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Track 1: Precarious and atypical work as a challenge for labour law

Immigration and precarious work in Brazil: legal changes, migration policies and labour rights

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ABSTRACT

The subject of this paper is the relationship between immigration and precarious work, making reference to Brazil. We assume that the immigration actually is one of the causes of the precarious work, among other such as 1) highly unequal income distribution; 2) racial or gender discrimination; 3) no legal regulation standard for jobs out of typical employment; and 4) lack of effectiveness of the legal system. Like most American countries that were subject to European colonization, the Brazilian population is now largely made up of immigrants. It is though surprising that the current Brazilian law has become so restrictive to workers' immigration. This paper than guide us through some complementary issues such as: (a) under which circumstance the immigration can be seen as a relevant factor in precarious work? (b) with regard to precarious work, is it possible to point out material differences between immigration "inside" and immigration "outside" the legal framework? The main argument in this paper consist of pointing out that National States like Brazil, which simply adopt migration policies with severe legal restrictions on the entry of workers, tend to encourage precarious work, either as an intended or unintended by-product.

Introduction

There is a wide variety of factors that cause or aggravate the occurrence of precarious work.

Among the causes of precarious work, the following are often cited: 1) highly unequal income distribution; 2) racial or gender discrimination; 3) no legal regulation

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standard for jobs out of typical employment; and 4) lack of effectiveness of the legal system.

Immigration, either alone or jointly with these factors, is always referred to as a relevant cause of precarious work.

For this reason, the analysis of the relationship between immigration and precarious work has been a subject of increasing academic and public policy interest.

The subject of this paper is the relationship between immigration and precarious work, making reference to Brazil.

1. Like most American countries that were subject to European colonization, the Brazilian population is now largely made up of immigrants.

Since 1850, with the prohibition of trafficking in African slaves, Brazil adopted migration policies strongly encouraging immigration, particularly of European workers.

For decades, the immigration was encouraged in two ways: 1) facilitation of the individual granting of visas for those who wanted to immigrate; and 2) promotion of the so-called "directed immigration", by means of international agreements that aimed to make it easy the exit from the home country; the collective grant of sojourn visas and the offering of advantages to those who wanted to settle in Brazil, especially to work in agriculture⁴.

The key ideas to understand all the old policy of encouragement to immigration are the "population of the territory" and the assurance of territorial integrity. It is important not to forget that the colonial Brazil had its territory invaded countless times along its coast for four centuries by corsairs and French, Dutch and other nationality conquerors. On the other hand, on the West side, the progressive expansion of the political border was legitimized by the previous expansion of the agricultural border.

Right from the start, to "populate the territory" was a synonym to expansion and consolidation of Brazil.

It is surprising that the current Brazilian law has become so restrictive to workers' immigration.

⁴The international agreements used in the policy internally called "directed immigration" were very similar to those listed in Annex II to the ILO Convention on Migrant Workers No. 97 (1949).

The starting point of this change was the enactment of the "2/3 Act"⁵, by the nationalist government of the dictator Getúlio Vargas in 1930, setting a parameter protecting the labor market to national workers. The ultimate turning point was the emergence of the so-called "Statute of Foreigner" in 1980⁶, which will be further discussed here and that was passed at the insistence of the Government during the military dictatorship that led Brazil between 1964 and 1985.

2. From the legal point of view, it is interesting to note that Brazil did not ratify the International UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UN, 1990). This well-known Convention is the most comprehensive and detailed international document focused on the protection of rights and promotion of equality in the treatment of immigrants, especially in labor issues.

Within the International Labour Organization (ILO), there are five important international conventions on that subject: Conventions Nos. 97 (1949) and 143 (1975), which provides for the regulation of immigrant work and State policies aimed at protecting the rights of workers "who had been regularly admitted into the national territory"; Convention No. 19 (1925) on equality of treatment for victims of work accidents; Convention No. 48 (1935) on immigrants' pension rights and Convention No. 118 (1962) on equality of treatment in social security⁷.

Out of all these rules, Brazil ratified only Conventions Nos. 97, 19 and 118.

It is necessary to warn that the ILO standards on protection of migrant labor evidence certain ambiguity concerning protection to workers: if, on one hand, the ILO welcomes, as its principle, the promotion of equal treatment between nationals and

⁵ Decree 19482, December 12, 1930.

⁶ Act No. 6.815, of August 19, 1980. As we shall see below, the Statute of the Foreigner does not address specifically the labour market, but indirectly affects it when it provides for the requirements for granting visas, naturalization, and regular entry visit in the Brazilian territory.

⁷ The Convention No.111 (1958) on discrimination at work is not applicable to unequal treatment based on nationality, as follows: *ILO- International Conference No. 66 -1980, Report III (Section 4 B), Estudio General de las memorias relativas a los Convenios núms. 97 y 143 y las Recomendaciones núms. 86 y 151 sobre Trabajadores Migrantes.* (Geneva: ILO, 1980); page 9, note 5.

foreigners, on the other hand, it excludes this right from undocumented immigrants ("non-regular")⁸.

