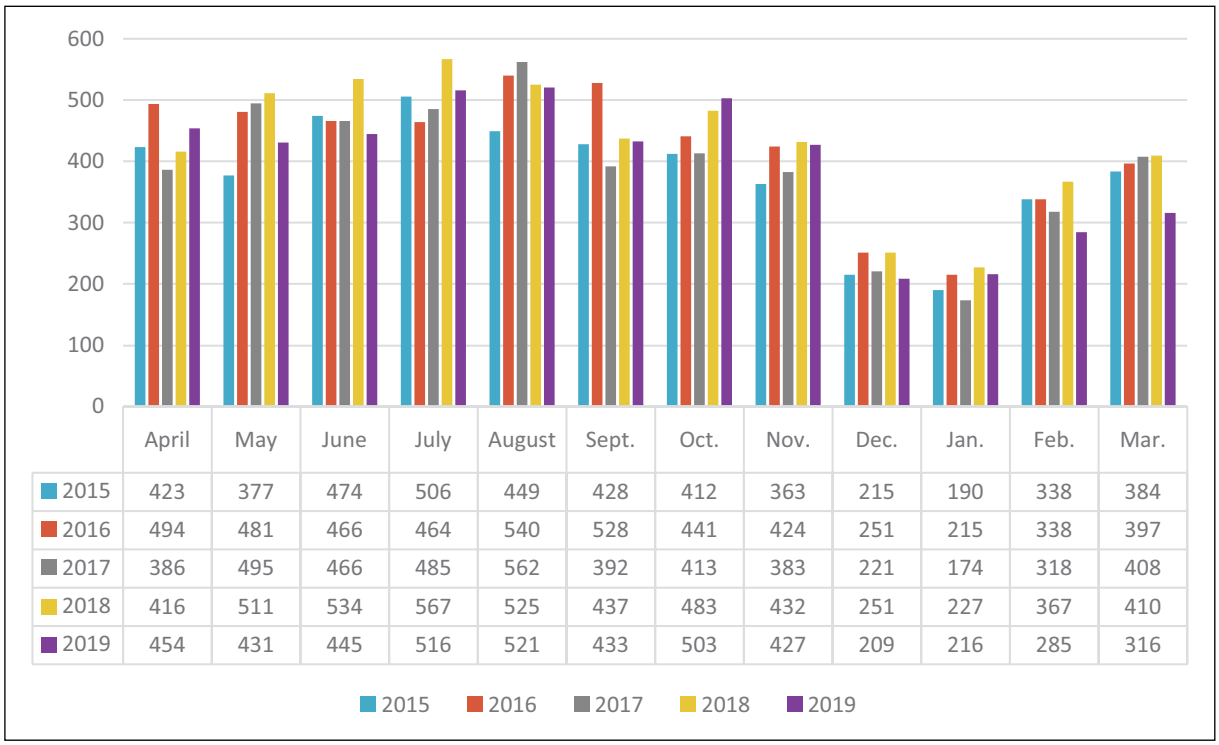
Source: CCMA (2019).

Almost 59 per cent of all referrals in 2019/2020 were related to alleged unfair dismissal compared to 71 per cent in the 2018/2019 financial year. The Business Professional Services

sector remained the highest referring sector, at 29 per cent of the total referrals, an increase of 2 per cent compared to the 2018/2019 financial year. The Safety and Private Security sector showed an increase of 2 per cent, totalling 14 per cent of all referrals, while the Domestic sector presented a decline of 1 per cent, from 7 per cent in the previous financial year. Referrals received from the retail, building and construction, agriculture/farming, food/beverage, and mining sectors remained unchanged compared to the 2018/2019 financial year.

In 2019/2020, the CCMA experienced a substantial increase in large-scale retrenchment (section 189A of LRA) referrals compared to the previous financial year, representing an increase of 47 per cent. The highest number of job losses were recorded in the mining (5,630), metal (3,954) and agriculture/farming (2,801) sectors. On the other hand, the number of small-scale retrenchment (section 189 of LRA) referrals decreased by 5 per cent compared to the same period of the previous year. In 2019/2020, 6,267 referrals were received, against 6,600 in 2018/2019.

FIGURE 9.6 CCMA caseload



	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.
2015	423	377	474	506	449	428	412	363	215	190	338	384
2016	494	481	466	464	540	528	441	424	251	215	338	397
2017	386	495	466	485	562	392	413	383	221	174	318	408
2018	416	511	534	567	525	437	483	432	251	227	367	410
2019	454	431	445	516	521	433	503	427	209	216	285	316

Source: CCMA (2019).

The CCMA dealt with 4,756 mutual interest disputes in 2019/2020, which is less than the 5,160 dealt with in the previous year. The Commission managed to resolve 58 per cent of them. At the national level, the CCMA deals with an average of 400 mutual interest disputes per month. As the Figure 6 shows, the number of mutual interest disputes received by the CCMA remained consistent over time. The Commission dealt with 144 public interest matters (section

150 of LRA) in the 2019/2020 financial year, a decrease compared to the 187 of the previous year and achieved a settlement rate of 79 per cent.

9.4.2 Indicators: types of request processing, average time, success rate, average number of convictions, and compliance rate

A. Labour Justice [26]

Paragraph 5.2.6 of the Judicial Norms and Standards stipulates that judgments in constitutional, criminal and civil matters should generally not be reserved without a fixed date for handing down sentences. Judicial officers have a choice to reserve judgments *sine die* where circumstances are such that the delivery of a judgment on a fixed date is not possible. The Judicial Norms and Standards state that Judicial Officers should make every effort to hand down reserved judgments no later than three months after the date of the last hearing.

TABLE 9.43 Reserved Judgments, 2017–2018

	Judicial Norms and Standards			Code of Judicial Conduct	
Court	Outstanding judgments reserved for longer than 3 months as of 31 March 2018	% Delivered	% Judgements delivered within three months in the period from 1 April 2017 to 31 March 2018	Judgments reserved and delivered within term during terms 2,3 and 4 in 2017, and term 1 in 2018	Judgments reserved within two weeks before end of term and delivered in the next term
Labour Court Johannesburg	74% (110 de 149)	77% (503 de 652)	61% (308 de 503)	46% (186 de 403)	73% (30 de 41)
Labour Court Cape Town	57% (16 de 28)	75% (84 de 112)	62% (52 de 84)	38% (31 de 81)	58% (7 de 12)
Labour Court, Port Elizabeth	50% (13 de 26)	82% (120 de 146)	39% (47 de 120)	0% (0 de 87)	73% (11 de 15)
Labour Court Durban	58% (11 de 19)	67% (39 de 58)	51% (20 de 39)	0% (0 de 44)	14% (1 de 7)

Source: South African Judiciary (2018).

The Code of Judicial Conduct, Article 10(2), provides that "A Judge must deliver all reserved judgments before the end of the term in which the hearing of a matter was completed, but may (a) in respect of a matter that was heard within two weeks of the end of that term; or (b) where a reserved judgment of a complex nature or for any other cogent and sound reason and with

26. There is no data available on the other topics of this section.

consent of the head of the court, deliver that reserved judgment during the course of the next term." Table 43 details the number of reserved judgments for 2017–2018.

According to the Judiciary Annual Report 2018/2019, in those years, 43 per cent of the reserved judgments were delivered more than 6 months later in the Cape Town Labour Court, followed by 29 per cent in Durban, and 27 per cent in Johannesburg.

TABLE 9.44 Reserved Judgments for 2018/2019

Court Name	More than 6 months	% more than 6 months
Labour Court Cape Town	6	43
Labour Court Durban	2	29
Labour Court Johannesburg	37	27
Labour Court Port Elizabeth	0	0

Source: South African Judiciary (2019).

B. CCMA

CCMA (2019) indicates that a total of 193.732 cases were referred to the CCMA in between 2018 and 2019. This number constitutes an increase of 4 per cent compared to the preceding year. In this universe, 88 per cent of the concealable cases were heard within the statutory frame of 30 days. On average, the CCMA takes 24 days to complete the conciliation process. Also, the Commission settled 74 per cent of all cases heard and closed.

In respect to arbitration turnaround times, the CCMA took an average of 68 days from date of receipt to the referral to complete the arbitration process; 99,69 per cent (51 out of 16.720) arbitration awards were issued by the 14-day statutory timeframe determined by the LRA. A total of 187 Public Interest Matters (section 150 of LRA) were submitted to the CCMA in 2018/2019, and a success rate of 87 per cent was reported. The CCMA also dealt with 5,160 Mutual Interest Disputes (section 134 of LRA), an increase of 10 per cent compared to the previous year, and the settlement rate in these matters was of 60 per cent.

In 2018/2019, the CCMA was involved in the resolution of high profile strikes, including: the Eskom wage dispute; the Gautrain Bombela wage dispute; the National Union Mineworkers (NUM), Association of Mineworkers and Construction Union (AMCU), United Association of South Africa (UASA) and Solidarity/Mineral Council wage dispute; the AMCU/ Murray and Roberts wage dispute; and the National Union of Metal Workers of South Africa (NUMSA)/Comair wage dispute.

During this same period, the CCMA conducted 529 large-scale retrenchment facilitation processes (section 189A of LRA), involving 38,588 employees. Of this total, 41 per cent were saved from retrenchment, 39 per cent were retrenched, 17 per cent opted for voluntary retrenchment, and 1 per cent had their matters concluded in an alternative way.

TABLE 9.45 Jobs saved per sector in the 2018/2019 financial year

Sector	Employees likely to be retrenched	Retrenchments			Other	Jobs saved (#)	Jobs saved (%)
		Forced	Voluntary	Total			
Agriculture/Farming	844	479	116	595	41	208	25
Banking/Finance	516	295	72	367	14	135	26
Building/Construction	5,984	2,857	727	3584	81	2319	39
Business/Professional service	2,290	978	556	1534	61	695	30
Chemical	758	95	337	432	32	294	39
Civil engineering	30	27	3	30	0	0	0
Clothing Manufacturing	626	556	0	556	0	70	11
Clothing/Textile (manufacture)	536	431	19	450	0	86	6
Contract cleaning	890	389	96	485	0	405	46
Distribution/Warehousing	214	0	5	5	0	209	98
Educators (private)	30	0	0	0	6	24	80
Electrical	354	109	93	202	28	124	35
Electricity/Gas/Water	9	5	3	8	0	1	11
Entertainment/Leisure	851	144	24	168	39	644	76
Fishing	242	0	231	231	1	10	4
Food/Beverage (manufacture)	2,382	864	454	1,318	46	1,018	43
Furniture (manufacture)	79	67	0	67	0	12	15
Health (private)	1,091	267	74	341	14	736	67
Hotel	241	2	24	26	7	208	86
Information and communication	62	13	10	23	1	38	61
Leather	504	234	150	384	0	120	24
Manufacturing	309	276	15	291	0	18	6
Marketing/Public Relations	14	0	0	0	0	14	100
Media (private)	215	131	0	131	3	81	38
Metal	2,828	1,270	471	1,741	38	1,049	37
Mining	7,224	1,835	1,425	3,260	416	3,548	49
Motor	334	184	42	226	5	103	31
Motor (manufacture)	648	0	0	0	0	648	100
Paper/Printing/Packaging	1,351	519	412	931	26	394	29
Parastatals	118	30	45	75	17	26	22
Pharmaceutical	10	2	0	2	1	7	70
Restaurant/Catering	30	0	0	0	0	30	100
Retail	2,951	1,188	518	1,706	131	1,114	38
Road Freight	167	23	5	28	0	139	83
Rubber/Tyre (manufacture)	385	255	42	297	0	88	23
Safety/Security (private)	1,561	344	358	702	385	474	30
Telecommunications	69	0	51	51	0	18	26
Transport (private)	1,577	851	86	937	10	630	40
Wholesale	231	178	0	178	3	50	22
Wood and Paper	14	10	0	10	4	0	0
Other	19	9	10	19	0	0	0
National	**38,588**	**14,917**	**6,474**	**21,391**	**1,410**	**15,787**	**41**

Source: CCMA (2019).

Approximately, 71 per cent of all case referrals at the CCMA were related to unfair dismissal, with 11 per cent relating to unfair labour practice disputes. Regarding the percentage of cases per sector, 27 per cent were from business professional services; 12 per cent from safety/security; 11 per cent from retail; 7 per cent from domestic; 7 per cent from building and construction; 4 per cent from agriculture/farming; 4 per cent from food and beverage manufacturing; and 4 per cent from mining. Only 2 per cent of the total referrals were related to BCEA and NMWA. Among them, most claims were for alleged outstanding statutory payments.

During 2018/2019, the CCMA conducted 13 Collective Bargaining Support Processes (CBSP) across various sectors, including pre-, during and post-wage facilitations, balloting and verification exercises, as well as the facilitation of any outstanding issues arising from wage disputes that may give rise to new ones. By the end of the financial year, a total of 5,160 mutual interest disputes had been dealt with, a 9 per cent increase in potential strike-related matters heard by the Commission, achieving a 60 per cent settlement rate. Concerning public interest matters, the CCMA worked on 187 cases and achieved an 87 per cent settlement rate.

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CHAPTER 10. COMPARATIVE STUDY[1]

10.1 INTRODUCTION

In its section 8, the Universal Declaration of Human Rights states that "every person has the right to an effective remedy to the competent national jurisdictions against acts that violate fundamental rights recognized by the Constitution or the law." In turn, Article 6 of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrines the human right to work, under fair and favourable conditions.

All countries addressed in this study are ICESCR states parties and, as such, have the obligations to respect (refrain from interfering directly or indirectly in the enjoyment of rights), protect (adopt measures that guarantee the non-interference of third parties in the enjoyment of rights) and comply (adopt appropriate measures, including judicial measures, to ensure the full realization of rights) with the rules agreed at the international level.

With reference to the human right to work, the Committee on Economic, Social and Cultural Rights, the body that monitors the implementation of the Covenant by its state parties, states in its General Comment No. 18, paragraph 48 (HUMAN RIGHTS COMMITTEE & COMMITTEE ON ECONOMIC, SOCIAL and CULTURAL RIGHTS, 2018) that:

Any person or group who is a victim of a violation of the right to work should have access to appropriate judicial or other remedies at the national level. [...] All victims of these violations are entitled to adequate redress, which may take the form of restitution, indemnification, compensation, or guarantees of non-repetition. (p. 407-408).

In addition, the same Committee cites in General Comment No. 23, paragraph 57 (2018) that:

> "Any person who has suffered a breach of the right to fair and favourable conditions of work shall have access to effective judicial or other appropriate remedy, including adequate redress, restitution, compensation, satisfaction or guarantees of non-repetition. [...] States should review and, if necessary, reform their laws and codes of procedure to ensure access to resources as well as procedural justice. Legal assistance for the promotion of resources must be available and must be free of charge for those who cannot afford it. (p. 490)"

1. By Alexandre Cunha, Luca Lazzarini, Mariana Hoffmann, Nicole Figueiredo, and Raissa Alves.

In addition, in the section of the General Comment dedicated to violations and remedies, it is pointed out in paragraph 80 that, "States parties must implement an adequate monitoring and accountability framework by ensuring access to justice or other effective remedies." (HUMAN RIGHTS COMMITTEE & COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 2018).

In order to describe how the six different countries that make up this comparative case study implement the commitments made at the international level, this chapter is divided into four parts. It begins with a comparison of the labour protection rules in force, and then analyzes the existing mechanisms for resolving conflicts that emerge from these relationships, the administrative organisation of the bodies in charge of resolving these disputes and their performance.

10.2 SUBSTANTIVE LABOUR LAW

Several fundamental rights enshrined in the respective charters, such as the right to personal integrity, privacy, freedom of expression, and information, despite their 'nonspecific' character, are put at stake in labour relations.

Each constitution has its own mechanisms for incorporating international law into the domestic legal order, including, in a manner relevant to our context, human rights treaties, conventions, and other instruments linked to the

International Labour Organisation For example, Argentina's fundamental law attributes a constitutional hierarchy to several international human rights instruments: its provisions complement the rights and guarantees enshrined therein (Art. 75, paragraph 22). As a consequence, it is essential to consult the constitutional settings, to understand whether the selected countries are bound by such instruments and on what terms.

The constitution also determines the form of government. Portugal, South Africa and South Korea are unitary states, while Argentina, Brazil and Mexico are federal systems. This has important consequences in the institutional framework applicable to the work, in the distribution of legislative powers between central and federative entities, as well as in the organisation of justice, among other aspects. Although a detailed analysis of this organisation can be found in each of the case studies, here it is important to highlight that in Argentina substantive labour legislation has national scope, but the federation units are responsible for the enactment of labour procedural laws. On the contrary, in Brazil and Mexico the legislative competence of labour, including procedural legislation, is the exclusive competence of the Union.