No data or argument is required to evidence that a protection policy grounded on the protection equality to immigrant / exclusion of undocumented immigrants binomial is far from half of the way. It is like an excellent blanket, but much smaller than the size of the body.

Taking into account these two factors, it is possible to affirm that the Brazilian law on immigrant worker protection does not violate the ILO Standards.

The overly restrictive conditions that the Brazilian law enforces to the entry of immigrants in search of work justify the methodological strategy of this paper: examine the relationship between immigration and precarious work, not only from the point of view of their legal standards, but, otherwise, emphasizing the recognition and evaluation of non-legal practices.

Only this way allows us to understand, for example, how Brazil creates and enforces its migration policy, in reference to workers' immigration, without addressing in its "Statute of Foreigner" the "immigrant" character nor the "immigration" itself.

The terms "immigrant" and "immigration", which are not referred to in the first 141 of the 145 sections of the Statute, are used without an accurate meaning only to name and report the assignment of the administrative agency created by it: The National Immigration Council, aiming at formulating and enforcing the Brazilian migratory policy.

The migratory policy⁹ is seen by the 1980 Statute of Foreigner as an extrajudicial subject. As if the law, policy, morality and market belonged to eccentric circles that never meet.

⁸ It is closely in line with Section 427 of the Versailles Peace Treaty, which provided, among the general principles included in the Constitution of the ILO, namely that "the rules of each country, regarding working conditions, shall ensure equitable economic treatment of all workers who lawfully reside in the country."

⁹ A proposed migration policy for Brazil, submitted to public consultation, was passed in 2010 by the National Immigration Council (CNIg). The text was passed as the "National Policy on Immigration and Protection of Migrant Worker" and forwarded as a proposal for a Presidential Decree in October 2010 for review by the Chief of Staff of the Presidency of the Republic. The proposal is still pending up to this date.

3. We assume here that the immigration actually is one of the causes cited of the precarious work.

All we discussed before about the Brazilian migration policy seems to guide us through important complementary issues:

(a) Under which circumstance the immigration can be seen as a relevant factor in precarious work?

(b) With regard to precarious work, is it possible to point out material differences between immigration "inside" and immigration "outside" the legal framework?

4. Further, besides this introduction, we will discuss some additional reflections on the idea of precarious work.

What should be understood as precarious work? What are its features and components?

Despite being a term widely employed in sociological literature and labor law doctrine, and sometimes present in official ILO documents, there is not a single and accurate definition for precarious work.

For the purposes of this article, we will call precarious work every form of subordinate work not covered by the same or similar legal protection provided to regular jobs, offered under the same time and space conditions.

We know how the concept of precarious work is disputed and this paper does not intend to submit a conclusive definition of it.

Focusing on the objectives of this article, it is important to highlight the presence of two decisive factual elements in the characterization of the precarious work: 1) the subordinate work, even when it is formally or falsely called autonomous and 2) the lack of the corresponding legal protection, under the same conditions provided to other employees.

Under this conceptual framework, for example, a part time work (i.e, a work day with the same number of working hours or less than half the maximum working hours allowed), is not deemed a precarious work, provided that it is covered by the legal

protection corresponding to the full time job. On the other hand, precarious work is that work provided by a subcontractor's employee, where the legal protection afforded to him/her is not identical to that offered to the principal's employee.

5. The immigration "inside" the legal framework should not be an exclusively relevant cause of precarious work. On the other hand, it is worth emphasizing that even some segments of migrant workers who lawfully enter Brazil, besides being affected by the "national worker protecting rules" which is formally still in force, seem to suffer more strongly the impact of the social and income inequality, the discrimination of gender and ethnic origin, either in an isolate or worsened manner, due to their condition of immigrants¹⁰.

In countries with formally restrictive migration policy such as Brazil, workers' immigration tends to occur illegally. Physical and police barriers are generally limited in scope with regard to these matters. Upon entering the country in breach of the law, the undocumented migrant is subject to all sorts of harassment and over-exploitation. The community and family ties that tend to provide protection and support in their home countries are either absent or may serve as encouragement tools, followed by threat and oppression.

There is almost no opportunities out of the precarious work for the undocumented immigrants.

Taking into account the peculiarities of the Brazilian immigration policy, we intend to develop the following argument in this paper: National States, which, like Brazil, simply adopt migration policies with severe legal restrictions on the entry of workers, tend to encourage precarious work, either as an intended or unintended by-product,.

¹⁰ It is important to emphasize the concept of intersectionality, a term coined by the US author, Kimberlé Crenshaw in 1989, according to which: "intersectionality is a conceptualization of the problem that seeks to capture the dynamic and structural consequences of the interaction between two or more axes of subordination. It specifically addresses the way in which racism, patriarchy, class oppression and other discriminatory systems create basic inequalities that structure the relative positions of women, races, ethnicities, classes, among others. In addition, the intersectionality addresses the way how specific actions and policies generate oppressions that flow along such axes, creating, thus, dynamic or active aspects of disempowerment." (CRENSHAW, Kimberlé W. Document for the meeting of experts on aspects of gender-related racial discrimination. *Revista Estudos Feministas*. Ano10, 1º Semestre. p. 171-188, 2002, p.177).