The division of labour jurisdiction between federal (or national) and state (or provincial) judicial powers should be considered. In Argentina, the application of labour legislation corresponds

to the provincial judiciary, and the labour competence of the National Justice is limited to cases in which the Nation is a party. In Brazil, the Labour Court is a specialized branch of the federal judiciary with an autonomous structure. In Mexico, the Federal Court adjudicates labour disputes related to the industrial branches, companies or matters listed in Articles 123, item A, item XXXI, of the Political Constitution and in Art. 527 of the Federal Labour Law, while the courts of the federated units retain residual jurisdiction.

The constitutions of the selected countries were written at different historical moments. The Constitution of Argentina dates back to 1853; similarly, the Constitution of Mexico was drafted in 1917. Both constitutions have been amended several times, including regarding the respective provisions dedicated to labour regulation. With regard to Argentina, Art. 14-bis, a kind of catalogue of basic labour rights, was introduced by a constitutional reform in 1957 (Ferreiròs, 1997). In turn, referring to Mexico, it should be noted that the main provision dedicated to work, Art. 123 of the fundamental law, was amended more than twenty times (Gamboa Montejano, 2008), with the last reform dating from 2017.

The Constitution of Portugal was promulgated in 1976, two years after the Carnation Revolution: since then, the fundamental law has been amended 7 times. The provisions dedicated to the work were changed with the reforms of 1982, 1989 and 1997. In turn, South Korea adopted its current democratic constitution in 1987, which has not been amended.

The Constitution of Brazil dates back to 1988, with the end of the military regime in the country: its provisions have been changed more than a hundred times since its validity. The rule that enshrines the rights of urban and rural workers (Art. 7) was amended in 1998, 2000, 2006 and 2013. In addition, Constitutional Amendment No. 45/2004 created the National Council of Justice, the Superior Council of Labour Justice and the National School for the Training and Improvement of Labour Magistrates, in addition to expanding the competence of the Labour Court to include other labour relations besides the employment relationship. In addition, in 2016, Constitutional Amendment No. 92 explicitly included the Superior Labour Court (TST) among the bodies of the Judiciary (Superior Labour Court—Secretariat of Social Communication, 2021).

The most recent constitution is that of South Africa, adopted in 1996, at the end of the Apartheid regime (1948-1994). The fundamental law has been subject to 17 amendments since its enactment. Perhaps the most relevant to the context of the present study is the most recent of these (2013) which, together with the Superior Courts Law, brought important changes to the judicial system, including the expansion of the competence of the Constitutional Court and the dismissal of appeals under the jurisdiction of the Supreme Court of Appeals and the Labour Appeals Court.

Finally, a particular feature of the Mexican constitution should be highlighted: the scope and level of detail of its provisions relating to the work. Section A of Art. 123, which unfolds in

more than 30 paragraphs, governs labour relations between workers, day labourers, maids and artisans, in addition to regulating all employment contracts in general. The Federal Labour Act governs the relationships included in this section. Section B, consisting of 15 paragraphs, regulates, instead, the industrial relations between the Union and its workers: in this case, the Federal Law of Workers in the Service of the State is applicable. In addition, Mexico's constitutional scenario is also the only one that includes several detailed provisions dedicated to the resolution of disputes and disputes between employers and workers. It is useful to remember that these rules were changed in 2017, determining the replacement of the *Juntas de Conciliación y Arbitraje,* which were part of the Executive Branch, by the new Labour Courts, under the aegis of the Judiciary Branch.

According to the ICESCR, the right to work includes the right of every human being to freely decide to accept or choose a job. This right aims to allow people to live with dignity, in addition to contributing to their survival and development. The right to work is explicitly present in the Argentine, Brazilian, Mexican, Portuguese and Korean constitutions. In evident connection with the foregoing, each constitutional arrangement contains a provision aimed at guaranteeing freedom of profession or occupation, albeit with different approaches.

The right to work also implies the right not to be unfairly deprived of employment.

In this sense, each fundamental law protects the worker against unfair and arbitrary dismissals.

In addition, the work must be decent, according to the standards set by human rights. Each constitutional structure, with the exception of Brazil, explicitly includes a provision that aims to ensure decent working conditions. The constitutions of Argentina, Brazil, Mexico and Portugal also include the right to rest and leisure, maximum working hours, weekly rest and periodic paid holidays.

In addition, work is decent when it respects the fundamental rights of the human person, as well as the rights of workers in terms of conditions of safety at work and remuneration. Every fundamental law, except Argentina, South Africa and South Korea, guarantees hygienic, safe and healthy working conditions. Similarly, national constitutions refer to "fair remuneration." The constitutions of Argentina, Mexico and Portugal explicitly contain the principle of equal pay for equal work. Each configuration, except for South Africa, also contains a minimum wage provision. In the latter country, the minimum wage was instituted in 2019, despite not being constitutionally mandatory.

Each constitution contains the principle of equality and the corresponding prohibition of discrimination. Finally, in terms of collective labour relations, each constitution guarantees workers the freedom to form and join organisations to represent and defend their interests, both for collective bargaining and union action.

A. Sources and basic principles

Among the countries analysed, Argentina, Brazil, Mexico and Portugal belong to the tradition of continental law. South Africa has a mixed or hybrid common law system, based mainly on Roman, Germanic and Dutch law, as well as English customary law. Finally, South Korea's legal system is primarily inspired by modern systems of continental European law, but it also incorporates some features of customary law (e.g., jury trial and the role assigned to law schools).

In each legal system, the sources of labour law cover:

- Constitutions: as seen, all constitutions contain a number of fundamental labour rights;
- Legislation: laws that can be subsequently regulated by means of decrees and other types of regulations;
- Collective agreements: although, depending on the country, the scope of execution and application of collective agreements can range from a company to an entire branch of activity; in addition, the effects of collective agreements can also vary significantly, binding only the parties or being extended to third parties, such as non-union workers and employers;
- International law;
- Jurisprudence.

TABLE 10.1 Main labour laws in the selected countries

Country	Labour legislation
Portugal	Labour Code and Labour Procedural Code
South Korea	Labour Standards Act; Minimum Wage Act; Occupational Safety and Health Act; Law on the Protection of Fixed, Part-Time and Separate Workers; Trade Union and Labour Relations Adjustment Act; and Labour Relations Commission Act
Brazil	Consolidation of Labour Laws
Mexico	Federal Labour Law
Argentina	Employment Contract Law; Collective Bargaining Law; Collective Bargaining Law; Activities Law Internal of Representative Organisations; Workplace Risk Law; and Complementary Law No. 27.348/2017
South Africa	Labour Relations Act; Basic Working Conditions Act; and Employment Equity Act

Source: Authors' elaboration.

In addition, in all countries considered in the study, labour law is understood to be an autonomous legal branch, governed by its own specific rules, institutes and principles.

While in Brazil, Portugal and Mexico labour legislation is concentrated on single pieces of legislation, the other countries have enacted several sets of legislation regulating specific aspects of labour, such as Argentina's Employment Contract Law, South Korea's Labour Relations and Trade Unions Adjustment Act, and South Africa's Basic Working Conditions Act. The table below identifies the main labour legislation of each country, and each of the case studies contains an exhaustive list of the national legislation applicable in each nation.

It should be noted that the labour law in force is the result of several successive changes in each legal system. Major recent reforms of national labour law are analysed in each case study. What is important to note here is that in all legal systems labour law is an expanding area of law, in the sense that it does not cover all possible fields of application, which are constantly changing as a result of economic, social and political changes.

However, all these legal systems have some common characteristics. In each legal system, labour law fundamentally responds to the need to protect the worker, considered to be the weakest part of the subordinate labour relationship, given its asymmetry of power in relation to the employer. In some legal systems, this is classified as constitutive of the so-called principle of protection, as we will see below. However, it is important to emphasize that this need to protect the weaker party in the employment relationship, strictly intertwined with a conception of work as a fundamental social right, is at the heart of national labour law also in countries such as South Africa and South Korea. In each country, labour legislation establishes minimum standards through mandatory norms that restrict the private autonomy of the parties. If, in the employment contract, a clause is inserted that violates such rules, it will be considered null and void, applying the minimum standard established by law.

In Argentina, Brazil, Mexico and Portugal, the principle of protection unfolds into several other principles. The first is the principle 'in dubium pro-operario': when the same norm can be interpreted in several ways, the interpretation that will prevail will be the most favourable to the worker. The second, imposes the application of the most favourable rule to the worker, whenever two rules are applicable to the same legal relationship. Finally, the principle of the most beneficial condition imposes that the working conditions agreed in the individual employment contract cannot be changed in the future to the detriment of the worker.
In South Korea, a similar mechanism exists, since a legal rule expressly prohibits precarious working conditions.

Another characteristic common to all legal systems analysed is that labour rights are inalienable. In some legal systems, national scholars relate this characteristic to the unavailability of these rights, while in others the doctrine refers to the public order character of labour standards or limitations on the exercise of private autonomy.

Likewise, the principle of non-discrimination governs labour relations in all countries studied. This principle prohibits arbitrary discrimination and unequal treatment of the employer in

relation to employees who are in the same situation. The principle extends to wages: equal pay is required for equal work.

In addition, it is common to all legal systems compared here that employer and employee must act in good faith in the formalization, execution and termination of the employment contract.

Some other principles are present in the labour law of only a few countries.

The principle of the primacy of reality governs labour law in Argentina, Brazil and Mexico. This principle implies the prevalence of the facts over the form or denomination that the parties attributed to the agreement. In this context, it should be noted that also in Portugal, where the existence of such a principle is not recognized, as well as in South Africa, where it was not verified as a regulatory principle, national labour legislation determines that the name assigned by the parties to the contract is not relevant to determine the rule that governs it. Finally, in South Korea, the Supreme Court has built extensive case law on recognition of an employment relationship, even in circumstances where the parties, or one of the parties, denies its existence.

In addition, the labour legislation of Argentina and Brazil also provides for the principle of continuity of the employment relationship. Based on this principle, it can be assumed that any employment relationship is in force for an indefinite period, unless expressly agreed otherwise. In Mexico, the principle of contract conservation also produces this effect, while in the labour legislation of Portugal, South Africa and South Korea, the typical employment relationship is always for an indefinite period.

B. Formal and informal work relationships

The typical employment relationship, on which each legal system has historically developed, is one in which the worker works full time, in a large horizontally integrated company. The employment relationship is characterised by a series of elements, reported in Table 10.2, which vary according to the legal system. The table also reports the definitions of employer and employee, according to each national legislation.

As can be seen in the table, the notion of subordination, although with different formulas, is the characterising element of the typical employment relationship in national legislation. The exact limits of this concept depend on the legal system and are analysed in each case study. From a more general perspective, however, these limits are crucial to differentiate the subordinate employment relationship, to which the protection conferred by labour law applies, from other institutes, such as the service contract governed by civil law. A phenomenon common to each labour system considered is the fraudulent concealment of a subordinate relationship, under the false guise of self-employment.

TABLE 10.2 Subjects and elements of the employment relationship

	Portugal	South Korea	Brazil	Mexico	Argentina	South Africa
Employee	An individual who, through an employment contract, makes his/her workforce available to third parties in exchange for remuneration.	Person, regardless of professional category, who offers work to a company or workplace, for the purpose of earning a salary.	It is considered an employee any individual providing any kind of non-occasional services to the employer, under its authority and upon payment of a salary.	Individual who provides another individual or legal entity with subordinate personal work.	Private person with legal capacity, which assumes the obligation to provide services in a situation of dependence, personally in exchange for retribution.	A person who works or provides services to any other person, regardless of the form of the contract, provided that certain elements are present (as shown in the table below).
Employer	Individual or legal entity that, by contract, acquires the power to dispose of the labour of others, within the scope of a company or not, upon remuneration.	Business owner, or a person responsible for the management of a business, or a person acting on behalf of a business owner, with respect to employee-related matters.	An employer is considered to be an individual or collective undertaking which, taking the risks of economic activity, admits, assists and directs the personal service provision.	Individual or legal entity that uses the services of one or more workers.	Individual or legal entity requiring the services of an employee.	One or more persons carrying out associated or related activities or business.
Elements	Employee activity directed and organized by the employer; compensation; legal subordination.	Organisation by the employer of the functions, time and place of work; control/ supervision of the employer; personality; non-ownership of equipment/ tools; remuneration; continuity and exclusivity.	Individual, onerousness, personality, subordination and non-contingency.	Personality, subordination, and remuneration (onerousness).	Subordination, unfolding in: • Technical dependence; • Economic dependence; • Legal dependence.	Control and direction of work and working hours; being part of the organisation; average of at least 40 hours per quarter; economic dependence; employer's tools/ equipment; exclusivity of services provided.

Source: Authors' elaboration/case studies.

Another relevant observation is that there are certain types of employment that are subject to a specific regulatory regime, but still fall within the scope of labour law. For example, in each system, public administration officials are subject to specific regulations, although in South Africa this special regime applies only to defence, intelligence and secret service personnel. Another example, with the exception of South Korea, could be housework.

Many significant changes in the world of work, resulting from factors such as productive decentralization, technological advancement, globalisation and digital economies, have been imposing the need for systems to cope with new work realities. As a result, atypical forms of employment, which do not fit the typical relationship identified above, have been introduced in each system and, since then, have been gaining more and more prominence in national labour markets. These new forms are analysed in detail in each separate country case study. Here, we will compare forms of atypical employment that are present in all legal systems considered: fixed-term, part-time, or intermittent employment. Table 10.3 reports

the proportion of fixed-term and part-time employees in each country in order to provide a quantitative view.

TABLE 10.3 Portion of temporary employees and part-time jobs

Reference Year	Portugal	South Korea	Brazil	Mexico	Argentina	South Africa
Percentage of employees for a given time	20.8%	16.8%	Not available.	53,4%	10.2%	13,3%
Percentage of part-time employees	28.7%	20.8%	27.2%	26.1%	39.5%	15.3 %

Source: Authors' elaboration/case studies.

With regard to fixed-term contracts, a first relevant observation from a comparative point of view is that each labour law system, with the exception of South Korea's and South Africa's, limits, with different approaches, the circumstances in which it can be used. In Argentina, there must be a justified reason, linked to the task or the nature of the activity; in Brazil, the contract is intended for service whose nature or transience justifies the predetermination of the deadline, commercial activity of a transitory nature, or is intended for the prior verification of the employee's technical capacity; in Mexico, it can be used when the nature of the work to be performed so justifies, or to temporarily replace another worker; in Portugal, to satisfy the company's temporary need. South African law applies exclusively to employees earning below a maximum amount set by the Ministry of Labour and does not apply to the employer employing fewer than 10 employees, nor where fixed-term contracts are permitted by law, sectoral determination or collective agreement.

In addition, labour legislation usually limits the duration of employment contracts for a fixed term. The South African system allows for contracts generally lasting a maximum of three months, which is particularly narrow. However, this period may be extended if the nature of the work has a limited duration or if the employer can provide a justifiable reason for fixing a longer duration for the contract. The same applies to South Korea's law, which sets the two-year limit but offers a number of exceptions that allow it to go beyond that period. The maximum duration of the fixed-term contract, in principle, is 5 years in Argentina, 3 years in Portugal and 2 years in Brazil (90 days, for verification of technical capacity). In these last three countries, if the employment relationship exceeds the limit established by law, the contract shall remain in force indefinitely. Finally, Mexican labour legislation provides that, once the deadline has expired, and if the object of the work remains, the relationship may extend as long as the circumstances that justify the temporary hiring continue.

South African law, when the contract exceeds three months, imposes equal treatment on the fixed-term contract worker and workers for an indefinite period, unless there is a justifiable reason. In turn, South Korea's system explicitly prohibits discriminatory treatment based on the form of employment, for workers on a fixed-term contract who perform the same type of work as other workers. In other countries, some institutes that are applicable to employment

relationships for an indefinite period are not applicable (as is the case of prior notice, in Brazil and Mexico) or are subject to their own rules (again prior notice, in the case of Argentina).

From a more formal perspective, for the conclusion of a fixed-term contract, with the exception of South Korea, the written form and the explicit mention of a justifiable reason are required. If these elements are missing from the contract, or the reason does not fit the hypotheses allowed by law, it is understood that the employment relationship is for an indefinite period.

To conclude, a brief exposition on another form of fixed-term employment contract, introduced in Brazil by the Federal Law No. 9.601/1998, is necessary. This is characterised by some peculiarities, such as: being instituted through collective bargaining to effectively increase the number of workers of a company; provide compensation payment, in case of breach of contract before the expiration of the term; and enable more than one extension.

With regard to part-time jobs, two main observations are needed. First, in Argentina and Brazil the maximum duration of this working day is limited by the respective labour laws. In Argentina, the established limit is two-thirds of the full day; if exceeded, the worker is entitled to the salary of a full-time employee. In Brazil, the system offers two options: up to 30 hours per week, without overtime; or up to 26 hours, with the possibility of working 6 overtime hours, paid with an additional 50 per cent on the contracted working hour. In turn, South Korean labour legislation allows working beyond the contractual hours, provided that with the employee's consent, up to a maximum of 12 overtime hours per week, with additional remuneration. According to the legislation of the other countries, part-time work must in any case be less than the length of the full-time working day and week.

In Mexico and Portugal, part-time workers are entitled to the same treatment as full-time workers, with the exception of compensation, which is proportional. Only in the case of Portugal, it is allowed that for objective reasons, duly identified in collective agreements, a different treatment is justified.

With a similar approach, South Africa's system guarantees "treatment no less favourable" than that of a full-time worker doing the same or similar work, as well as the same rights to training and professional development. In turn, according to South Korean labour legislation, working conditions are determined based on the relative proportion between the hours of work of part-time and full-time workers, employed in the same type of work and in the same place, and any discriminatory treatment is prohibited.

In Brazil, employees hired on a part-time basis are subject to the rules of the CLT, provided that they do not conflict with the provisions of the specific rules of their work regime. Finally, part-time workers in Argentina are entitled to proportional remuneration and social security contributions, and it is possible to limit the number of part-time workers in a given establishment, through a collective agreement.

In relation to other types of temporary work, different countries have adopted very different approaches in regulating the matter. For example, the Mexican system allows both labour intermediation and subcontracting. Brazil, on the other hand, has admitted intermittent work and outsourcing of labour since the 2017 labour reform. In turn, Portuguese labour law allows the occasional assignment of workers from one company to another.

Table 10.4 presents the cases in which temporary and intermittent work is allowed, as defined in national labour legislation.az

TABLE 10.4 Situations where temporary and intermittent work is permitted

Country	Admitted cases
Portugal	a) Vacant employment, while the recruitment process to fill it is in progress; b) Intermittent need for work, determined by fluctuation of activity during the days or parts of the day, provided that weekly use does not exceed half of the normal working period plus practiced by the user; c) Intermittent need for direct family support, of a social nature, during days or parts of the day; d) Provisional project execution, namely installation or restructuring of company or establishment, assembly or industrial repair.
South Korea	Adequate jobs for these purposes, by virtue of their nature and the professional knowledge, skills and levels of experience required, established by presidential decree, excluding the industrial sector. However, if there is a vacancy or the need to temporarily or intermittently secure labour, the hiring of workers may be allowed, provided that prior consultation with the union or workers' representative, if it does not exist, again excluding certain professional categories, such as dockers.
Brazil	Meet the need for temporary replacement of permanent personnel or the complementary demand for services, arising from unforeseeable factors or, when arising from foreseeable factors, are intermittent, periodic or seasonal in nature.
Mexico	No restrictions
Argentina	a) Coverage of the absence of an effective worker; b) Coverage of legal or conventional licenses or suspensions, except those resulting from strike, force majeure, absence from work or suspension of employment contract due to reduction of the employer's economic activity; c) To cover the increase in the company's activity, which may require extraordinary and occasional more workers; d) For organizing congresses, conferences, exhibitions, etc.; e) For the unavoidable execution of work intended to prevent accidents, adoption of urgent safety measures or repair of equipment, facilities or buildings dangerous to workers and third parties, provided that these tasks cannot be carried out by the company's own personnel; f) For temporary needs or extraordinary tasks that are outside the normal and usual business of the company, there must be a reasonable and justified ratio between temporary and permanent.
South Africa	a) Services with a term of less than three months; b) Temporary replacement of absent permanent worker; c) When a collective agreement or sectoral determination designates a certain type of work as temporary.

Source: Authors' elaboration.

To conclude, it is interesting to note that in Argentina temporary workers are entitled to the benefits provided for in labour legislation that are compatible with the nature of the employment relationship, provided that the requirements for its acquisition are met. In Brazil,

temporary workers are guaranteed the same rights as permanent workers, except for prior notice compensation and fines relative to the Fund for Guaranteed Time of Services (FGTS). In the Mexican system, as already mentioned, the working conditions of temporary workers are the same as those of other workers who provide services in the company or establishment. In Portugal, the principle of equal treatment governs. In South Africa, the employee must be treated no less favourably than the permanent employee of the establishment performing the same or similar work, unless the distinction is justifiable, under penalty of being considered a permanent employee. Finally, Korean labour law prohibits discriminatory treatment for no justifiable reason.

C. Regulation of contractual termination

Dismissal, like any other cause of termination of employment, has significant consequences for workers, since remuneration usually represents their main source of income. For this reason, each legal system somehow limits the employer's ability to dismiss, as detailed in each of the case studies.

The term dismissal generally refers to the unilateral termination of the employment contract by the employer. It should be noted that each legal system considered includes a series of rules that regulate dismissal procedures: failure to comply may qualify the dismissal as unfair or unjustified. Before the contract is finalized, each legal system requires, although with different approaches, that the employer previously inform the employee of its intention. It should be clarified that, outside the scope of the dismissal, the worker also has a parallel obligation to inform the employer in advance of his intention to terminate the employment contract. Argentine labour law requires the employer to give written notice, by means of a notification, and provides for several minimum terms, the duration of which increases according to the seniority of the relationship. The notice must clearly state the reasons that led to the termination of the contract, which cannot be modified in a subsequent labour action.

In Brazil, the employer must communicate in writing its intention to terminate without cause the employment contract for an indefinite period. In case of dismissal for just cause, motivated by serious misconduct of the employee, no prior notice is due. In addition, in fixed-term employment contracts, notice is due exclusively when a clause is present that admits the reciprocal right of the parties to terminate the agreement in advance. The company is obliged to maintain the employment contract for another 30 days, plus an additional period proportional to the working time, of up to 90 days.

In Mexico, the employer must give written notice of the conduct(s) underlying the termination and the date or dates they were committed. The notification must be delivered personally to the worker at the time of dismissal or communicated to the competent court, within five

following business days, accompanied by the last registered address of the worker, so that the authority communicates it. Failure to communicate to the worker implies the presumption of dismissal without just cause.

Portuguese labour law also requires the communication of the reasons for the dismissal in writing. In case of dismissal for disciplinary reasons, the employer is not obliged to give prior notice of the decision to terminate the contract. In other cases, communication is due, and the length of notice depends on the employee's working time. The Portuguese system does not allow financial compensation in place of prior notice for individual dismissals, but allows it to occur in collective dismissals and dismissals motivated by the non-adaptation of workers to their duties.

In turn, South African law also requires advance notice, the duration of which depends on the time of work and the type of employment. These terms may be reduced through collective bargaining agreements or converted into indemnity.

Finally, the South Korean system requires the employer to provide oral or written notice to the employee at least 30 days in advance. If the notification is not complied with, the employee is entitled to receive an additional 30 days of salary. In addition, the employer must notify the reasons at the time of dismissal. A waiver that does not clearly and concretely state the underlying reasons is considered null and void.

As already mentioned, each constitution studied, in a different way, offers protection to workers against arbitrary or unfair dismissals by the employer. Dismissal without just cause can be described as the decision by the employer to terminate the contract without mentioning any reason, or without clearly expressing or proving it.

The legal notion and the limits related to what is considered a just cause depend on each legal system. Except in Brazil and Mexico, the reasons why a dismissal can be considered legitimate are always a set of subjective and objective causes that make it impossible to continue the employment relationship, making the contract unenforceable. Argentine law does not typify in the Law the hypotheses that constitute just cause, but remits to the judge the duty of a 'prudent assessment' as to the existence of an infringement, taking into account the personal circumstances and the obligations arising from the contract. In addition, the legislation includes among the causes of extinction the decrease or cessation of the activity performed by the employee, provided that they are duly substantiated and not attributable to the employer, in addition to the cases of force majeure, bankruptcy or bankruptcy.

South African labour law identifies employee conduct and competence and the operational requirements of the employer's business as legitimate causes for termination of employment. As in Argentina, the rule is that each case is judged individually, in the face of its own circumstances.

South Korean doctrine identifies, among the categories of just cause, both personal and behavioural motives and managerial needs. The law, among the subjective grounds, does not define what constitutes a just cause: it is peacefully accepted by scholars of labour law in the country that it arises from the company's regulations or collective agreements, requiring an assessment on a case-by-case basis. On the other hand, in the dismissal for managerial needs, Art. 24 of the Labour Standards Law lists a series of criteria, the full observance of which is necessary for the dismissal to be made for justifiable reasons. The systems of South Africa and South Korea include a number of hypotheses in which the dismissal should be considered unfair, null and void (respectively, Art. 187 of the Labour Relations Law; Art. 6 of the Labour Standards Act and Art. 81 of the Union and Labour Adjustment Act).

According to the Brazilian legal system, just cause arises exclusively from the conduct of the employee, typified by law, and dismissal for objective reasons is not allowed. The approach used by the legislator also aims to protect against arbitrary dismissal by typifying cases in which dismissal is prohibited, as in the case of pregnant women, union leaders and representatives and victims of occupational accidents or diseases, in addition to prohibiting discriminatory dismissal. In other countries, such as Portugal, it is preferred to produce an exhaustive list of legitimate causes for termination of the contract. The same applies to Mexico, where Art. 47 of the Federal Labour Law identifies the causes of termination based on the employee's conduct, also without listing any cause for objective dismissal.

Finally, in Portugal, Art. 351 of the Labour Code, within the scope of dismissal for disciplinary reasons, for reasons attributable to the worker, defines as just cause the culpable conduct of the worker, which, due to its severity and consequences, makes it immediately and practically impossible to maintain the employment relationship, including a non-exhaustive list of hypotheses. In addition, within the scope of objective grounds for market, structural or technological reasons, the Code admits collective dismissal, dismissal for termination of office and dismissal for non-adaptation of the worker.

In each country, the worker is free to contest dismissal for just cause before the national labour dispute resolution system. The burden of proof to demonstrate the existence of just cause always rests with the employer. If the employer fails to do so, or fails to prove that the dismissal was effected on the basis of a fair process, the dismissal is deemed to be without cause.

In relation to dismissal without just cause, each national labour law, although with different approaches, confers protection to the worker, through the imposition of economic compensation, or reintegration into the workplace.

D. Collective labour law

The labour law of each of the legal systems considered here attaches great importance to collective law, regulating the organisation, constitution and management of representative organisations, as well as collective negotiations, agreements and conflicts.

This section presents the main characteristics of the organisations representing each country, as well as the different collective bargaining systems they use. A more detailed assessment of collective labour relations in each country can be found in each of the national case studies.

Tables 10.5 and 10.6 report, respectively, the number of unions, federations, unions and confederations for each country, in the last year for which data were available, as well as the union density rate (as a percentage) between 2009 and 2018, when available. The latter indicator clarifies the scope of the exercise of freedom of association in each country and must be interpreted in accordance with the respective legal framework.

TABLE 10.5 Number of worker representative organisations

		Portugal (2015)	South Korea (2016)	Brazil (2017)	Mexico (2017)	Argentina (2020)	South Africa (2019)
Representative organisations	Labour Unions	300	6,136	10,817	2,768	3,290	204
	Federations	27			532	110	24
	Unions	43					
	Cup title.	6			47	19	

Source: Authors' elaboration/case studies.

TABLE 10.6 Union density rate

Union density rate 2009	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Portugal	20.4%	19.6%	18.7%	18.9%	18.7%	17.2%	16.1%	15.3 %		
South Korea	10.1%	9.8%	10.1%	ND	10.3%	10.3%	10.2%	10.3%	10.7%	11.8%
Brazil	18.1%	ND	17.5%	16.9%	16.2%	16.9%	19.5%	18.9%		
Mexico	15.3%	14.2%	14.4%	13.5%	13.6%	13.5%	12,9%	12.5%		
Argentina	31.9%	30.1%	31.8%	30%	30.4 %	27.7%				
South Africa	ND	30.1%	29.3%	29.7%	28.7%	29%	27.4%	28.1%		

Source: Authors' elaboration/case studies.

In Argentina, labour legislation defines a union as a permanent coalition of workers who carry out the same professional or economic activity, for the defence and promotion of their collective interests. The legal system includes the following types of workers' representative organisations: trade unions; trade union federations; and confederations composed of

trade unions and federations. The making of a request to the administrative authority and a subsequent registration in the special register are legal requirements for the constitution of a union, and only some unions are granted the right to participate in collective bargaining, as well as to defend and represent before the State and employers the individual and collective interests of workers. This qualification is granted by the Ministry of Labour, Employment and Social Security to the most representative entity in a given activity, trade or profession, provided that it meets a set of legally determined criteria. At the same time, employers' associations, whose functions often go beyond labour relations, have as their main role to be the counterpart of workers' representative organisations in collective bargaining. Referring to the representative organisations of Argentina, it is important to highlight that only 1,681 have the necessary qualification for collective bargaining, and that this country has the highest rate of union density among the countries object of this study.

In Brazil, labour legislation grants associations the right to study, defend and coordinate the economic or professional interests of all those who, as employers, employees, outsourced workers or self-employed professionals, respectively exercise the same activity, profession or similar activities or professions.

The system enables unions, operating at the local level, as well as regional federations and national confederations. It is important to note that it is forbidden to create more than one union organisation, to any degree, representative of a professional or economic category, on the same territorial basis, with an area not less than the limit of a municipality. Unions must submit an application for recognition to the Ministry of Economy, presenting their statutes. Once the professional association is recognized, a letter of recognition will be issued, specifying the economic or professional representation and the territorial basis granted. To conclude, it is important to note that before the 2017 labour reform, the union financing system had a mandatory contribution from workers. Brazil, compared to the other countries in the study, has the largest number of workers' representative organisations, although union density is not as high.

In the case of Mexico, it is important to emphasize, first of all, that collective labour relations in this country have been harmed by the existence of so-called "protection" unions, which enter into "employer protection agreements". Although an analysis of this phenomenon can be found in the case study of this country, it is important to emphasize that the constitutional reform of 2017, the ratification of ILO Convention No. 98 in 2018, and the reform of the Federal Labour Law of 2019 clearly aim to guarantee the broadest freedom of association for workers, as well as the right to collective bargaining.

The freedom of Mexican workers and employers to organize associatively is constitutionally guaranteed. The Federal Labour Law defines a union as an association of workers or employers, constituted for the study, improvement and defence of their respective interests. As a result of the 2019 reform, representative organisations must be registered with the Federal Centre for Conciliation and Labour Registration. For registration, the law requires compliance with

the principles of autonomy, equity, democracy, legality, transparency, reliability, gratuity, immediacy, impartiality and respect for freedom of association. In addition, the law also specifies that the Federal Centre must make publicly available information regarding the registration of unions, and that the will of workers and the collective interest will prevail over formal aspects. It is worth remembering that unions have the obligation to adapt their statutes to Art. 371 of the Federal Labour Law, including the incorporation of provisions relating to the revision of collective agreements.

Mexico's labour legislation includes the following types of workers' representative organisations: professional unions, company unions, industry unions (formed by workers who provide services in two or more companies in the same sector), national unions (formed by workers who provide services in one or more companies in the same sector, established in one or more federative entity), and multiprofessional unions, which can only be constituted when in their territorial base the number of workers in the same profession is less than twenty. Similarly, employers' organisations can cover the entire industry or the entire country. In addition, the law also provides for the formation of trade union federations and confederations of federations. Mexico stands out as the Latin American country with the lowest number of unions, although this is substantially high, when compared to countries such as Portugal or South Africa. The union density rate is similar to the Latin American average.

The Constitution of Portugal guarantees workers not only the right to form unions, but also workers' committees, which are organisations with legal personality, composed of workers elected in a company to defend their interests and intervene democratically in management. However, from a practical point of view, collective labour relations are strongly dominated by unions, since only unions have the right to sign collective agreements. The Portuguese Labour Code defines a union as a permanent association of workers, of a voluntary nature, for the defence and promotion of their socio-professional interests. The legal personality depends on the registration and publication of the union statute, before the Ministry of Labour. At the same time, the right to form employers' associations is also provided for in the Code; these group, represent and promote the interest of employers in collective bargaining, and also depend on registration. Under the Portuguese system, both trade unions and employers' associations can be organized into federations, unions and confederations. As for the number of unions, it is important to note that the 346 organisations in 2006 decreased to 300 in 2015; the number of employers' organisations also decreased from 497 to 358 in the same period. In both cases, the trend can be explained by an amendment to the Labour Code in 2009. Trade union density in Portugal has also been decreasing.

The South African Labour Relations Act describes a union as an association of employees whose main purpose is to regulate relations between them and their employers; in turn, the term employers' organisation refers to any group of employers associated for individual or collective purposes, for the purpose of regulating relations between them, their employees or their respective unions. The law also admits the formation of trade union federations.

A trade union which is independent, has its registered office in South Africa and adopts a statute in accordance with the Act, may apply for registration with the labour relations registrar. Interestingly, the mandatory registration of employers' organisations is not foreseen.

In addition to the above, in the country there are also labour forums, which are committees of employees elected in the workplace and who meet regularly to discuss labour issues, without exercising collective bargaining functions. The general objectives of these forums are to promote the interests and demand improvements in favor of all employees, including non-union employees, and can be established in any workplace with more than 100 employees.

South Africa, compared to the other countries in the study, has the lowest number of unions. Still, the country's union density rate is similar to Argentina's.