Historical background of the migratory issue in Brazil

At the beginning of the 21st Century, the debate on the migration issue re-emerges on the Brazilian scene. Either through stories in newspapers and magazines, providing a distorted vision of an "invasion" of Haitian immigrants in the country or through the discussion on the need for a new Migration Law in Brazil, promoted by the civil society and accompanied by discussions in the Executive and Legislative branches for the production of a new migratory legislation.

The controversial and heated discussions in view of the possibility of entry or stay of immigrants in the country, which are currently targeted at Haitian immigrants, are not a novelty, since it followed more or less intensely, depending on the analyzed period¹¹, all historical formation of the Brazilian State. The purpose of this topic is to make the reader aware of this history, briefly outlining the main migration flows that entered Brazilian borderline¹².

The Portuguese were the first significant group of foreigners to arrive in the country. The Lusitanian colonizers took possession of the lands and colonized Brazil based on an extractive economy to subsequently cultivate sugar cane. Cultural and numerical factors hampered the use of native manpower and the European population was in small number and little available to the needs arising from the sugarcane plantation.¹³

To cope with the insufficient European workforce, a second large group of immigrants was notably forced to enter in Brazil: Africans trafficked as slaves¹⁴. The slave labor was used for three long centuries and brought into the country

¹¹ The 1930's was strongly marked by the polarized debate about Japanese immigration to Brazil, with a group against the hosting of these immigrants, based on nationalist and racist arguments, and another, which was favorable, seeing these immigrants as an important source of manpower for agriculture. Cf. *A negociação da identidade nacional: imigrantes, minorias e a luta pela etnicidade no Brasil*. (translated by: Patrícia de Queiroz Carvalho Zimbres). São Paulo: Editora Unesp, 2001.

¹² For a more detailed discussion of the main migratory flows in Brazilian history, cf.: WALDMAN, Tatiana Chang. *O acesso à educação escolar de imigrantes em São Paulo: a trajetória de um direito*. 2012. 236f. Dissertation (Master Degree) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2012.

¹³ LEVY, Maria Stella Ferreira. O papel da migração internacional na evolução da população brasileira (1872-1972). *Revista de Saúde Pública*, São Paulo, 8 (supl.), p. 49-90, 1974. p. 49.

¹⁴ LEVY, Maria Stella Ferreira. O papel da migração internacional na evolução da população brasileira (1872-1972). *Revista de Saúde Pública*, São Paulo, 8 (supl.), p. 49-90, 1974. p. 50.

approximately four million people of African origin. The arrival of Africans to forced labor in sugar cane plantation only stopped in 1850, with the prohibition of the slave trade¹⁵.

With the rise of coffee cultivation, the legal abolition of slavery and the consequent replacement of slave labor for free work, Brazil reformulated its policy for the admission of migrants into its territory. At that time, it started prioritizing, and not a few times even financed, the arrival of immigrants, particularly white men and women of European origin. At that time, the bleaching theories of the Brazilian population, defended by relevant sectors of the national elite, started to guide the agenda of migratory debates.

The majority of Europeans who arrived here between the late 19th century and early 20th century, came in search of access to land and labor. Maria Stella Levy reviewed the international migration to Brazil from 1820 to 1963 and divided it into four major moments that illustrate this new posture adopted by the Brazilian State.

Levy points out that, at first, between 1820 and 1876, with the first settlement cores, Brazil hosted especially Portuguese, but also a significant number of Germans. In the second phase, between 1877 to 1903, at the time of expansion of the coffee crop in the West of São Paulo and the outset of the funding policies, Brazil received a large migratory flow, of about two million people (1,927,992), consisting mainly of Italians. In a third phase, from 1904 to 1930, marked by the 1st World War, there was the more significant admission of immigrants in the country during the period under review, with the entry of 2,142,781 people, especially Spanish and Portuguese, and, from 1908 on, Japanese as well. In the Postwar period, it can be noticed the arrival of Polish, Russian, Romanian and Jew immigrants. In the fourth and final period, from 1931 to 1963, the coffee crisis¹⁶ and the restrictive measures to the entry of immigrants in the country,¹⁷ reduced the number of new immigrants to 1,106,404, with the Japanese emerging as the most numerically significant group. From 1964 on, with the beginning of the military

¹⁵BASSANEZI, Maria Silva C. Beozzo. Imigrações internacionais no Brasil: um panorama histórico. p. 1-37. In: PATARRA, Neide Lopes (Coord.). *Emigração e Imigração Internacionais no Brasil Contemporâneo*. 2. ed. São Paulo: FNUAP, 1995. p. 2.

¹⁶The coffee crisis in Brazil is closely related to the disproportionate increase in coffee production during the 1920s and the 1929 crisis in the United States, which decreased the international demand for coffee. The Brazilian economy, during this period, was strongly shaken, since it was dependent on its main national export product: coffee.

¹⁷Inclusively with the adoption of a quota system for the entry of foreigners by the 1934 Constitution.

dictatorship¹⁸, there was a significant decrease in the number of immigrants entering Brazil¹⁹.