South Korea's labour legislation defines a union as a workers' organisation, formed voluntarily and collectively, at the initiative of the workers themselves, with the objective of maintaining and promoting working conditions or improving their economic and social situation. For the constitution of a union, the Law requires the submission of a report and the proposed statute to various administrative authorities, including the Ministry of Employment and Labour, responsible for its certification. Unions that are not legally constituted may not request the settlement of labour disputes or the redress of unfair labour practices, notwithstanding certain exceptions. In Korea, unions can be established at the level of the company, a profession, or an economic sector. In turn, an employers' association is defined as an organisation of employers that has the authority to adjust and control its constituent members, with regard to labour relations.

The Korean Collective Labour Law also requires the creation of a labour management board, in companies or workplaces that typically employ thirty or more workers. This body, which has parity of representatives between the employer and the workers, aims to promote cooperation between capital and labour. However, it is important to note that board activities must be independent and cannot coincide with those of unions, excluding collective bargaining.

The country has the second largest number of unions, totaling 6,164 in 2016, but has the lowest union density rate among the countries analysed.

Table 10.7 reports the collective bargaining coverage rate (as a percentage), which gives some indication of the scope of the exercise of trade union rights in each country.

There are significant differences between the countries considered here. When we take into account the most recent data presented in the table, in Mexico and South Korea, only about 10 workers out of 100 are covered by collective bargaining agreements. In South Africa, that number rises to around 30, while in Argentina to just over 50. Finally, Brazil and Portugal have by far the highest coverage, reaching about 70 out of every 100 workers covered by collective bargaining agreements. Therefore, there is no correlation between the union density rate and coverage by collective agreement.

TABLE 10.7 Collective Bargaining Coverage Rate

	2008	2009	2010	2011	2012	2013	2014	2015	2016
Portugal	85.9%	84,1%	76.7%	78.1%	75.4%	76,5%	74%	73.6%	73.9%
South Korea	12%	11.6%	11,3%	11.5%	11.7%	11.8%	11.9%	11.8%	
Brazil	ND	58.8%	ND	63.1%	63.8%	65.7%	70.5%		
Mexico	10.1%	9.2%	10.2%	9.8%	11%	10.1%	10%	9.8%	9.9%
Argentina	50.9%	50.6%	52.4%	51,2%	50.5%	51.5%	51%	52,9%	51.8%
South Africa			32.9%	31.8%	32.7%	30.7%	30.8%	29.1%	29,9%

Source: Authors' elaboration based on single case studies and ILOSTAT (2021).

There are significant differences between the countries considered here. When we take into account the most recent data presented in the table, in Mexico and South Korea, only about 10 workers out of 100 are covered by collective bargaining agreements. In South Africa, that number rises to around 30, while in Argentina to just over 50. Finally, Brazil and Portugal have by far the highest coverage, reaching about 70 out of every 100 workers covered by collective bargaining agreements. Therefore, there is no correlation between the union density rate and coverage by collective agreement.

In Argentina, collective bargaining takes place through the institution of "negotiation commissions", with an equal number of representatives of unions and employers, or their representative organisations. The agreement needs to be approved by the Ministry of Labour, Employment and Social Security. It is important to emphasize that the approved agreements are *erga omnes*, that is, they apply to workers who fall within the scope of union and employer representation, regardless of their affiliation.

In turn, the system of collective labour relations in Brazil provides for collective agreements and collective bargaining agreements. The first is negotiated between representative organisations of workers and employers, within a certain economic or professional category. Instead, a collective agreement is negotiated by a workers' union and a company or set of companies, within its territorial jurisdiction. It is important to note that collective agreements apply exclusively to these company(ies) and their workers. Collective agreements must apply to all employment contracts in the territorial jurisdiction of the employers' and workers' organisations that entered into them. In addition, this instrument must be renegotiated each year, privately at round tables, or before the Regional Labour Delegates, who exercise mediation.

With regard to Mexico, it is important to note that the data presented here refers to a period in which the aforementioned 'employer protection agreements' were applied. It was only in 2019 that the reform of the Federal Labour Law, implementing the 2017 constitutional amendment, more broadly guaranteed freedom of collective bargaining and effective representation of unions. In addition, the transitional provisions of the reform require that all collective agreements entered into prior to its effectiveness be reviewed by 2023.

In the Mexican system, the collective bargaining agreement applies to all people who work in the company or establishment, even those who are not unionized. The Law also provides for *the ley contract,* which defines working conditions in a given branch of industry and applies to one or more units of the federation, economic zones or throughout the national territory. For the conclusion of such an agreement, the representation of at least two thirds of the workers in a given branch of industry is required. The Mexican system allows you to insert clauses in collective bargaining agreements that determine that the employer will contract exclusively workers affiliated with the union signing the agreement, but this does not apply to non-union workers already employed in the company, before entering into or reviewing the contract.

In Portugal, collective agreements can occur at the level of the company, the economic sector or the profession. A company contract is entered into with a single employer. The collective bargaining agreement is signed with several employers. Finally, if the agreement is concluded with one or more employers' associations, it is called a collective agreement. In the Portuguese system, company agreements are typical of large companies, while collective agreements are quite rare. Collective agreements applicable to an economic sector are the most widespread. In this context, it is important to note that several normative changes have been modifying its scope. Until 2010, the Ministry of Labour could extend the scope of application to all workers of companies in the sector, including non-unionized workers, and to workers of companies affiliated to signatory employers' associations, by means of an ordinance. In 2011, the government suspended the issuance of ordinances and introduced a 50 per cent representation floor, so that it would be possible to request the extension of the agreement. These changes, coupled with the international financial crisis, resulted in a rapid reduction in the number of updated collective bargaining agreements, reducing the impact of collective bargaining on wages. In 2015, this requirement of representativeness was withdrawn by the new government.

Also in South Africa, collective bargaining can occur at the company/ establishment level as well as at the sectoral level, the latter historically being predominant. This system can be considered largely voluntary. Collective bargaining takes place before bargaining boards, permanent bodies, voluntarily established by representative organisations of workers and employers to bargain collectively with a specific sector and geographical area, within which these organisations are representative. It is possible to agree that employers can only hire unionized workers. Once a collective agreement is reached, the board may require the Ministry of Labour to extend the agreement to all employers and employees within its jurisdiction. In this context, it should be noted that the boards have an obligation to create an 'exemption committee' and a procedure for examining requests for partial or total exemption from the agreement. From a more practical perspective, two observations are needed (Godfrey, 2018): despite the decline in the number of bargaining boards, the total number of workers covered has increased significantly, largely due to the provisions on the institution of bargaining boards in the public service; and that only in the manufacturing sector more than 10 per cent of employees are covered by an extended contract,

indicating that the extension mechanism does not cover a significant portion of the labour market. In addition to the above, national labour legislation also provides for the possibility of establishing legal councils for sectors with little organisation, and the administrative determination of minimum hiring standards for these sectors.

In Korea, the coverage rate of collective bargaining, as well as union density, has been well below the OECD average since 1970, although, in terms of binding force, a collective agreement is applicable to all employees who perform the same type of work and to all workers in a company or workplace, whenever entered into by organisations representing at least half of the total number of employees.

In addition, whenever more than two thirds of the workers performing the same type of work and employed in the same area are subject to the application of a collective agreement, the administrative authorities may, by resolution of the Labour Relations Commission, and at the request of one or both parties to the collective agreement or by their own authority, resolve that such collective agreement apply to other workers performing the same activity and who are employed in the same area, as well as to their employers. To conclude, it should be noted that the Korean system allows collective agreements to establish exclusive hiring agreements for employees belonging to a particular union. The Supreme Court maintains that such agreements should be interpreted as obliging the employer to dismiss the worker who refuses to join a union, whereas this rule does not apply when the worker chooses to join another union.

10.3 LABOUR DISPUTE RESOLUTION SYSTEM

Although the different countries studied have very different labour dispute resolution systems, it is possible to perceive an appreciation of the alternative means of dispute resolution in disputes between workers and employers, whether at the collective or individual level. The difference between countries is mainly in the degree of predominance that the bodies responsible for carrying out conciliations, mediations and arbitrations have, as well as their administrative character or insertion in the justice system.

In Portugal and Brazil, conciliation attempts are carried out within the scope of the Judiciary, throughout labour proceedings. Mexico has just created the Labour Conciliation Centres, an agency of the Judiciary responsible for the attempt at mandatory conciliation, before the lawsuit is filed in the Labour Court. In Argentina, there are differences according to jurisdiction. In Argentina, in the City of Buenos Aires, conciliation takes place at the administrative level, before the Mandatory Labour Conciliation Service, while in the Province of Córdoba, it takes place before the Judiciary, throughout the labour process. In South Korea and South Africa, there are their own and independent administrative institutions: the Regional Labour Relations Commissions and the Mediation, Conciliation and Arbitration Commission, respectively.

Another relevant aspect is the existence, or not, of an autonomous Labour Court in relation to the other branches of the Judiciary, and the competence it has to resolve labour claims. In Portugal, Argentina and Mexico, labour judgments are carried out by specialized civil courts. The same is true in South Korea, although in this country most labour disputes are resolved at the administrative level, being subject only to judicial review, like any other administrative act. Brazil has a specialized Court in labour disputes, in the same way as South Africa, although, in this case and similarly to South Korea, an administrative entity concentrates the competence to analyse and resolve disputes between workers and employers.

A. Description of labour dispute resolution systems

In Portugal, the judicial courts of first instance are called District Courts. These unfold in Courts, which may have specialized competence. Thus, labour disputes are judged by civil courts specialized in labour matters. The Labour Courts are also competent to judge the appeals of the decisions of the administrative authorities in proceedings related to labour and social security violations.

The Law of Organisation of the Judiciary also provides for the competence of the social sections of the Supreme Court of Justice to judge appeals against decisions of a labour nature. The same applies to the Courts of Appeal, second instance bodies of the Portuguese Judiciary.

In South Korea, the Labour Relations Commission is the main institution responsible for dealing with labour disputes in the country, consisting of an independent, quasi-judicial public administrative body that aims to resolve labour disputes through the use of alternative means of conflict resolution.

The Labour Relations Commission is composed of the National Labour Relations Commission (CNRT), the Regional Labour Relations Commissions (CRRTs), and the Special Labour Relations Commission. The jurisdiction of these commissions is defined as follows.

TABLE 10.8 Jurisdiction of Labour Commissions in South Korea

Agency	Jurisdiction
National Commission of Labour Relations	• Review the measures adopted by the Regional and Special Labour Relations Commissions; • Make adjustments in labour disputes of competence of two or more Regional Commissions; • Analysethe cases of its jurisdiction, according to legal prescription.
Regional Commissions of Labour Relations	• Resolve cases that happen in their respective region and that are not the responsibility of the National or Special Commission.
Special Commission of abour Relations	• Solve cases relating to specific matters that are included among its objectives.

Source: Authors' elaboration based on the national case study.

The Regional Labour Relations Commissions are composed of a Plenary Session and seven committees. The following table describes each of them, their composition and respective functions. The National Labour Relations Commission has committees similar to those of regional commissions.

TABLE 10.9 Committees of Regional Labour Relations Committees

Committees	Composition	Function
Full Court	Tripartite—representatives of workers, of the employers and the public interest	Resolve general administrative issues concerning the functioning of the Commission; dictate recommendations, and the orders and rules for the improvement of working conditions.
Award Committee	Three commissioners of public interest	Judging cases involving unfair labour practices and dismissals without just cause; act correctionally in matters relating to negotiations and the right to fair representation.
Correction Committee of Discrimination	Three commissioners of public interest	Determine measures for the correction of cases of discrimination against non-regular workers, as workers of contract for a fixed term, part-time and temporary.
Mediation Committee	Two commissioners representing employees and one commissioner in the public interest	Mediate labour disputes.
Special Mediation Committee	Three commissioners of public interest	Mediate labour disputes and determine the minimum levels of operation for public service concessionaires in the event of a strike.
Arbitration Committee	Three commissioners of public interest	Arbitrate labour disputes, upon request of both interested parties or one of the parties to a collective bargaining agreement.
Mediation Committee of the Work Relationships Mediation Teachers (national)	Three commissioners of public interest	Mediation and arbitration of the teachers' work relationships.
Mediation Committee of Labour Relations Public Officials	Seven or fewer commissioners in the public interest	Mediation and arbitration of the labour relations of public officials (national).

Source: Authors' elaboration based on the national case study.

Like any administrative act, the decisions of the Labour Relations Committees are subject to judicial review by the competent court.

In Brazil, the Labour Court, of an autonomous and national nature, is responsible for reconciling and adjudicating labour disputes. However, the Federal Court and the State Court also deal with demands that orbit the world of work. The Federal Court, for example, has jurisdiction for disputes involving the so-called criminal law of labour, being under its jurisdiction the cases of crimes against personal freedom, such as those that occur in work situations in conditions analogous to slavery. In addition, there is also a list of so-called crimes against the organisation of work that are also incumbent on the Federal Justice

(Criminal Code, Articles 197 to 207). The State Court, in turn, has jurisdiction for demands related to the insurance benefit paid by the State due to an occupational accident. These cases have considerable quantitative representativeness in the general framework of labour claims.

Labour Courts are the gateway to common disputes between workers and employers in the Labour Court. Its functions and competence are defined, specifically, by Articles 652 and 653 of the CLT, among which the following stand out: disputes over recognition of employee stability; remuneration, vacation and indemnities for termination of the individual employment contract; disputes concerning the individual employment contract; inquiries into serious misconduct; ratification of extrajudicial agreements, among others.

The Labour Court is composed of a full labour judge and a substitute judge. In places where there are no Labour Courts, labour disputes will be referred to the judge of law of the Common Justice, but their decision may be reviewed by the Regional Labour Court (Art. 112, CF/88).

The Regional Labour Courts (TRTs), composed of labour judges, judge the appeals against the judgments of the labour judges of first instance and some other disputes that are directly referred to them, such as collective bargaining, termination actions, writs of mandamus and habeas corpus.

The higher instance of the Labour Court is concentrated in the Superior Labour Court (TST), with headquarters in the Federal District and jurisdiction throughout the national territory. Its main function is to standardize labour jurisprudence and its competence covers the conciliation and judgment of collective and individual bargaining agreements.

In Mexico, until 2017, the Conciliation and Arbitration Boards were the bodies of the Executive Branch responsible for resolving labour disputes, both at the federal and local levels. On February 23, 2017, the Mexican Constitution was reformed and, in order to improve access to Labour Justice, the Labour Conciliation Centres were created, substitutes for the Boards, linked to the Judiciary Branch. In 2019, the Federal Labour Law was also modified, establishing the parameters for the implementation of the new system.

The Labour Conciliation Centres are also divided into federal and local levels. They are specialized and impartial institutions, with technical, budgetary, operational, decision-making and managerial autonomy. The reform provides that all labour lawsuits must be submitted to a conciliation hearing before being referred to court.

It is noteworthy that the Conciliation and Arbitration Boards will remain responsible for resolving labour disputes until the local and federal Labour Conciliation Centres begin to operate. The implementation of the new labour justice system is expected to occur in four years, starting in 2019.

The reform of the Federal Labour Law also created the Federal Centre for Labour Conciliation and Registration, responsible for exercising the pre-procedural conciliatory function at the federal level and provide for acts and procedures relating to the registration of trade unions and collective agreements, law contracts and company regulations.

The Labour Conciliation Centres will be responsible for resolving labour disputes occurring in their jurisdiction, subject to the classification of competencies by subject, degree and territory. In case of actions involving matters of both federal and local competence, it remains competent to analyse the matter.

It is noteworthy that the Mexican Constitution establishes a system of residual competence. All powers that are not expressly delegated to federal entities are reserved to the states. Thus, cases of federal competence are expressed in the Mexican Constitution and the Federal Labour Law. The others are the responsibility of the local authorities.

In the case of the Argentine federation, legislative competence in matters of substantive labour law is federal, but for procedural labour law it is provincial. Therefore, different federative units have different labour dispute resolution systems.

In the City of Buenos Aires, labour disputes are resolved in two stages.

The first occurs in an administrative instance, the Mandatory Labour Conciliation Service, linked to the Ministry of Labour, Employment and Social Security. The second takes place in the courts. The national courts of the Argentine capital have labour courts of first instance, composed of a judge, and a national chamber of labour appeals, divided into sections composed of three judges each.

In Córdoba, the Judiciary is exercised by the Superior Court of Justice, which has a Chamber of Labour and conciliating judges. The province is divided into ten constituencies. The Labour Chambers are in the capital of the constituency, while the Conciliation Courts can be decentralized in other main cities. In less populated districts, both may be replaced by chambers and courts of mixed jurisdiction. Also in this context, the work chambers are made up of sections, each of them composed of three members, while the conciliation court is always single-member.

In Córdoba, prior conciliation is not mandatory before accessing the Judiciary. However, the parties may request an attempt at administrative conciliation in cases of individual conflicts. Tables 10.10 and 10.11 illustrate the steps in the institutions responsible for resolving labour disputes in Buenos Aires and Córdoba.