If in late 19th century and early 20th century, Brazil was a wide receiver of migratory flows, about a century later, the scenario changed. In addition to the presence of new immigrant groups that started to land in the country, what actually marks the end of the 20th century is the beginning of an emigrating flow of Brazilians to the United States, Japan, Paraguay, Japan and some European countries.

Aspects of contemporary migration flows

The contemporary Brazil has its migration scenario marked by three aspects: (I) It is a country that receives international immigrants and Brazilians who are coming back; (II) at the same time, it is the home country of Brazilians who emigrate; and (III) to a lesser extent, it is a transit country for people who want to reach a third destination State.

By way of illustration, it should be noticed that, according to estimates of the Brazilian Institute of Geography and Statistics (IBGE), in 2011, 192.4 million people lived in Brazil. Further included in this universe of people, the Ministry of Justice estimated there were 1.5 million foreigners in the same year, what accounted for 0.8% of the resident population in Brazil. However, the Ministry of Foreign Affairs stated that 3.1 million Brazilians were living abroad, accounting for approximately 1.6% of the population²⁰.

However, the figures of these flows are not satisfactory and there are several databases. Regarding emigrant Brazilians, for example, estimates provided by the Ministry of Foreign Affairs for the year of 2008, based on data from Brazilian consular agencies abroad, report approximately 3,045,000 Brazilians emigrants²¹. But the official data from the 2010 Census, which for the first time recorded the number of Brazilians

¹⁸As already mentioned before, the military dictatorship led Brazil between 1964 and 1985.

¹⁹LEVY, Maria Stella Ferreira. O papel da migração internacional na evolução da população brasileira (1872-1972). *Revista de Saúde Pública*, São Paulo, 8 (supl.), p. 49-90, 1974. p. 53, 54, 55.

²⁰OLIVEIRA, Antônio Tadeu. Um panorama da migração internacional a partir do censo demográfico de 2010. *Rev. Inter. Mob. Hum.*, Brasília, Ano XXI, n. 40, p. 195-210, Jan./Jun. 2013. p. 207.

²¹INTERNATIONAL ORGANIZATION FOR MIGRATION. *Perfil Migratório do Brasil 2009*. Brasília, DF: Comissão Nacional de População e Desenvolvimento; Ministério do Trabalho e Emprego, 2010. p. 12; 40.

living abroad,²² total 491,645 emigrants. It can be noticed that the figures of the Census is underestimated²³ and well below expectations, and, for this reason, it should be considered as the minimum number of Brazilians abroad.²⁴

The group of international immigrants is growing and diversified, especially in terms of origin. Upon reviewing the data of immigrants who are in the Brazilian formal labor market, from 2011 to 2013²⁵, there was a 50.9% growth in the number of immigrant workers, both in activities that require high qualification and those that have lower requirements. It is worth noting that the Haitian immigrants are numerically outstanding, reaching the most significant rate of nationality in the formal labour market in 2013. Its growth was very significant: while in 2011 there were 814 Haitian immigrants employed in the formal labour market, in 2013, this figure increased to 14,579²⁶.

As show by the data referred to here, since mid-2010 the Haitians began to form an important group among the migratory flows of Brazil today. The migratory regularization of this new group of immigrants, however, was largely debated. Many of the Haitians who arrived on Brazilian territory, especially through the State of Acre, in the city of Brasília, requested refuge. The Brazilian State, however, did not recognize them as refugees and understood that the worsening of the living conditions of the Haitian population, as a result of the earthquake in January 2010, justified the grant of

²² Under the international emigration topic, it was investigated whether any person who had resided with the dweller of a particular home was living in another country at the reference date.

²³ With the deployment of this methodology, if all people in each household emigrated or if the household ceased to exist, there would be no emigration record. Cf. OLIVEIRA, Antônio Tadeu. Um panorama da migração internacional a partir do Censo demográfico de 2010. *Rev. Inter. Mob. Hum.*, Brasília, Ano XXI, n. 40, p. 195-210, jan./jun. 2013. P. 202.

²⁴ BRAZIL. Instituto Brasileiro de Geografia e Estatística (IBGE); Ministério do Planejamento, Orçamento e Gestão. *Censo Demográfico 2010: características da população e dos domicílios*. Rio de Janeiro, 2011. Available at: <<http://www.brasileirosnomundo.itamaraty.gov.br/a-comunidade/estimativas-populacionais-das-comunidades/estimativas-do-ibge/censo-demografico-ibge-2010.pdf>>. Accessed on: 05 February 2012.

²⁵ The following are the three databases used: two of them belong to the Ministry of Labor and Employment: (I) Annual List of Social Information (RAIS), which is an administrative record required to be filed annually by all employers, covering the domestic territory; (II) the records of the Coordenação Geral de Imigração/Conselho Nacional de Imigração (General Immigration Coordination Office/National Immigration Council) (CGI/CNIg), which grant temporary or permanent work and/or residence permits in the country; and the third database is formed by the IBGE (Brazilian Institute of Geography and Statistics) Census in 2000 and 2010.

²⁶ CAVALCANTI, Leonardo; OLIVEIRA, Antonio Tadeu; TONHATI, Tânia (Orgs.). *A Inserção dos Imigrantes no Mercado de Trabalho Brasileiro*. Brasília: Cadernos do Observatório das Migrações Internacionais, 2014. P. 13

visa on humanitarian grounds, established by a Normative Resolution of the National Immigration Council (CNIg) - the Normative Resolution (NR) 97/2012²⁷.

Even though the arrival of Haitian immigrants is occurring increasingly since 2010, the group of more significant presence in the country is still the South American immigrants, in particular Bolivians, Peruvians and Paraguayans. Most of these immigrants benefits of the Mercosur Free Residence Agreements, which currently include Argentina, Brazil, Paraguay, Uruguay, Bolivia, Chile, Peru, Colombia and Ecuador.

With less impressive figures, we see Asians, Europeans and Africans, who are not benefited by any specific agreement that allows them to regularize their immigration status in the country. All they have is an outdated legislation, out of context vis-à-vis the 1988 Federal Constitution, and the Statute of Foreigner (Act No. 6815/80), which has been valid for over three decades. With its content grounded on national security terms, and without emphasis on the guarantee of fundamental rights to immigrants, the Statute shows itself as a major barrier to be faced by immigrants, besides so many others that are already faced in the countries of destination due to cultural, linguistic, social and other issues.

A significant part of African requests the status of refugees in Brazil. Data from the National Committee for Refugees (CONARE) suggests this comment. In 2014²⁸, among the main nationalities seeking refuge, we find Senegalese (1,687 applicants), Nigerians (1,116 applicants), Syrians (1,075 applicants) and Ghanaians (1,032 applicants). But among the refugees recognized today in Brazil, the main countries of origin are Syria, Colombia, Angola and the Democratic Republic of the Congo. Even not standing near the conflict zones, Brazil currently has 7,289 recognised refugees from 81 different nationalities²⁹. A low figure, but that tends to increase in the coming years, especially upon the arrival of requestors of refuge from countries in the Middle East and Africa.

²⁷A number of factors influenced this debate. One of them, in particular, is the presence of the Brazilian State in Haiti since 2004, in charge of the United Nations Stabilization Mission in Haiti – MINUSTAH.

²⁸ According to data of the National Committee for Refugees (CONARE) and statistical analysis carried out by the United Nations High Commissioner for Refugees, which presents data for the months of January to October 2014.

²⁹ -United Nations High Commissioner for Refugees - UNHCR - Alto Comissariado das Nações Unidas para Refugiados (ACNUR). *Refúgio no Brasil: uma Análise Estatística* (janeiro de 2010 a outubro de 2014). 2014. P. 1; 2; 4.

Labor law of immigrants in Brazil

The Brazilian Federal Constitution of 1988, still in force, was enacted after twenty-one years of civil-military dictatorship in Brazil. Within its legal sphere, it represents a break with the old authoritarian regime and the democratization of Brazil. According to Flavia Piovesan, the 1988 Constitution "also introduces an indisputable advance in the legislative consolidation of guarantees and fundamental rights and protection of vulnerable sectors in the Brazilian society. From it, the human rights acquire an extraordinary status, with the 1988 Constitution being the most comprehensive and detailed document on human rights ever adopted in Brazil " ³⁰.

An important innovation introduced by the 1988 Constitution was the inclusion of a list of social rights, alongside the civil and political rights. The aforementioned law provides incoming foreigners in national territory equality before the law (Section 5), and the freedom to exercise any work, trade or profession, provided that the requirements of the relevant legislation are met, and except for positions that are exclusively held by native Brazilians (Section 12, 3rd paragraph). The infraconstitutional legislation, however, has not been adapted to the constitutional standard, as it is the case of the Labor Code (CLT - Decree Law No. 5.452/1943) and the Statute of Foreigner (Act No. 6.815/1980).

Section 352 of the Labor Code provides for one of the most symbolic and controversial issues regarding the labor condition of immigrants: the so-called "2/3 rule". The said "2/3 rule" was the first expression in the Brazilian legislation of the "national worker protection" policy. This policy appeared in Brazil in the first year of the nationalist dictatorship of Getúlio Vargas (1930-1945) and is reaffirmed in the 1980 Statute of Foreigner, under the context of a new dictatorship (authoritarian regime: 1964-1985).

According to the "2/3 rule", the companies are required to keep in their staff, when composed of three or more employees, a proportion of 2/3 of Brazilian employees. On the other hand, Section 358 of the Labor Code provides, among other

³⁰PIOVESAN, Flávia. *Direitos Humanos e o Direito Constitucional Internacional*. 7 ed. São Paulo: Saraiva, 2006, pp. 23-24.

restrictions, that in case of lack or termination of work, the dismissal of foreign worker must precede the dismissal of a Brazilian worker performing a similar function.

The compliance with this proportion of "national workers" would be later reinforced by the approval of the Brazilian Criminal Code in 1940, which provided for a criminal punishment in case of "impairment of the legal rule on labor nationalization"³¹.