In South Africa, the Labour Court plays an important but residual role in the resolution of

labour disputes. The Conciliation, Mediation and Arbitration Commission (CCMA) is the main institution responsible for assessing labour disputes in general.

CCMA is an independent legal entity, with jurisdiction over all the provinces of South Africa, and with at least one office in each of them. CCMA has a Board of Directors composed of a president plus nine members, appointed by the National Council for Economic Development and Labour (NEDLAC) and appointed by the Minister of Employment and Labour, to perform the function for three years.

TABLE 10.10 Steps of the conflict resolution procedure—Córdoba

	Agency	Acts/phase
1	Conciliation Court	Conciliation between the parties and, if this is unsuccessful, investigation of the process.
2	Chamber of Labour	Judgment of the case.
3	Superior Court of Justice	Judgment of appeals to the sentence, for the purpose of controlling constitutionality and legality.
4	Supreme Court of Justice	Extraordinary federal appeal.

Source: Authors' elaboration based on the national case study.

TABLE 10.11 Steps of the conflict resolution procedure—Buenos Aires

	Agency	Acts/phase
1	Service required Labour Conciliation	Conciliation between the parties.
2	Labour Court	If the conciliation is unsuccessful, instruction and judgment of the process.
3	Board of Appeal	Judgment of appeals against the judgment.
4	Supreme Court of Justice	Extraordinary federal appeal.

Source: Authors' elaboration based on the national case study.

CCMA may create committees to assist its work, composed of a member of the Board of Directors, the director, a commissioner, an employee of the Commission and any other person. The Board of Directors may delegate certain of its functions to committees or the officer, with the exception of the appointment and removal of commissioners; appointment of the officer; and accreditation and funding of Trading Boards and private agencies.

Among CCMA's main functions are the conciliation of workplace disputes and the arbitration of certain types of labour litigation, after unsuccessful attempts at conciliation. In addition, the Commission should also establish the rules regarding strikes and legal lock-outs. Any party to an employment contract that is dissatisfied with its termination, or with procedural irregularities, must invariably refer the matter to conciliation or arbitration.

According to the South African Constitution, the Judiciary is composed of the Court Constitutional; the Supreme Court of Appeal; the High Courts, including any High Court of Appeal established by law to adjudicate appeals from the lower courts; the Magistrates' Courts; and any other court established or recognized under law, including any court of similar status to the High Courts and the Magistrates' Courts.

The Labour Court is composed of a presiding judge, a presiding judge and as many judges as the President of the Republic deems necessary, on the recommendation of NEDLAC and in consultation with the Minister of Justice and the presiding judge. Labour judges are appointed for a determined period by the President of the Republic.

The Labour Appeal Court is composed of the presiding judge and the vice president judge of the Labour Court, and the number of judges of the Superior Court that are necessary for its proper functioning.

B. Ordinary Labour Dispute Resolution Procedures

The Portuguese Labour Code (CT) admits conciliation, mediation and arbitration as alternative means of resolving collective labour disputes resulting from the conclusion or revision of a collective agreement. Both conciliation and mediation may take place at the initiative of the parties. Arbitration, on the other hand, is divided into three types: voluntary, mandatory and necessary.

Voluntary arbitration takes place by agreement of the parties and is carried out by three arbitrators, appointed by the parties. Arbitration is mandatory in conflicts resulting from the conclusion of a collective agreement in the following cases (Art. 508, CT):

- In the case of the first agreement, at the request of either party, provided that there have been prolonged and unsuccessful negotiations, conciliation and frustrated mediation and it has not been possible to resolve the conflict through voluntary arbitration, due to bad faith negotiation of the other party, after hearing the Permanent Commission for Social Concertation;

- If there is a recommendation to this effect from the Permanent Commission for Social Coordination, with a favourable vote by the majority of the members representing workers and employers;

- At the initiative of the minister responsible for the labour area, after hearing the Standing Committee on Social Dialogue, when essential services are involved to protect people's lives, health and safety.

Mandatory arbitration may also be determined by reasoned order of the minister responsible for the labour area, depending on (Art. 509º, 1, CT):

- The number of workers and employers affected by the conflict;
- The relevance of the social protection of the affected workers;
- The position of the parties as to the object of the arbitration.

When there is the expiration of one or more collective agreements applicable to a company, group of companies or sector of activities, and no new agreement is entered into in the following twelve months, as well as there is no other agreement applicable to at least 50 per cent of the employees of the same company, group of companies or sector of activities, a necessary arbitration may be carried out. This is determined by reasoned order of the minister responsible for the labour area upon request of either party.

Judgments rendered by the Labour Courts (first instance) may be appealed to the Courts of Appeal and, subsequently, to the Supreme Court of Justice. The Portuguese Labour Procedure Code (CPT) provides for the subsidiary application of civil and criminal procedural rules. According to the CPT, labour lawsuits are divided into two types: declarative and executive. The declaratory processes are subdivided into common and special.

In the common declaratory process, it is mandatory to attempt conciliation at the hearing of the parties, before the presentation of the defence, and at the beginning of the final hearing. In addition, conciliation can also occur at any stage of the process, at the request of the parties, or judgment of convenience of the magistrate.

Table 10.12 illustrates the steps of the common declarative process.

Procedural costs are regulated by the Regulation of Procedural Costs (RCP). The RCP gathers cost provisions applicable to the different processes regardless of their nature, judicial, administrative or fiscal, regulating, in a unified manner, all exemptions from costs that were dispersed in its own legislation. The court costs include the court fee, as well as charges and costs of the party. The court fee, due by the procedural impulse, is fixed according to the value and complexity of the litigation. On the other hand, the RCP also provides for several hypotheses in which the payment of procedural costs is not due.

TABLE 10.12 Steps of the Common Declarative Process

	Fase	Procedural acts
1	Presentation	• Complaint with indication of the court and the parties, description of the facts that allow to determine the existence of an employment contract, indication of the facts that constitute the cause of action and the underlying legal motivation and formulation of the demand; • Distribution of the petition to a Labour Court, at which time the judge may request the plaintiff to clarify or complement any point of the petition, or designate the hearing of the parties.
2	Conciliation	• The parties must attend in person the initial hearing, at which there will be an attempt at conciliation; • If there is no agreement, the defendant is notified to present his defence within ten days; • The date of the hearing is defined.
3	Contestation	• Presentation of the defence by the defendant, which may include counterclaims; • In his response to the defence, the plaintiff may indicate new demands, provided that they correspond to the same type of process; • If there is an allegation of new facts, the defendant is notified to file a new defence.

4	Pre-sanctioning order	• The judge may issue a pre-clearing order for the purpose of:
		  • Provide dilatory exceptions;
		  • Integrate procedural acts;
		  • Request the intervention of a third party in the process;
		  • Determine the inclusion of documents.

5	Preliminary hearing	• Depending on the complexity of the dispute, the judge may determine that a preliminary hearing be held, at which there will be a new attempt at conciliation; • Consideration, by the judge, of delaying exceptions or the merits of the case (in whole or in part); • Delimitation of the terms of the dispute; • Provision for injunctive relief to examine delaying exceptions and procedural nullities, merits of the cause or peremptory exception; • Formal adequacy and simplification of the process; • Issuance of an order relating to the identification of the object of the dispute and the enunciation of the evidence; • After hearing representatives and lawyers, determination of the acts to be performed at the final hearing; • Even if there is no preliminary hearing, the judge may issue a precautionary measure, an order of adequacy/simplification of the process, an order identifying the object of the dispute and stating the evidence, and an order establishing the acts to be carried out at the final hearing.
6	Final hearing	• The parties must attend the final hearing in person. In the absence of one of them, the facts alleged by the other party are considered proven. In the absence of both parties, the facts alleged by the plaintiff are presumed to be proven, but not the other way around; • The process proceeds normally if one or both parties do not appear, as long as they are represented by a lawyer; • Attempted conciliation; • Witnesses, as well as technicians, interpreters and translators, also participate in the hearing; • The hearing is held before a monocratic and recorded court; • At this hearing, the cause of request is still exceptionally extended by the judge, with the consequent possible modification of the means of evidence; • Oral final arguments of the lawyers, as to the grounds of fact and law; • If the decision is not rendered at a hearing, the judge must do so within thirty days.

Source: Authors' elaboration based on the national case study.

In addition, in Portugal, ensuring access to justice and courts is a responsibility of the State, and includes both legal information or consultation and representation in court. Portuguese and European citizens, as well as foreigners and stateless persons with a legal residence permit in a Member State of the European Union, who prove to be in a situation of economic insufficiency are entitled to free legal aid.

In South Korea, labour lawsuits are administrative actions, conducted within the scope of the Labour Relations Commission (CRT) and the National Labour Relations Commissions (CNRT). If the parties are not satisfied with the Commission's decision, administrative litigation may be brought before the Administrative Court in accordance with the right to judicial review of administrative acts.

For the exercise of their function, the Commissions may require workers, trade unions, employers and employers' associations, in addition to other relevant individuals or entities, to attend or submit documents. The Committees may also appoint a member or investigating officer to investigate the conditions of an enterprise, request documents, among other aspects related to the business or workplace, as well as request the assistance of other administrative bodies.

In its performance, the Adjudication Committee makes a judgment regarding a request for reparation, based on the results of the investigation and the hearing of the parties. The Committee decides in favour of the complainant (worker/union) or the defendant (employer), determining the merits of the case. Analysing the constitutionality of this procedure, the Supreme Court has already recognized the discretion of the Committee to determine the content of the reparation, with a view to remedying the damage caused. If the employer does not comply with the Award Committee's determination within the specified period, an execution fee may be imposed. When one of the parties is injured or disagrees with the decision, it may appeal to the National Commission, submitting a request for review. Likewise, either party may bring an administrative action in accordance with the Administrative Litigation Law, against a review decision rendered by the National Commission, within fifteen days, from the date of receipt of notification of the review decision. Unless a request for review or an administrative action has been filed within the specified timeframe, the order arising from that of the Committee shall be final.

Conciliation is the simplest and least burdensome procedure for parties involved in a dispute before Regional Commissions. It is carried out by a public agent appointed by the competent administrative authority who, in addition to confirming and clarifying the complaint, assists the parties in reaching an agreement. Within the scope of the Adjudication Committee, conciliation may be requested by the parties before and during the hearing, or recommended by the Committee itself. In the event of a request for mediation, the chairman of the Committee or the mediator must designate a specific date for the attendance of the interested parties, in order to verify the main points of the claims. Then, the Committee or the mediator prepares a proposal for mediation and presents it to the parties, recommending

its acceptance and disclosing it publicly, including in the press, if necessary. The parties may request clarification as to the interpretation or implementation of the agreement, which must be replied to within seven days. In case of collective litigation, the disputing parties may not strike until the Committee or the mediator expresses its opinion.

If there is no conciliation or acceptance of mediation, the Arbitration Committee requests the attendance of one or both parties to confirm the main points of the claims and issues an arbitration award. In case of divergence as to the interpretation or implementation of the judgment, the understanding of the Committee shall prevail. The arbitration award binds the parties, regardless of their acceptance, unlike what happens in conciliation and mediation. The parties have ten days to appeal the decision. The review decision issued by the National Commission is subject to judicial review within fifteen days.

The South Korean judicial system does not have courts exclusively dedicated to labour litigation, so that any labour disputes that escape the competence of the administrative sphere are analysed by the civil courts. This occurs in cases of unfair treatment, such as in the case of suspension, transfer and imposition of disciplinary actions, in actions to confirm employee status or to claim payment of salary. The court may order the worker's reinstatement or compensation for damages.

A civil action may be commenced before, during or after an administrative proceeding before the Labour Relations Commission, and must be brought before the competent district court. To strengthen the professionalism of civil magistrates in labour proceedings, the courts of each district have a department dedicated to labour proceedings and a labour coordination commission.

It is worth mentioning that representation by a lawyer is not always required before the Judiciary or Regional Commissions. As for these, assistance is allowed by consultants in labour matters, certified under the terms of the respective law.

In South Korean civil proceedings, the costs of the proceedings are in principle paid by the unsuccessful party. On the other hand, the court may charge the winning party costs in certain cases, such as in the practice of unnecessary acts and unjustified delay, among others. In case of partial approval, the costs borne by each party are fixed by the court which, according to the circumstances, may charge any of them the totality of the costs. Lawyers and clients are free to agree on contingent or conditional fees. There is no prohibition on the use of third-party funding or the sharing of litigation risks or proceeds. The court may also grant financial assistance, ex officio or at the request of the parties, in cases where they are unable to pay the costs of the proceedings.

With regard to proceedings before the Commissions, the law does not provide for the payment of any procedural fee. Even so, legal assistance and representation expenses are due to the lawyer or accredited labour consultant acting in the case. Committees may retain certified labour consultants to assist socially vulnerable groups.

In Brazil, labour litigation is judicial, and the labour process is regulated by the Consolidation of Labour Laws (CLT) and, alternatively, by common procedural law (such as, for example, the Code of Civil Procedure, Law at 13.105/2015).

In general, three basic types of actions with common procedures, actions with special procedures and constitutional actions are allowed; it is also possible to use civil lawsuits in the labour process. Some of these instruments serve to declare rights, others to perform obligations, others for both; likewise, some are intended for individual, collective or both proceedings.

Labour lawsuits basically follow three types of procedural rails, defined and regulated by law: ordinary, summary and summary proceedings, classified according to the largest number and dispersion of the acts provided for, in addition to other formal issues.

The first act to initiate a process in the Labour Court in Brazil is the forwarding of an initial petition. The law establishes formal requirements for the initial petition, without which it is not admitted (CLT, Arts. 787 and 840, §1). Generally, the party is represented by a lawyer, but, exceptionally, it is admitted that it presents itself per se, without a lawyer (jus postulandi).

In the individual labour process, the complaint can also be verbal; the employee attends the forum to present it (Art. 786, CLT). It should be noted that the period for the limitation of the action for the claim of labour relations credits has a constitutional provision (Art. 7, XXIX of the Federal Constitution) and is five years for urban and rural workers, and may be proposed up to two years after the termination of the employment contract.

Once the complaint is forwarded and distributed to one of the labour courts, the defendant's summons to present his defence will be determined — usually at an inaugural hearing. If the defendant does not attend the inaugural hearing or does not contest the complaint (default), the facts alleged by the plaintiff are considered true, which may lead to the termination of the process with the acceptance of the requests except in the cases provided for by law, such as in collective bargaining. If the plaintiff does not attend the inaugural hearing, he will be ordered to pay the costs (including if he is a beneficiary of free legal assistance) and the complaint filed (Art. 844, CLT).

The defendant may defend himself orally or deliver the written defence at the inaugural hearing, questioning the formal regularity of the proceedings or the very content of the allegations and applications presented.

The hearing also serves for a mandatory attempt at conciliation between the parties. If there is an agreement, it will be approved by the judge, except in cases where the agreement is considered harmful to the worker. The approval decision gives the agreement the effectiveness of a court decision and is unappealable. If not, the case

will proceed according to the most appropriate procedural rite. Conciliation can also take place at any time during the proceedings, including after the judgment, during the enforcement procedure.

After the hearing, the case will be heard, from which the judgment will be rendered, which can be challenged by ordinary appeal. The judgment shall become unchangeable if no appeal is filed or after all appeals filed are adjudicated.

The ordinary appeal against the judgments is addressed to the respective Regional Labour Court, has a period of 8 days to be filed and can be filed in a notary's office or electronically. The filing of an appeal requires the payment of costs and the consignment of the amount of the conviction (appeal deposit). Every appeal, before being considered, undergoes an examination of formal regularity. Generally, the examination of admissibility is not made by the judging body of the appeal, but by a previous body, at the same level as the judge who issued the contested decision; the examination of the admissibility of the ordinary appeal, for example, is made by the judge who issued the contested judgment.

If admitted, the appeal is forwarded to the higher body, which is responsible for appraising and judging it. This judgment is usually made by a group of judges (collegiate), but the possibilities of judgments by a single judge (monocratic) have increased in recent years, including as a way to generate faster judgments.

The appeal allows the review only of the matter that was challenged by the appellant. If the arguments of the appeal are accepted (appeal granted), the contested decision may be annulled or replaced by another—depending on the type of irregularity found in the contested decision and the type of request made in the appeal. The appellant may withdraw the appeal, in whole or in part, at any time and regardless of the agreement of the opposing party or the authorization of the judge.

If the party ordered to pay an amount or to make some other provision does not comply with the decision, it will be possible for the labour creditor, within two years, to return to the judge to request the execution of the decision, forcing the defaulting party to fulfill its obligation (compliance with the sentence). The same can happen if, even if there is no legal proceeding, one of the parties to an employment relationship does not comply with the terms of an agreement or other agreement between those parties.