Just as the labor norms for work protection, including the "2/3 Act", the criminal provision of 1940 is still formally in force, even if it does not deserve to be enforced.

This is a quite important point for understanding the Brazilian legal system relating to immigration. When a legal provision enters into force in Brazil, its withdrawal can occur only by two ways: 1) the formal repeal by the Congress or 2) the formal declaration of unconstitutionality by the Brazilian Supreme Court. If none of these two changes occur, the law passed formally remains able to be enforced as a tool to punish its offenders.

If it is true that the political circumstances in Brazil today make remote the enforcement of labor and criminal penalties for violation of the "2/3 Act", it is even more true that for an immigrant who does not know these circumstances, the simple formal existence of the law tends to operate as a *sword of damocles* to embarrass them to accept precarious work.

While the discussion of the enforceability of Sections 352 and 358 is acceptable from the point of view of constitutional hermeneutics, its persistent formal validity allows to describe Brazil as a country that still discriminates against foreign workers, not only directly and individually, but also indirectly and institutionally. Santiago Falluh Varella claims that "such kind of discrimination does not derive from express demonstrations of hatred or segregation, but from administrative, business practices, laws, regulations or public policies that are apparently neutral, but provided with a discriminatory potential"³².

By the way, this ambiguous way to overlook the formal repeal of discriminatory legal provisions is very characteristic of the daily discriminatory practices of

³¹ Section 204 of the Brazilian Criminal Code (Decree-Law No. 2.848 / 1940.): "Frustrating, by fraud or violence, a legal obligation concerning the nationalization of the work: Penalty - detention for one month to one year and fine, in addition to the penalty corresponding to the offense."

³² VARELLA, Santiago Falluh. *Discriminação racial indireta e ação afirmativa no emprego sob a perspectiva dos direitos coletivos*. 2009. 321 f. Thesis (Doctorate in Social Sciences) – Instituto de Ciências Sociais, Universidade de Brasília, Brasília. 2009, p. 22.

conservative elites in Brazil. Handling the uncertainty about the enforceability of legal prohibitions, discriminatory behavior can be practiced in a non-explicit manner by offenders who do assume themselves as such.

Reproducing the standard of the 1931 labor law, the initial provisions of the 1980 Statute of Foreigner, specifically its Section 2 clearly show the adoption of a protective policy of "national workers"³³. Next, Section 3 of the Statute of Foreigner conditions the granting of a visa to "national interests", without any criteria being established by law on what exactly would be the national interest that would not recommend the issuance of a permit to a person entering the country, except for crime-related issues.

Focusing on immigration in accordance with the law, the visa to work in Brazil can be either temporary or permanent. In addition to the "2/3 Act", the granting of the first visa requires the submission of some evidences by the foreigner, such as that his/her livelihoods, which consists of the letter of invitation from the company or institution to which he/she is associated. In addition, according to Section 100 of the Statute of the Foreigner, the immigrant admitted under a temporary condition based on an employment contract can only work to the entity by which he/she was hired. Exceptionally, the Ministry of Justice, after consulting the Ministry of Labour, may authorize the immigrant who enters Brazil to work for another employer. In other words, even for the immigrant who has a Brazilian legal permission, it is possible to affirm that the freedom to work is not full, and, actually, is much smaller than the freedom to work granted to the national worker.

Under Section 99 of the Statute of Foreigner, the holder of a temporary visa may not hold the position or office of administrator, manager or director of a business or civil company, or officer in unions, or supervisory body of the exercise of a regulated profession. The violation of these restrictions makes foreigner subject to cancellation of his/her registration in Brazil and the deportation, as provided for in Section 125, X, of the Statute of Foreigner.

The permanent visa, regulated in Section 16 of the Statute, is that granted for the entry of highly qualified foreigners that intend to live definitely in Brazil. This legal

³³Section 2 of the Statute of Foreigner (Act No. 6.815/1980): "This Law is primarily targeted to the national security, the institutional organization, the political, cultural and socio-economic interests of Brazil, as well as to protect the national worker."

provision is explicit when it assumes that it aims at "providing skilled labor to the various sectors of the domestic economy, aiming at the National Development Policy in all aspects and, particularly, for increased productivity, assimilation of technology and fundraising for specific sectors." Pursuant to Section 18, the granting of the visa, although named permanent, may be conditioned, for a period not exceeding five years, to the exercise of a regular activity and settlement in a specific region in the national territory.

One of the strong criticism to the Statute of Foreigner and the Brazilian migration policy is their failure to provide for the grant of visa to foreigner workers with no professional qualification. In the current scenario, besides the qualification, the Statute of Foreigner requires that the visa, which has been previously applied to in their home country, is accompanied by the request of the future employer. The Statute of Foreigner does not allow immigrants, in search of a work position not offered yet, to enter and stay in the country.

According to the São Paulo Human Rights City Department, one in three immigrants living in São Paulo is in "irregular situation"³⁴.

In addition to the immigration of a qualified worker in accordance with the provisions of the Statute of Foreigner, currently there is a second gateway for the legal admission of a worker who wishes to settle in Brazil: the aforementioned Mercosur Residence Agreement, which is in force since 2009. This agreement provides the citizens of the countries signatory of such treaty with the freedom to reside temporarily in any of the signatory countries for a period of two years. This permanence may be permitted definitively, provided that the worker evidences his/her livelihood and their families', what is clearly difficult to be achieved by workers submitted to precarious jobs.

A third legal gateway for admission into the country is the Statute of Refugees (Act 9474/1997). It states that, once the refugee application is filed with the Federal Police, the applicant is hereby authorized to take up residence in the country (Section 21), what allows him/her to get a Labor Card with the Ministry of Labor and the exercise of compensated activities (Section 21, 1st paragraph) until the end of the

³⁴SPINELLI, Ana Carolina. Força de trabalho imigrante. *Revista Labor do Ministério Público do Trabalho*. Ano II, n. 5. p. 33-36, 2014, p. 33.

process. The National Committee for Refugees (Conare), an agency linked to the Brazilian Ministry of Justice, is in charge of the final decision³⁵.

It is important not to lose sight of the fact that this means of admission is only allowed for those people coming from places and situations that justify the granting of refuge. In Brazil, according to Section 1 of the Statute of Refugees, people can only be accepted as refugees in case of founded fear of being persecuted for reasons of race, religion, nationality, social group or political opinion, or (1) if they are outside their home country and cannot or do not want to remain under its protection; or (2) who, not being a national and outside the country where they once had their habitual residence, are unable or unwilling to return to it due to serious and widespread violations of human rights.

Both immigrants benefited by the Mercosur Residence Agreement and refugees or people who are undergoing a refuge process, even if they do not find legal obstacle to their entry into the labor market³⁶, enter Brazil in a situation of strong social and economic vulnerability.

Except for one of these three legal forms of admission into Brazil (1 - worker qualified in accordance with the 1980 Statute of Foreigner, 2 - a citizen from the Mercosur countries or 3 - a refugee), the immigrant worker enters Brazil undocumented. This makes them even more vulnerable to human rights violations and the imposition of indecent work conditions. As reported by authorities of the Public Labor Prosecution's Office in Brazil, "the brutal wage discrepancy makes the jobs that are sometimes rejected by Brazilians become attractive to migrants"³⁷.

As it turns out, although Brazil is a country of semi-peripheral capitalism marked by great inequality in the distribution of employment opportunities including to Brazilians, the statement of Brazilian authorities can be easily heard in the speech of a German civil servant.

³⁵PASCHOAL, Gustavo Henrique. *Trabalho como direito fundamental e a condição de refugiado no Brasil*. Curitiba: Juruá, 2012, pages 108 and 109.

³⁶ Reversely to what happens in some European Union countries, whose national legislation expressly prohibits refugees to accept job offers.

³⁷XIMENES, Dimas. ALMEIDA, Guilherme. Brasil de volta ao imaginário de imigrantes. *Revista Labor do Ministério Público do Trabalho*. Ano II, n. 5. p. 26-32, 2014, p. 32.

In addition to the mentioned legal obstacles to immigration of workers, those who immigrate illegally are often victimized by many illegal recruitment and admission practices.

The probation agreement, for example, provided for in the Brazilian labor law for a maximum term of ninety (90) days as a prior hiring before the full hiring, allows the termination of the employment without being required to pay the fines due in the termination of the full contract. The unjustified adoption of a probation contract as a way to avoid the fines of the full contract has been adopted by unscrupulous employers as a tool to make immigrants work precarious.

There are also cases of entrepreneurs who make "false registration"³⁸. They fill out workers' Labor Card in an inappropriate manner, with content that does not correspond to an employment contract, making jobs become apparently formal but, actually, without no labor law protection.

Under extreme situations, immigrants are subject to the worst working conditions: they earn no salary, they have exhaustive working days, starve, besides working and sleeping in the same place. The slave labor, increasingly common among immigrants in Brazil, involves different nationalities. In São Paulo became widely known the case of well-known confections such as Zara and M.Officer, which used slave labor of Bolivians and Paraguayans immigrants in their productive chains in Brazil."³⁹

Looking the problem from the legal doctrine perspective, there are principles in the Brazilian labor law that could ensure the precarious work were legally recognized as decent work, regardless of the undocumented immigrant. Namely: 1) the principle of primacy of reality over the form; and 2) the principle of prohibition of unjust enrichment.

The primacy of reality over form is "a powerful tool to research and find the truth in case of labour disputes."⁴⁰ According to this principle, the regularity status of the immigrant in the country would not matter if the elements that configure the

³⁸Cf. the following about probation contracts and recording just for effect, see : Revista Labor do Ministério Público do Trabalho. Ano II, n. 5. p. 26-32, 2014.

³⁹SPINELLI, Ana Carolina. *op. cit.*, p.36.

⁴⁰ DELGADO, Maurício Godinho. *Curso de Direito do Trabalho*. 10. ed. São Paulo: LTr, 2011, p. 202.

employment bond are present in the work provision (Sections 2 and 3 of the Labor Code-CLT)⁴¹.