The enforcement process, the name given to this process to request compliance with private agreements, can be used, asking the judge to force the other party to comply with the obligation, even without a process of knowledge, in which the party is ordered to comply with that obligation; the private agreement, provided that it is of one of the types admitted by law, can be executed directly.

Compliance with decisions and the enforcement process are based on the debtor's property liability. That is to say, the judge orders the debtor to pay the sentence defined in the sentence or the obligation agreed in the private pact under penalty of expropriation of his assets. If he does not comply with the order for payment (within 48 hours), his assets will be pledged and delivered to the creditor or sold for his benefit.

The enforcement process may be challenged by the debtor (debtor's embargoes) and by third parties who have not participated in the procedural relationship and whose assets are constricted as a result of the enforcement (third party's embargoes). They serve to question the value of the conviction, the responsibility for the obligation or the irregularity of the procedure. Embargoes can suspend enforcement until they are tried.

In Mexico, before accessing the Labour Court, the parties to a labour dispute must attend the Federal Centre for Labour Conciliation and Registration, or their local equivalents, for an attempt at conciliation. The conciliation procedure has a limit of 45 calendar days, and the authority must take the corresponding measures that allow it to comply with said deadline.

The Work Reconciliation Centres can correct the omissions or irregularities identified in the evidence presented by the plaintiff in his demand, after which it will be admitted. The decisions of the Labour Conciliation Centres do not allow appeal, so the filing of a writ of mandamus is the only possible means to challenge them.

The simple attendance of the applicant will exhaust the stage, but in case of absence his request will be filed for lack of interest. The presence of both parties will initiate the possibility of a conciliatory agreement; if no agreement is reached, proof will be issued that this preliminary stage has been exhausted. In the event of an agreement, the title will acquire the value of res judicata with competence for executive purposes, promoting compliance by the affected party in the enforcement proceedings before the Court. If there is no agreement, a certificate is issued, and the jurisdiction becomes that of the Labour Court.

The Federal Labour Law excludes the mandatory conciliation phase in cases of discrimination in employment or occupation due to pregnancy, as well as on grounds of sexual, racial, religious, ethnic or sexual orientation, social status and moral or sexual harassment. It also excludes conflicts over the designation of beneficiaries for death; social security benefits for risks of work, maternity, illness, disability, life, daycare and benefits in kind and accidents at work; protection of fundamental rights and public freedoms of a labour nature related to freedom of association, freedoms inherent in unions and effective recognition of collective bargaining; labour trafficking, forced labour and child labour.

The ordinary procedure is applicable to both individual and collective conflicts, for which there is no special procedure provided for in the Federal Labour Law.

Table 10.13 shows the different phases of the process.

TABLE 10.13 Steps of the Mexican ordinary procedure

	Phase	Procedural acts
1	Written litigation of the definition phase	• The party presents the complaint and the evidence, followed, by summons, by the of the response by the opposing party; • Granting the right of reply and objection to the evidence presented; • The extension of the claim is not allowed, except for the inclusion of previously unknown facts.
2	Preliminary hearing	• It aims to exempt the procedure (i) removing uncontroversial facts, (ii) admitting the evidence in accordance with the law and relating to the dispute. (iii) resolving the procedural exceptions, (iv) summoning the parties to the trial hearing; • The court must also order the preparation of the evidence offered, aiming at the release of all at the trial hearing.
3	Judgment hearing	• Presentation of evidence; • Formulation of allegations; • Progression of the judgment at the hearing itself or, in extraordinary cases, publication of the judgment within five days.

Source: Authors' elaboration based on the national case study.

The parties have the right to defence and legal representation. Consequently, they may be assisted by a legal representative, who must have a bachelor's degree in Law or a lawyer with professional qualification. When the Court considers that there is a manifest and systematic technical incapacity of the legal representative, it will be up to the party to designate another, having three calendar days to perform this act. Workers or their beneficiaries will be entitled to be assisted by a lawyer from the Public Ministry of Labour or the Public Defender's Office.

In Argentina, the competence to legislate on the procedure lies with the provinces, which is why the Autonomous City of Buenos Aires (CABA) and the Province of Córdoba, federated units selected for the present study, use different procedures.

At CABA, submitting the litigation to the Mandatory Labour Conciliation Service is a free procedure and a condition of admissibility for the subsequent legal dispute. The procedure is predominantly oral, but begins with the submission of a written complaint, through a form that contains information related to the subject matter of the dispute, including an estimate of its pecuniary value.

Once the complaint is admitted, a conciliator (lawyer with experience in labour law, registered in the National Registry of Labour Conciliators) is drawn and the first meeting is scheduled within ten days. The conciliator may arrange further meetings with the aim of causing the parties to reach an agreement. If this agreement is not obtained, the conciliator may propose to the parties to submit the matter to arbitration. In addition, a certification will be provided that proves the conclusion of the process, and that will allow the worker to file a lawsuit before the courts.

If there is an agreement, it is communicated to the Mandatory Labour Conciliation Service, which, after reviewing its content, may proceed with its approval or deny its approval.

If the agreement is not subsequently implemented, the worker can promote enforcement before the labour courts: in case of non-payment, the worker is entitled to receive a fine of 30 per cent of the amount due.

The administrative attempt at conciliation is not mandatory for proposing the following actions:

- Writ of mandamus and precautionary measures;
- Preliminary procedures and advance production of evidence;
- Individual or multipersonal complaints that have as their object the discussion of disputes arising from acts of the employer under productive restructuring or crisis prevention, governed by the mandatory conciliation procedures provided for in Laws No. 24.013 and 14.786;
- Lawsuits against bankrupt/insolvent employers;
- Lawsuits against the national, provincial and municipal State;
- Lawsuits promoted by minors that require the intervention of the Public Prosecutor's Office;
- Lawsuits arising from occupational accidents, regulated by the Labour Risks Law.

It is worth mentioning that conciliation can occur voluntarily, that is, when one of the parties requests the intervention of the competent authority to approve and final and unappealable the agreement that both parties voluntarily agreed to.

The process before the Labour Court is predominantly written and has a double instance. It begins with the presentation of the written demand before the General Secretariat of the National Chamber of Labour Appeals, which will trigger the court of first instance responsible for the litigation.

As a rule, the impetus of the process is ex officio, that is, it is in charge of the court and lasts until after the judgment, when it settles the amounts due and requests payment.

From this moment on, the impulse of the execution process is the responsibility of the interested parties. The judge may pronounce himself ultra petita, while the question of the possibility of an extra petita decision is the subject of controversy, in view of the tension between the right of defence and the tutelary principle.

TABLE 10.14 Stages of the Argentine labour process

	Stage	Procedural acts
1	Presentation of the claim	• Presentation of the demand with certification of the Mandatory Labour Conciliation Service before the National Chamber of Labour Appeals and designation of the competent court.
2	Probationary phase	• The lower court judge rules on the jurisdiction and admissibility of the claim; • The defendant has ten days to contest the claim, present evidence, oppose exceptions, cite third parties, challenge the claimant's documentation and file a counterclaim; • The complainant has three days to offer evidence, challenge the defendant's documentation and contest the exceptions; • After five days, the court notifies the parties to produce evidence; • Hearings are held and evidentiary acts are practiced, such as confession, hearing of witnesses, summons of the defendant to recognize the documentation produced by the plaintiff and draw of specialized experts; • Closing of the evidentiary phase.
3	Overview of the allegations	• Ten days for the parties to present their claims in writing.
4	Pronouncement of court decision	• Thirty days for the judge to issue the sentence; • Six days for the parties to appeal and three days to respond to complaints; • If there is no appeal, the decision becomes res judicata.
5	1st appeal phase	• The parties may appeal the judgment before the National Chamber of Labour Appeals, which must render a decision within sixty days.
6	2nd appeal phase	• As partes podem recorrer da decisão da Câmara no prazo de dez dias perante a Suprema Corte de Justiça.

Source: Authors' elaboration based on the national case study.

TABLE 10.15 Steps of the labour process—Córdoba

	Stage	Procedural acts
1	Presentation of the claim	• Presentation of the demand before the Conciliation Judge, who issues a decree of admission and cites the parties and third parties.
2	Preliminary hearing	• The parties or their representatives shall attend the conciliation hearing. In the event of the absence of the plaintiff, or his representative, it is considered that the action was withdrawn. In the case of the defendant, there is a presumption of veracity of the acts declared in the complaint. • In case of agreement, this will be approved by the judge. If not, the demand is contested and proceeds to the next phase.
3	Presentation of evidence	• Within six days, the Conciliation Judge determines the opening of the production of evidence, which may be challenged; • *Ex officio*, or at the request of the parties, a new hearing for conciliation may be determined by the judge; • If there is no agreement, the demand is brought to trial before the Labour Chamber.
4	Chamber of the work	• Conducting the evidentiary hearing. The Chamber may request *ex officio* the evidence it deems essential for the issuance of a decision; • Oral arguments; • Closure of the debate; • Pronouncement of decision within thirty days.
5	1st appeal phase	• The parties have ten days to file an appeal of cassation or unconstitutionality before the Superior Court of Justice.
6	2nd appeal phase	• The parties may appeal the decision of the Chamber within ten days before the Supreme Court of Justice.

Source: Authors' elaboration based on the national case study.

In Córdoba, the labour dispute resolution process has only one instance, divided into two stages: the investigation and conciliation phase before the Conciliation Courts, and the process before the Labour Chambers. Tables 10.14 and 10.15 illustrate the different procedural stages in the Labour Court in Argentina.

In both Buenos Aires and Córdoba, the parties must be assisted by a lawyer, the union (workers), or the representative organisation of employers (employers), during the administrative conciliation process. In the judicial process, the parties may act in person or represented. The worker may be represented by a professional association legally authorized for this purpose. In Buenos Aires, the Public Prosecutor's Office for the Defence of the Law offers free legal advice. In Córdoba, it is offered by the Ministry of Labour. It is worth mentioning that both administrative and judicial proceedings are governed by the principle of gratuitousness.

In South Africa, the law provides that any party to a dispute may refer it in writing to CCMA if the parties are, on the one hand, trade unions, employees or unions and employees, and, on the other hand, organisations of employers, employers, or organisations of employers and employers. As a rule, CCMA does not charge fees to resolve labour disputes. Once the dispute is referred to the Committee, the latter must appoint a commissioner to try to resolve the dispute, through conciliation, within a maximum period of thirty days, which may be extended by up to five more days by the director, to ensure a meaningful conciliation process.

The commissioner must determine a procedure for resolving the dispute, which may include mediation, ascertainment of facts and recommendation to the parties, including that they submit to arbitration. If the conciliation process fails, or if there is an expiry of time, the commissioner must issue a certificate, attesting whether the dispute has been resolved or not.

The CCMA shall appoint a commissioner to arbitrate a dispute if a commissioner has issued a certificate stating that the dispute remains unresolved, or if within ninety days after the date the certificate was issued, any party so requests.

The commissioner appointed to arbitrate the dispute may be the same one who tried to resolve the dispute through conciliation, but the parties may oppose its permanence. In this case, CCMA must designate another. In addition, the parties may appoint a commissioner of their choice, to the extent this is reasonably practicable, or request that a senior commissioner attempt to resolve the dispute.

According to the law, the commissioner can conduct the dispute in the way he deems appropriate to resolve it fairly and quickly, but he must appreciate the merits and obey a set of minimum legal formalities. Subject to the discretion of the commissioner and the appropriate form of proceedings, a party may give testimony, call witnesses, question witnesses of any other party, and address closing arguments to the commissioner. If all parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.

If the party making the dispute does not appear or is not represented in the arbitration proceedings, the commissioner may reject the matter, continue the arbitration or suspend the proceedings.

The commissioner shall issue a brief reasoned arbitral award within fourteen days of the conclusion of the arbitral proceedings and send a copy thereof to each party or representative. If there is just cause proven, the director may extend this period. The commissioner may render any appropriate arbitral award, including an award that puts into effect a collective bargaining agreement. The commissioner may also issue an order for payment of costs accordingly.

CCMA shall arbitrate a dispute whenever it remains unresolved after conciliation and is referred to the Labour Court for judgment, if all parties agree in writing. In this case, the commissioner may render a judgment in lieu of the Labour Court. Any party to the arbitration agreement may appeal to the Labour Court at any time, to amend or annul it.

The law also provides that, if a party to an arbitration agreement initiates proceedings in the Labour Court against any other party, on a matter it has agreed to submit to arbitration, any other party may ask the Court to suspend the proceedings and refer the dispute to arbitration; or, with the consent of the other parties, continue the arbitration before the Labour Court, in which case the Court may only issue an award corresponding to that which an arbitrator could produce.

A party, alleging a defect in any arbitration proceeding, may apply to the Labour Court for an order to annul the arbitration decision, within six weeks from the date on which it was delivered to the claimant, or from the date on which a violation of the Prevention and Combating Corruption Activities Act of 2004 has been discovered. There is a defect in the arbitration process whenever the commissioner presents misconduct in relation to his duties as an arbitrator; commits a serious irregularity in the conduct of the arbitration procedure; exceeds his powers as commissioner; or receives undue payment.

The Labour Court may suspend the execution of the arbitration award until it expresses its opinion on the case. In the event of annulment, it may resolve the merits of the dispute submitted to arbitration in such manner as it deems appropriate or determine what procedures will be followed to resolve the dispute.

The Labour Court has exclusive jurisdiction to review CCMA decisions. In addition, it has exclusive jurisdiction to interpret labour legislation, which includes the competence to rule on the legality of strikes, as well as other illegal conduct arising from a strike or blockade. But the Labour Court may not review any decision or rule rendered during the conciliation or arbitration proceedings before the matter in dispute has been finally decided by the CCMA or the bargaining board, unless the Court considers it fair and equitable to do so.

In addition to its exclusive powers, the Labour Court has concurrent jurisdiction with the Superior Court in relation to the violation of any fundamental right enshrined in Chapter 2 of the Constitution and arising from:

- Employment and labour relations;
- Dispute over the constitutionality of any executive or administrative act or conduct, or any threat of executive or administrative act or conduct, practiced by an agent of the State, in its capacity as employer;
- The application of any rule of competence of the Minister of Employment and Labour.

The labour judgment must be rendered as soon as possible. On its own initiative or at the request of any of the parties to the proceedings, the Court may reserve for the decision of the Labour Appeal Court any question of law that arises in these proceedings. This is only possible if this issue is decisive for the proper judgment of the dispute. Pending the Labour Appeal Court's decision on a reserved matter, the Labour Court may render an interim decision.

Any party to a proceeding before the Labour Court may apply to the Court for authorization to appeal to the Labour Court of Appeal against any final judgment or order. If the application for permission to appeal is refused, the applicant may apply to the Labour Court of Appeal for permission to appeal. Permission to appeal may be granted under any conditions that the Court concerned may determine.

Under the Constitution, an appeal against any final decision or final order of the Labour Court in any matter over which it has exclusive jurisdiction may be brought only before the Labour Court of Appeal. A decision to which two judges of this court agree shall be the decision of the Court.

The Labour Appeal Court is competent to confirm, amend or annul the judgment or order that is the subject of the appeal. It also has the power to receive additional evidence, either orally or by testimony before a person appointed for this purpose, as well as to refer the case to the Labour Court for a new hearing, with instructions regarding the taking of new evidence.

The Presiding Judge of the Labour Appeal Court has the power to invoke any case submitted to the Labour Court in the first instance, in which case the Labour Appeal Court shall proceed in accordance with the powers and rites of the Labour Court of first instance.

Proceedings in the Labour Court of Appeal shall be public. However, the Court may exclude members of the public, or certain persons or categories of persons from proceedings in any case where a High Court would have done so. The same persons who are entitled to appear before the Labour Court are entitled to appear before the Labour Court of Appeal.

Any decision of the Labour Court of Appeals is binding on the Labour Court. There is no appeal against any of its decisions, judgments or orders, whenever it has acted in matters over which it enjoys exclusive jurisdiction, or when it acts as a court of first instance.

In any proceeding before the Labour Court, the party may appear in person or be represented by an attorney, attorney, union or employer organisation representative, or by an employee of the Department of Labour. The Labour Courts and the Labour Court of Appeal may order the payment of costs by the parties.

10.4 MANAGEMENT OF THE LABOUR DISPUTE RESOLUTION SYSTEM

The different labour dispute resolution systems used in the countries studied are also subject to quite different administration and management rules. From the available data, we draw an overview of how the budget and human resources are distributed, as well as the selection and training processes of the staff employed. Finally, the role of public administration in labour lawsuits, whether before the jurisdiction, in arbitration, conciliation or mediation, is analysed.

A. Budget and compensation of members of the labour dispute resolution system

The organisation and administration of the labour dispute resolution system of the analysed countries can be divided into two axes: a) the countries that have the administration and budget linked to the executive branch, and b) those whose system is autonomous, at least under the law. Portugal, South Korea, Argentina and South Africa present devices for deciding and implementing the budget of courts that pass through the central or local government. In Brazil and Mexico, the judiciary maintains administrative and budgetary autonomy.

In Portugal, the Ministry of Justice manages the human, financial and material resources of the courts, in addition to participating in the management of the budgets of the courts of first instance. In South Korea and Argentina, the highest judicial bodies administer the budget of the courts, but the approval of the amount depends on executive bodies.

In Korea, it is the Supreme Court that administers, but this is under the direction and supervision of the Chief Justice, a kind of Minister of Justice. The Labour Relations Commission (LRC), which is a heterogeneous committee, is managed by the president of the National Labour Relations Commission (NLRC) and has autonomy to execute the budget approved by the Executive.

In Argentina, judicial management is also subject to the Executive: the Supreme Court, through the Council of the Judiciary, administers the resources and executes the budget of the Judiciary Branch, which is sent to the Executive Branch and presented annually to Congress for its incorporation into the draft General Budget of the National Administration.

This budget includes CABA's Justice resources. In Córdoba, the Superior Court of Justice (STJ), at the provincial level, exercises the administration of the Judiciary. The organisation of the budget, expenses and investments of the Judiciary must be presented to the Governor and the Legislature, so that they are included within the general budget of the Province.

South Africa sought to reverse the organisational structure of the conflict resolution system, which during Apartheid was highly centralized and directed by the Executive. To this end, the Chief Justice was created, who acquired the functions of Head of the Judiciary and Head of the Constitutional Court, and served to establish an independent system of court administration, finally recognizing its judicial authority and subjecting the courts only to the Constitution and the law. However, the courts have no authority to decide or administer the budget independently of the Executive Branch. The Chief Justice has no fiscal and operational responsibility that would allow him to function independently of executive directives, although the Court emphasizes institutional judicial independence as a constitutional principle. The Conciliation, Mediation and Arbitration Commission (CCMA) has a Board of Directors that manages the budget, with members appointed by the Minister of Employment and Labour.

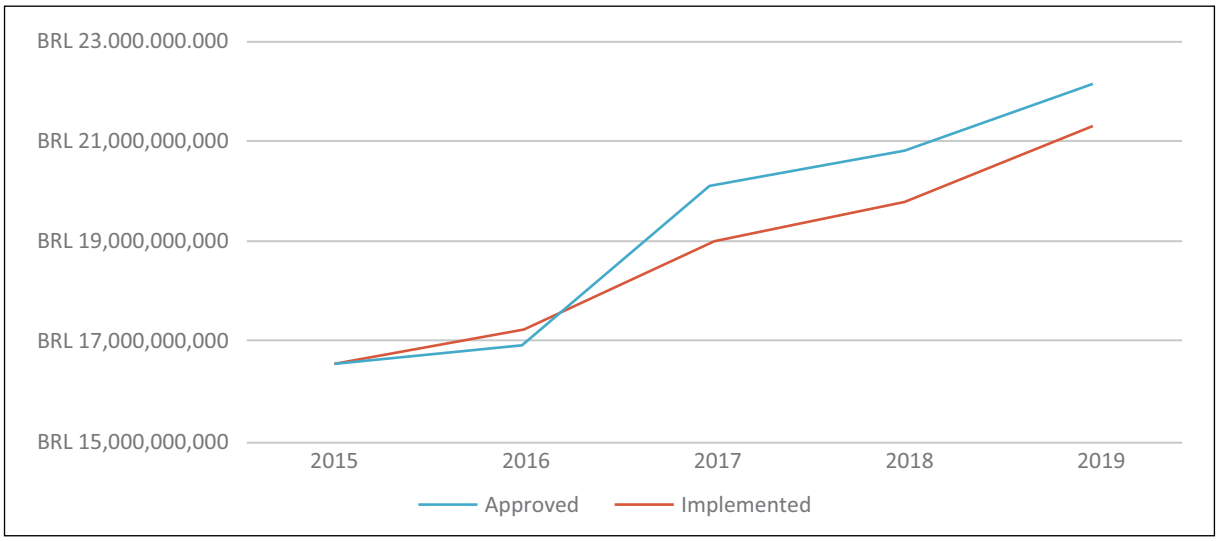
In Brazil and Mexico, the budgets of the judiciary are reserved to the authority of the Judiciary, without interference from other powers. In Brazil, the independence of the Judiciary in the preparation of the budget, within the limits of the Budget Guidelines Law (LDO). The body responsible for acting in the budgetary, financial and patrimonial supervision of the Labour Court is the Superior Council of the Labour Court (CSJT), reaching 25 budget units (Superior Labour Court and 24 Regional Labour Courts).

In Mexico, the Federal Judicial Council is the body in charge of the administration, supervision, discipline and judicial career of the Federal Judiciary, with the exception of the Federal Supreme Court and the Electoral Court. The Council was created after the constitutional reforms of 1994, with the same hierarchy as the Federal Supreme Court. In Mexico City, which has special jurisdiction, the Organic Law of the Superior Court of Justice of the Federal District establishes that the administration of Justice in the Federal District is under the responsibility of the Superior Court and other judicial bodies. The judiciary of the State of Guanajuato has budgetary and administrative autonomy in relation to the other powers of the State. It is the Council of the Judiciary Branch responsible for the budget, subject to the Law of Exercise and Control of Public Resources of the State and Municipalities of Guanajuato. With the ongoing reform, labour conciliation began to be carried out by "specialized and impartial" federal and local Conciliation Centres, with full technical, operational, budgetary, decision-making and managerial autonomy.

In most countries, an increase in the budget of the labour judicial system can be observed in recent years. With one of the largest budgets, Brazil recorded a 33 per cent increase in the approved budget for the Labour Court (federal level) between 2015 and 2019. The total resources implemented reached 21 billion reais in 2019. In relation to the other branches of the

Brazilian justice, the revenue of the Labour Court was the one that grew the most, registering a growth of 115 per cent in recent years, with an extraordinary highlight in 2019.

FIGURE 10.1 Approved and implemented budget of the Brazilian Labour Court, 2015–2019



Source: Elaboration of the authors based on the Annual Budget Laws and the "Budget" page of the Cnj website.

Portugal kept the budget of the justice system practically stable between 2015-2019, around 1.3 billion euros, reaching 1.4 billion euros in 2019 (about 9.3 billion reais).[2]

In Argentina, the overall budget of the National Judiciary Branch increased significantly. It went from about 12 billion Argentine pesos (653 million reais) in 2015 to about 46 billion Argentine pesos in 2019 (about 2.5 billion reais).[3] The budget grew each year, accumulating an increase of 264 per cent during the period (*Ministerio de Economía—Oficina Nacional de Presupuesto*, 2021). The budget allocated to CABA courts (which represents a portion of the total budget of the National Judiciary) fluctuated between 2015 and 2019, with about 8 billion Argentine pesos (435 million reais) in 2019, practically double the budget in 2015. The total budget of the Judiciary of the Province of Córdoba has increased every year, accumulating an increase of 240 per cent of the budget allocated between 2015 and 2019, in a context of high inflation.

In South Africa, the OCJ's total budget to administer the court system was around 295 million reais[4] (R824,755,000) in 2019, slightly above what was designated for 2017: around 272 million reais (R760,322,000). Of this total, about 20 million reais were assigned to the specialized courts in 2019, which includes the Labour Courts. CCMA receives funds from the National Treasury

2. Conversion rate: EUR 1= BRL 6.21

3. Conversion rate ARS 1 = BRL 0.054

4. Conversion rate ZAR 1 = BRL 0.36

through transfers of scholarships from the Secretariat of Employment and Labour, its main source of funds, and other revenues from the provision of services and investments. During 2018/2019, the Commission received about 345 million reais, well above the budget allocated to the Labour Courts.

It was not possible to obtain budget data from the federal or state judiciary, aggregated or disaggregated, for South Korea and Mexico. Regarding Mexico, it is important to note that the implementation of the labour reform represents a challenge in terms of budgeting for the new infrastructure, adaptations of spaces and even technological resources.

In Brazil, Labour Court expenses are predominantly concentrated in human resources. Between 2015 and 2019, the average percentage of expenses in human resources was 92.9 per cent, while the average percentage in other expenses was 7.4 per cent. According to the Justice in Numbers reports (2016-2020), on average the remuneration of TRTs and TST servers is similar, around 22 thousand reais per month as recorded in 2019. These remunerations are higher than those estimated for employees of the labour courts. The evolution of the number of servants, analysts, technicians and assistants in the Labour Court between 2015 and 2019 indicates a reduction in the structure. Total servers decreased from about 264,000 servers in 2015 to approximately 123,000 in 2019.

The salaries of Argentine judges are compatible with Brazilians and, as in Brazil, the main expense in these courts is with employees, representing 99 per cent of the total budget in 2019. According to a recent newspaper survey (Noguera, 2020), the average gross salary of an STJ judge with 20 years of accumulated seniority is about 28 thousand reais per month; the average gross salary of a Chamber judge with 15 years of seniority is 21 thousand reais per month; and, finally, a lower court judge with 15 years of seniority would earn a gross salary of 17 thousand reais per month. Although there are official data for some provinces of Argentina, it was not possible to find official information on the remuneration of magistrates for CABA or for Córdoba. It was possible, however, to perceive that, as in the capital, personnel expenses in the province represent a significant portion of the budget, but decreasing in relation to the total budget during the 2015–2019 period.

TABLE 10.16 Judges' minimum and maximum salaries (per month)

Category	Amount
Minimum—Courts of 1st instance	2,549.91
Maximum—Courts of 1st instance	5,609.80
Minimum—Courts of 2nd instance	5,778.10
Maximum—Supreme Court	6,129.97

Source: Authors' elaboration with data (Franco, 2019).

As in many countries, Portugal, South Africa and South Korea have a magistrates' remuneration system that is composed of a base remuneration and several supplements provided for by law. In Portugal, the monthly remuneration of magistrates follows a rating scale and one of the criteria is seniority, taken into account from the day of the magistrate's entry into the Centre for Judicial Studies as an auditor of justice. Table 16 below shows the monthly salary range of magistrates of 1st, 2nd instances and Supreme Court (2019). The figures are below the average of the 46 Member States of the Council of Europe (Council of Europe and European Commission for the Efficiency of Justice, 2018). Converting to the realities of Brazil and Argentina, the starting salaries of Portuguese judges are similar, but increase considerably at the end of their careers. Compared to general salary averages of European workers, the remuneration of judges at the top of their career is 5.34 times above the average annual gross salary.

Surprisingly, the highest salaries of magistrates are in South Africa and Mexico. The remuneration of South African judges consists of a cash component of 72.24 per cent and a non-monetary component of 27.76 per cent (which includes the motor vehicle allowance and the employer's health care contribution). A judge of the Superior Labour Court receives a monthly salary of approximately 59 thousand reais. The magistrate of the Regional Court receives around 40 thousand reais per month. In the CCMA, commissioners are remunerated according to the rates approved annually by the National Treasury and government representatives are not entitled to this remuneration. For the year 2018-2019, the remuneration of commissioners varied widely, between 109 thousand and 1000 reais per year. The following factors determine compensation: a) Financial health of the organisation; b) Impact on inflation; c) General rate of wage increase in the labour market; d) Type of work and expectations of results; e) Negotiation Unit or Non-Negotiation Unit; f) Performance.

Table 10.17 shows the salaries of different judicial positions in the federal and Guanajuato systems in pesos and reais.

TABLE 10.17 Monthly remuneration of servants of the State and Federal Judiciary Branch, 2019 and 2020

Judicial Branch	Position	Mexican Peso	BRL[5]
Federal[6]	Justice	204.683	73,256
Federal	Magistrate	213,723.67	56,649
Federal	Judge	193,755.58	51,356
Guanajuato[7]	President of the Supreme Court of Justice	151,698.34	40,209
Guanajuato	Magistrate of the Supreme Court of Justice	132,948.11	35,239
Guanajuato	Judge	68,664.21	18,200

Source: Elaboration of the authors with data from the Supreme Court of Justice of the State of Guanajuato, 2019 and Judicial Branch of the State of Guanajuato. Dirección de Administración, 2020.

5. Conversion rate 1 Mexican peso = 0.27 BRL.

6. In 2019

7. In 2020

The lack of information and tables on remuneration in South Korea translated into English did not allow its analysis during the research period. The rules regarding the methods of payment and calculation of remuneration of both the salary of magistrates and public officials working in the LRC are regulated by the Law on Remuneration of Judges and the Law and Regulation of State Public Officials, respectively.

B. Human Resources: territorial distribution, number of officials and judges by courts, recruitment and selection of judges

Most judges are allocated to the courts of first instance or local conciliation spaces (counties or provinces), thus covering a large part of the territory.

In federal countries such as Brazil, Argentina and Mexico, the distribution of labour justice agencies is represented at the federal and state (or provincial) level. The first instance of the Labour Court in Brazil is composed of 1,587 Labour Courts, covering all Brazilian states. Each Labour Court covers the territory of the respective district, which may cover one or more municipalities. The TRTs form the second instance of the Labour Court.

In total, there are 24 TRTs distributed among the 27 units of the Federation. The higher instance of the Labour Court is concentrated in the Superior Labour Court (TST), with headquarters in the Federal District and jurisdiction throughout the national territory.

In Mexico, it is still too early to map the new structure of labour justice that is in the process of being implemented. Currently, the Mexican Federal Judiciary is based on a three-tiered system: 1) Supreme Court of Justice of the Nation, with final appellate jurisdiction over all state and federal courts; 2) Courts of First Instance (*Tribunales de Circuito*), which are the federal appellate courts; 3) District Courts that are divided into single courts (*Tribunales Unitarios de Circuito*) and collegiate courts (*Tribunales Colegiados de Circuito*). And there are still district courts (*Juzgados de Distrito*) and jury courts (Jurado *Populares Federales*), which are the federal courts of first instance. The labour reform proposes a new structure that creates labour justice institutions in all states and at the federal level.[8]

In South Africa there are four Labour Courts (Johannesburg, Durban, Cape Town and Port Elizabeth) and one Labour Court of Appeal (Johannesburg). CCMA has jurisdiction in all provinces of the country and maintains at least one office in each province.[9]

8. In the first stage of implementation of the reform, headquarters were created in 8 states of the country, 19 local conciliation centers, 18 local labour courts, 10 federal labour courts and 8 offices of the Federal Centre for Conciliation and Labour Registration (CFCRL). The second stage of the reform foresees as of November 2021 the creation of 132 headquarters of the new labour justice institutions in 13 states of the country, 43 local conciliation centers; 32 federal labour courts and 39 local labour courts (La Jornada, 2021).

9. The territorial distribution of courts or commissions in South Korea could not be identified.

As in Mexico and Brazil, the judicial organisation responds to the federal character of the Argentine State. In the Province of CABA (federal) there are *80* single-person Judges (court of a judge), which would be the equivalent of labour courts of first instance. In Córdoba there are 10 other *single-person* judges. Due to the single-member character in both instances, the number of judges corresponds to the number of *Judges*, that is, 90 judges in total. However, if conciliation before the *Juzgado* fails in Córdoba, the litigation is sent to one of the 11 Working Chambers of the Province. Each Chamber is composed of 3 magistrates. In the capital, the Chamber is composed of 11 rooms, each composed of 3 judges. As a result, the number of trial judges in the Province of Córdoba is 43 (33 operating in the Chambers of Labour and 10 in the *Judges*). The second instance in CABA is represented by the National Chamber of Appeals—subdivided into ten rooms, each composed of 3 judges.

The exception would be the Portuguese system where all labour lawsuits are appreciated by a single branch of the judiciary. Among the 18,763 justice officials (total in 2019), considering all magistrates, court servants and advisors, there were 86 magistrates working in labour lawsuits. This represents a minority of 7 per cent of the total number of magistrates working in courts of first instance, distributed in 46 districts (municipalities) or with broad territorial jurisdiction, with jurisdiction over several districts.

If we consider the magistrates of the judiciary, Portugal is the case with more judges per inhabitant and one of those that had a considerable increase in the volume of magistrates. Between 1995 and 2019 there was an increase of 49 per cent in the number of judges (from 1,165 to 1,734), with 2013 being the year with the highest number of judges in office: 1,816. In 2010 the system had 18.4 judges per 100,000 inhabitants, growing to 19.3 judges per 100,000 inhabitants in 2016. It is worth mentioning that the size of the body of magistrates of the Portuguese Public Prosecutor's Office is relatively high when compared to the European average. The number of magistrates (MP) per 100,000 inhabitants went from 13.9 in 2010 to 14.5 in 2016. In 2016, 46 Council of Europe Member States had an average of 21.5 judges and 11.7 magistrates per 100,000 inhabitants in the Public Prosecutor's Office. Even with fluctuations, the trend continues in relation to prosecutors, which went from 942 in 1995 to 1,327 in 2019—representing an increase of almost 41 per cent in that period.