Looking at the prohibition of unjust enrichment provided for in Section 884 of the Brazilian Civil Code (Act No. 10406/2002), the principle requires that the person who gets advantage without due cause at the expense of another person shall reimburse the victim the value of the benefit.

The strength of these principles, however, depends on the possibility of the victimized worker filing a labor claim for definition of labor liability. It is not necessary to show that even that the Brazilian laws do not prohibit it, the filing of a labor claim by an undocumented worker is an almost impossible practice.

With regard to updating of the legal migration framework in Brazil, despite evidence of the weak political commitment from the Government, there are reputable initiatives promoted by some sectors in civil society; especially activists and authorities that defend the human rights.

It is true that the debate on the change of the legal migration framework does not occupy a prominent place, either in the press or in the prevailing political agenda. Successive economic crises and corruption scandals have led the Government to an attempt to guide the political representative system reform as the axis of its current initiatives.

But this is not the only factor to be considered. For multiple reasons, it seems the subject still does not excite the labor unions, and it is certainly better than seeing them as antagonists of the legal change, but this is still a dissuasive behavior. On the other hand, some find that the migratory policy has not been able to conquer a prominent place, also due to the modest participation of the migratory phenomenon in the Brazilian economically active population (still around 0.8%).

Although the Brazilian migration movement involves hundreds of thousands of workers, it is necessary to recognize that its minority numerical weight in population and in the labour market in Brazil requires this is handled not as a problem of majority, but of human rights agenda.

⁴¹ PASCHOAL, Gustavo Henrique. *op. cit.*, p.119.

In this Brazilian debate on changes to the immigration law, there are two different bills: 1) the Bill No. 5655/09, from the Government; and 2) the Senate Bill No. 288/2013. There is also a proposed amendment known as "Migration and Promotion of Migrant Rights in Brazil Act", submitted to the political debate in 2014 by a Commission of experts devoted to replace Bill No. 5655/09.

With regard to labor matters, the Bill 5655 of 2009 maintains procedural obstacles to migratory regularization, as well as its dependence on prior finding of a job by the immigrant who applies for it. On the other hand, Senate Bill No. 288 of 2013 and the draft "Migrations Act" may represent qualitative changes in the regulatory standard of the Statute of the Foreigner of 1980, since, inter alia, they encourage migratory regularization and allow the regular admission of the worker who is still seeking a job⁴².

Final Comments

Similar to what happens in other countries, the immigration is not quantitatively relevant to explain the spread of precarious work in Brazil.

Reversely, however, the precarious work may well sum up a suitable connotation for immigrant work.

While the precarious work is the rule for those who enter Brazil on an illegal basis, it is surprising that many workers who immigrate in accordance with the law have to overcome other obstacles to achieve a decent job position, in comparison with other Brazilian workers.

Brazil currently has a migratory legislation still based on values and targets pertaining to its authoritarian past. After experiencing two dictatorships, which lasted for more than a decade each, the political system has not yet fully restored its commitments to human rights improvement, what is also true concerning the migratory legislation.

⁴²ALMEIDA, Guilherme. Brasil precisa reformar o Estatuto do Estrangeiro. *Revista Labor do Ministério Público do Trabalho*. Ano II, n. 5. p. 37-39, 2014, p. 39.

For this reason, the Brazilian laws still speaks about regularizing migration through the "national worker protection" goals, as well as the protection of "national security"; whatever that means these days.

Thinking of migration within the frame of human rights means to think of the free circulation of human beings beyond their national origin. This is true from the point of view of the legal jurisprudence, just as it seems to be from the viwe of the legal sociology of public policies.

A highly restrictive legal system to entry of immigrant workers, as demonstrated in the Brazilian case hereunder, evidences clear difficulties for its effectiveness in curbing the entry of people in search of survival.

Featuring a little equipped police force with low professionalism, for a border area of 23,000 km, a highly restrictive migratory policy upon entry of workers in Brazil will always be a geographically impossible standard.

However, the failure of this standard cannot be seen as the failure of a national authoritarian project. Under an opposite look, we notice that the affirmation of Brazilian democracy, bringing the growing attention to human rights as its by-product, as well as the strengthening of an independent public opinion, challenges the current migratory legislation in Brazil.

The democratic governments that succeed one another in Brazil since the late 1990 have been negligent with the demands in favor of the adoption of a new legal framework for migration.

Rather than facing the challenge for legal change, recent Governments have been taking *ad hoc* political decisions through legal artifice of questionable constitutionality. Among the legal artifices, there are the "resolutions" of the National Immigration Council (CNIg) authorising the granting of humanitarian visas without legal support. This is the case, among others, of the recent "policy" aimed to the regularization of the thousands of Haitians who have entered Brazil from the 2010 earthquake suffered by their home country.

The problem is that this "lack of policy"- or this policy with no legal standard - tends to cause growing problems to all social partners: 1) legal uncertainty for migrant workers; 2) difficulty of planning and looses of competitive advantages to good

employers; 3) lack of transparency for unions and associations of defense of immigrants' rights, and last but not least, 4) expansion of precarious work.

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