In Mexico there are fewer judges per inhabitant. There are a total of 4.19 judges for every 100,000 inhabitants, according to data from the Government Secretariat, subordinate to the federal government (Brugés, 2019). In total, there are 1,437 judges and magistrates, of which 78.6 per cent are men and 21.4 per cent are women, according to the National Census of the Federal Justice Administration (2020). From 2010 to 2019, the number of men in these positions increased by 28.4 per cent, while the increase for women was 40.0 per cent. Regarding the number of magistrates and judges of the Judiciary of Guanajuato, the 2019 data account for 10 civil magistrates, 10 criminal magistrates and 318 judges.

In Argentina, data from single-person courts (1st instance) allowed the number of judges per citizen and per employee to be counted. In CABA, 2.6 judges were observed for every 100,000 citizens, which corresponds to 6.5 judges for 100,000 employees in 2019. As expected, in the Province of Córdoba the ratio is lower, about 1.2 judges for every 100,000 citizens, that is, almost 3.8 judges for every 100,000 employees.

The unavailability of data did not allow the judge/inhabitants ratio to be purchased in South Africa and South Korea. However, it is possible to get an idea of the volume and characteristics of the body of Korean judges and officials.

In South Korea, of the total 2,918 people allocated to the judicial system in 2019, 1,491 are judges and are distributed in district courts. On average, there are between 10 and 50 members representing workers and employers on committees, while members representing the public interest are between 10 and 70. Members on the workers' and employers' side must be equal in number. In 2018, a total of 1,805 members representing employees and employees in the National and Regional Commissions were registered. Among the members representing the public interest in the 3 Committees (Adjudication, Mediation and Correction of Discrimination) was 735. Although the law (LRCA) requires full members or the presence of the president of the LRC for the constitution of a commission, the number of full members in relation to the number of cases to be treated is insufficient, according to a 2018 report (Labour Relations Commission, 2018, p. 374). On the other hand, the report indicates an evolution in the number of committee members since the constitution of the Labour Standards Act (LSA) in a manner consistent with the expansion of their responsibilities and structural changes.

In the opposite trend of the cases studied is Brazil. Data of the Association of Magistrates Brazilians reveal a reduction in the number of magistrates in the first degree per worker in recent years, probably due to the increase in vacancies of positions, in addition to the increase in the population itself. The number of 1st degree magistrates fluctuated between 2015 and 2019 around 3,000. With 2,077 1st degree magistrates in 2019, 3.4 magistrates per 100,000 workers were registered.

In Portugal, Brazil and Argentina, the selection of magistrates or judicial career officials involves some competitive selection process, mixing written, oral tests, resume analysis or interviews with candidates. South Korea and Mexico have changed their legislation and adopted a model similar to that of South Africa, in which recruitment is based on appointments of candidates with experience. As for the conciliation bodies, recruitment is usually by appointment by the responsible authority and depends on specific qualifications for the position (Korea and South Africa).

Portugal and Brazil share a similar recruitment model. The two countries recruit judges from the courts of first instance through a public competition with qualifying rounds. In Brazil, candidates need to have training in law, and in Portugal, legal knowledge is tested during

the competition. In both cases, the selected candidates need to undergo an initial training course, and in Portugal the selected candidates can choose between the judiciary or the magistracy of the Public Prosecutor's Office. In both countries, the selection of magistrates for appellate courts takes place among the magistrates of first instance and is based on criteria such as seniority and merit.

Argentina has a hybrid selection system. Candidates need to be lawyers and the selection process for courts at the national level (including CABA) is through public tender. The Judiciary Council (CM) of the National Judiciary Branch and the Judicial School evaluate the candidates' exams and curricula. Based on these elements and the interview of the candidates, the Board and the School determine the list of three candidates and the order of precedence. The list can be approved or rejected by the Senate and then the national executive branch can make the appointment of the selected magistrates. The Council of the Judiciary (CM) also prepares the competitions for the process of evaluation and selection of candidates for positions in the provincial judiciary (Córdoba), at least once a year, following the same process adopted at the national level.

Previously in South Korea, recruitment was similar to the systems in Brazil and Portugal. The Organizing Law of the Court allowed the appointment of judges who passed the National Examination of Justice and who completed the two-year training course at the Judicial Research and Training Institute (JRTI), training judges, prosecutors and lawyers. The current version of the rule provides that judges are appointed from among those who have served in positions such as judge, prosecutor, lawyer, university professor, specialist in legal affairs of government agency, local government, national or public company. The appointment or recommendation of committee members representing employees, employers and the public interest have different requirements. The qualifications required to serve as a public interest member of the LRC vary depending on position (NLRC or RLRC) and area (trial/ discrimination, redress and mediation). The selection of committee members representing workers and employers is different due to the fact that they participate in dispute resolution as stakeholders. The LRCA provides that these are respectively recommended by trade unions and employers' associations: for the NLRC the appointment is made by the President, on the recommendation of the Minister of Labour and Employment; for the RLRCs, the members representing the workers are recommended by the regional representative organisation of the federation of all trade unions.

Mexico has also changed its model for recruiting magistrates. The selection for the Federal Judiciary Branch and the local Judiciary Branches took place through a public tender. With the recent reform, the recruitment system has become closer to the Argentine case. The Organic Law of the Judiciary (2019 amendment) determines that magistrates from the national sphere are appointed based on restricted lists proposed by the Judiciary Council and that they must be ratified by two thirds of the Chamber of Deputies. The Mexican Constitution establishes that it is necessary to observe the principle of gender parity and requires candidates to have

capacity and experience in labour issues. The Organic Law of the Judiciary of Guanajuato (2017 amendment) establishes that the State Congress appoints magistrates to the Supreme Court of Justice from three lists presented by the Governor of the State and by the Councils of the Judiciary and Judiciary.

In South Africa, judges are holders of public office and are appointed by the President after taking into account the recommendations of the Judicial Service Commission (JSC), a body that brings together various institutions such as the Chief Justice, President of the Supreme Court of Appeal, representatives of the class of Lawyers and Attorneys, Law professors, National Council of Provinces among other persons appointed by the President. The Commission selects candidates through interviews and must ensure that the candidates to be recommended are suitable and competent for judicial positions. In addition, the judiciary must broadly reflect South Africa's racial and gender composition to redress the imbalances of apartheid. For CCMA, the Board of Directors may appoint as many commissioners as it deems necessary. It is also necessary to observe the independent, competent and representative character regarding the race and gender of the committees. Commissioners may be entry-level or senior-level, both of whom must have experience in employment relations and law.

In Brazil, Portugal, Argentina, Mexico and South Korea, initial and continuing training is available for judges and civil servants. Only continued training is provided for South African servers.

In Portugal, the Centre for Judicial Studies (CEJ) concentrates training, including for prosecutors. In Brazil, the training of labour judges is carried out by ENAMAT (National School for the Training and Improvement of Labour Magistrates) at the national level, and regionally, the training is taken over by the schools of the 24 TRTs. In addition to initial and continuing training, in Argentina there is also training for aspiring magistrates. It is important to note that in the Argentine case only courses for newly hired employees are mandatory. The reform in Mexico creates the Institute of Judicial Studies to lead the initial and continuing training of Labour Court personnel at the federal level. In Guanajuato, the Council of the State Judiciary is in charge of the judicial career, training and evaluation of public servants.

In Korea, as mentioned earlier, JRTI has enhanced the training program for newly appointed judges with legal experience and opened a new program for experienced judges. The law does not specify the type and content of training, but establishes that conciliation commissions have an educational function related to their typical competencies.

In South Africa judges and mediators receive only continuing education. The South African Institute of Judicial Education (SAJEI) has the function of promoting continued judicial training, and focuses on areas such as sentence writing, civil and criminal trial management and court management, ethics and constitutional litigation. CCMA commissioners can also conduct continuing education each year, on topics ranging from statute review to skills development.

C. The role of public administration in labour processes

The public administration of the cases studied is present in judicial arbitration, conciliation and mediation. Bodies of the Ministries of Labour, Employment and/or Social Security are identified as the main actors in the regulation of individual labour relations, sometimes exercising powers of inspection and control, or acting as sanctioners and conciliators.

In Portugal, the Labour Mediation System (SML) is operated by mediators accredited under the European Code of Conduct for Mediators, and selected from a list organized by the Ministry of Labour, Solidarity and Social Security (MTSSS), after attending training courses. From the point of view of the regulation of labour relations, the regulatory body Authority for Working Conditions (ACT) and the MTS General Inspectorate monitor compliance with labour regulations in the context of private labour relations and supervise compliance with standards on working conditions, employment, unemployment and payment of social security contributions, respectively.

In Korea, the Ministry of Employment and Labour is primarily responsible for the protection of working conditions. Together with the Ministry of Justice they can provide administrative interpretations in official opinions or disseminate instructions on work standards. Labour inspectors inspecting workplaces and dormitories are attached to the Ministry of Labour and Employment. In addition, the Ministry of Education is involved in the Korean labour judicial system by regulating law schools that work directly in the training of potential candidates for magistrates.

The Brazilian Constitution gives the Federal Government exclusive competence to organize, maintain and perform labour inspection activities. As in Korea, the Labour Tax Auditors work in areas such as: general labour legislation; eradication of child labour; combating informality; Guarantee Fund for Length of Service; combating work in slave-like conditions and are linked to the current Ministry of Labour and Social Security. In the context of the collective rights of workers, the Public Ministry of Labour (MPT) can promote collective actions against the violation of labour legislation by companies.

The role of the Mexican public administration in labour disputes is mainly through the Mexican Social Security Institute, which is qualified to provide labour risk prevention services. In coordination with the Ministry of Labour, the Institute also conducts programs to prevent occupational accidents and diseases. As in Brazil, the Labour Defence Attorney's Office defends the interests of workers through its national and state representations.

In Argentina, the Ministry of Labour, Employment and Social Security (MTEySS) designs and enforces policies that cover individual and collective labour relations, as well as conciliation and mediation, the legal regime of collective labour relations and agreements, employment, training and social security. The same discourse applies to the Ministry of Labour (MoL), an organ of the provincial government of Córdoba. The Comprehensive Labour and Social Security Inspection System (SIDITYSS) allows the federal state to act nationally in the

prevention and resolution of labour conflicts, although the provinces maintain labour inspection powers, producing serious delays in law enforcement (Arese, 2020).

In South Africa, the executive also plays an important role in collective labour actions. The Ministry of Labour may have representation on bargaining boards, when one or more registered unions and one or more registered employers' organisations establish a bargaining board in a given sector. In addition, the Ministry may, at the request of a bargaining board, appoint any person as the board's designated agent to promote, supervise (through labour inspectors) and enforce the collective bargaining agreement entered into therein, as well as other labour laws. Although the executive does not actively resolve disputes, he remains responsible for the compliance of the labour scenario.

10.5 EFFICIENCY OF THE LABOUR DISPUTE RESOLUTION SYSTEM

The countries subject to this comparative study were selected based on the differences between the respective labour markets and labour and social protection systems. Therefore, not surprisingly, the average number of new cases submitted annually to the respective labour dispute resolution systems varies significantly.

To allow comparability, we calculated the average number of new cases per hundred thousand inhabitants for the last year in which these data are available. Due to the important differences between the respective labour dispute resolution systems, the following new cases were considered:

- For South Africa and South Korea, in which there is an administrative system that receives, processes and resolves labour disputes, even if they are subsequently subject to judicial review, the number of claims filed before the respective administrative authority;

- For Argentina, Brazil, Mexico and Portugal, in which the Judiciary is responsible for receiving, processing and resolving labour disputes, the number of demands presented to the judges of first instance, even though in the Autonomous City of Buenos Aires and Mexico an attempt at prior conciliation is a requirement for the admissibility of lawsuits.

Based on this exercise, it can be seen that, regardless of the large differences between the respective labour markets and labour and social protection systems, the number of labour disputes is never small, usually ranging between 300 and 600 new cases per 100,000 inhabitants/year. The exceptions to this rule, pointing to greater litigation, are the Autonomous City of Buenos Aires and Brazil, located in a range of 1,600 to 2,100 new cases per 100,000 inhabitants/year. On the contrary, with low litigation, South Korea appears, with only 55.4 new cases per hundred thousand inhabitants/year.

TABLE 10.18 Number of labour disputes brought to decision in the first degree (2019, except when a different period is expressly indicated)

State		Population	Total new cases	New cases/100,000 inhabitants
South Africa		58,560,000	221,547	378.3
Argentina	CABA (2013)	3,072,029	64,890	2,112.3
	Córdoba	3,722,332	22,741	610.9
Brazil		211,049,519	3,530,197	1,672.7
South Korea (2018)		51,710,000	28,628	55.4
Mexico	Federal District	9,209,944	33,752	366.5
	Guanajuato	6,166,934	17,827	289,1
Portugal		10,290,000	52,298	508.2

Source: Authors' elaboration based on the national case study.

On the other hand, the main causes of these labour disputes seem to express more clearly the differences between the ways in which the respective countries protect the employee, even though, with the exception of the Brazilian case, debates about the legality of the worker's dismissal seem to prevail.

TABLE 10.19 Main causes of labour litigation (2019, except when a different period is expressly indicated)

State		Main causes of labour litigation
South Africa		Unjustified dismissal, abusive labour practices and other causes.
Argentina	CABA (2013)	Unjustified dismissal, occupational diseases and accidents at work.
	Córdoba	Unjustified dismissal, occupational diseases and accidents at work.
Brazil		Severance pay, moral damages and salary differences.
South Korea		Unjustified dismissal, discriminatory labour practices and other causes.
Mexico	District Federal	Unjustified dismissal, social contributions and designation of beneficiaries of social contributions.
	Guanajuato	Unjustified dismissal, social contributions and designation of beneficiaries of social contributions.
Portugal		Salary differences, severance pay and unjustified dismissal.

Source: Authors' elaboration based on the national case study.

Different litigation rates, associated with profound differences in the structure of the labour dispute resolution system in each country, cause the workload of decision makers responsible for solving new cases to also vary significantly, although it is usually between 600 and 800 cases/year. The exceptions to this rule, with higher workloads, between 1,100 and 2,200 cases/year, are South Africa, Brazil and the province of Córdoba. Conversely, with a significantly lower workload, there is South Korea, with only 15.9 cases/year.

TABLE 10.20 Workload by first degree decision maker (2019, except when a different period is expressly indicated)

State		Number of decision makers	Total new cases	New cases/decision maker
South Africa		168	221,547	1,318.7
Argentina	CABA (2013)	80	64,890	811.1
	Córdoba	10	22,741	2,274.1
Brazil		3,077	3,530,197	1,147.3
South Korea		1,805	28,628	15.9
Mexico	Federal District	60	33,752	562.5
	Guanajuato	20	17,827	891,4
Portugal	Portugal	86	52,298	608.1

Source: Authors' elaboration based on the national case study.

The workload of those responsible for reviewing decisions taken at the administrative level, or judicial decisions of first instance, is even more dispersed. For comparison purposes, the following are considered as reviewers and cases submitted for review:

- For South Africa and South Korea, in which an administrative system of labour dispute resolution prevails, judges with exclusive competence in labour matters, and demands for review of administrative decisions, presented before the Judiciary;

- For Argentina, Brazil, Mexico and Portugal, in which a judicial system for the resolution of labour disputes prevails, judges with exclusive competence to consider the appeals presented to the decision of the judge who decided a new case, with competence to judge matters of fact and law, and the demands for review of judicial decisions, related to new cases.

TABLE 10.21 Workload per reviewer (2019, except when a different period is expressly indicated)

State	Number of reviewers	Total cases submitted for review	New cases/reviewer	New cases/ decision maker
South Africa		168	221,547	1,318.7
Argentina	CABA (2013)	80	64,890	811.1
	Córdoba	10	22,741	2,274.1
Brazil		3,077	3,530,197	1,147.3
South Korea		1,805	28,628	15.9
Mexico	Federal District	60	33,752	562.5
	Guanajuato	20	17,827	891,4
Portugal	Portugal	86	52,298	608.1

Source: Authors' elaboration based on the national case study.

TABLE 10.22 Average duration of the process (2019, except when a different period is expressly indicated)

State	Average time to first decision	Average time in review	Total time of a case that is submitted for review
South Africa	3 months and 2 days	57% of cases resolved within 3 months	97% of cases resolved within 12 months
CABA (2013) Argentina	No information	No information	47% of cases resolved within 12 months
Córdoba	No information	No information	78% of cases resolved within 12 months
Brazil	7 months and 9 days	7 months and 23 days	15 months and 2 days
(South Corea).	1 month and 25 days	7 months and 15 days	9 months and 10 days
District	3 months and 14 days	No information	60 months
Mexico Federal			
Guanajuato	4 months and 13 days	No information	36 months
Portugal	6 months	2 months and 13 days	8 months and 13 days

Source: Authors' elaboration based on the national case study.

In any case, although workloads and procedures are very uneven, and different countries use different metrics to assess the duration of procedures, a common characteristic of labour dispute resolution processes seems to be speed, as shown in Table 10.22.

In the case of Mexico, it is important to note that the ongoing reform of the labour judicial system already presents relevant results regarding the reduction of the processing time of cases in the first instance, although it is still to be implemented and produce effects, regarding the review of these decisions.

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