

International Labor Law (ILO Conventions) and Labor Reform in Brazil, According to Technical Notes of “Labor Public Prosecutors”

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Abstract: This paper aims to analyze possible violations of the International Conventions ratified by Brazil in the context of the International Labor Organization (“ILO”), under the technical notes stated by the Labor Public Prosecutors,¹ considering the approval by the Government of Law 13.467 / 2017, also known as “Labor Reform”. In order to deepen this analysis, subjects related to Labor Law as a Fundamental Right and “Conventionality Control” before the Judiciary will also be reported.

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1 Introduction

This paper aims to analyze possible violations of the International Conventions ratified by Brazil in the context of the International Labor Organization (“ILO”),

¹ “The Labor Public Prosecutors (MPT) is the branch of the MPU whose function is to supervise the compliance of labor legislation when there is a public interest, seeking to regularize and mediate relations between employees and employers. It is MPT’s task to promote the public civil action in the scope of the Labor Justice to defend collective interests, when the social rights constitutionally guaranteed to the workers are disrespected. It may also manifest itself at any stage of the labor lawsuit, when it considers that there is a justified public interest. The MPT can be an arbitrator or mediator in collective bargaining and can oversee the right to strike in essential activities” (free translation). Available at: http://portal.mpt.mp.br/wps/portal/portal_mpt/mpt/ompt/mpt/. Accessed on: 06/02/2018.

Article 127 – Constitution of the Federative Republic of Brazil 1988 – The Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests. (CA No. 19, 1998; CA No. 45, 2004) Available at: http://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11. Accessed on: 06/02/2018.

under the technical standards stated by the Labor Public Prosecutors, considering the approval by the Government of Law 13.467 / 2017, also known as “Labor Reform”. In order to strength this analysis, subjects related to Labor Law as a Fundamental Right and “Conventionality Control” before the Judiciary will also be reported.

2 Relaxation and concerns about Workers’ Rights

The ILO, in its meetings, through the “Workers Members” showed an increasingly concern about the future of Labor Law considering the contemporary scene.²

The situation of Workers’ Rights is getting more and more precarious. There are several factors involved. First, technology improvement has replaced the jobs of many employees, who have either been reinserted into the labor market as (i) self-employed with reduced income values and worse working conditions or (ii) are unemployed.

Second, the relaxation of Worker Rights has created new forms of labor relations, which do not guarantee “minimum” Rights to them. As a result, it is possible that in short term, workers will be facing similar troubles that workers faced during Industrial Revolution, such as, nonstop nights at work, disrespect of Fundamental Rights of the human person, such as rest, leisure, health, between many others.

For such a situation does not deteriorate, it is essential the role of International Law in the face of everyday violations of Fundamental Rights in the labor field, because International Law has norms ratified by the countries that are able to prevent this collapse of civilization.³

² “The Worker members welcomed the presence of the Chairperson of the Committee of Experts in the general discussion of the Conference Committee. They observed that the world was currently experiencing upheaval in several respects: (i) the globalization of the economy was allowing the free movement of capital with the sole objective of achieving profit, which often had detrimental social and environmental consequences; (ii) climate change and environmental issues would give rise to an increasing number of work-related problems; and (iii) armed conflict was laying waste to certain whole regions. Those three phenomena were closely linked and were behind the massive migratory flows which were raising fundamental questions concerning how work-related issues should be addressed in a context which was also characterized by the emergence of authoritarian regimes in certain countries that were not very respectful of civil liberties and fundamental rights. The problems that arose in that regard constituted challenges for the ILO, in which the Committee had an important role to play as one of the two pillars of the Organization in the supervisory system for international labour standards, alongside the Committee of Experts.” Available at: https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_631794.pdf. Accessed on: 06/02/2018, p. 13.

³ JUNIOR, Edson Beas Rodrigues. DARONCHO, Leomar. “In times of labor reform, conducted in an agitated way and under false or false premises, International Law can play the leading role in preventing the implosion of the humanist and civilizing character of Labor Law.” Article originally published on the website Conjur, June 23, 2018 and available at: <https://www.conjur.com.br/2018jun-23/opinio-reforma-trabalhista-normas-internacionais>. Accessed on: 7/27/2018

3 The changes brought by Law 13.467/2017 (Labor Reform)⁴

The Labor Reform brought changes that relaxed in Brazil the rules in force for the protection of the employee. It would be simplistic to describe briefly all the changes that have taken place. However, in order to clarify the arguments of this paper it is necessary to remember that the Labor Reform regulated, among others, work part-time, intermittent work, the “home office”, the need to assign a certain value to the lawsuit when suing the employer, as well as stated that the union contribution is no longer mandatory. There was also a change in union representation in companies, while maintaining the rule of unity union (according to the territory).

One of the major changes was the possibility that terms negotiated (between workers and company) prevail over the legislated for a number of rights provided by law to the employees (Article 611-A of Law 13.467 / 2017). Now, the parties may settle even the reduction of the protections to the employee.⁵ In addition, along with the prevalence of the negotiated terms over the law, many of the changes have also affected access to justice. First, there is a limitation of the possibility of granting free justice to the party considering its salary. Second, it made possible the condemnation in defeat fees. Lastly, the employee may be ordered to pay expert fees even when benefits of free justice, among other changes.

4 The Labor Reform, the technical notes issued by the Labor Public Prosecutors and the breaches identified in the context of the “Conventionality Control” (ILO)

The Labor Public Prosecutors, as a way of supporting or not the viability of the Brazilian Labor Reform, issued technical notes describing the fragility of several points of the Labor Reform. It brought some important notions in the field of International Law about the violations that would be committed with the approval of that law:

Check the technical notes of the Labor Public Prosecutors (MPT), which are studies on the changes of the labor legislation proposed by the Federal Government. Studies show that the changes are unconstitutional and contradict the Federal Constitution and the international conventions signed by Brazil, generating legal insecurity and negative impact on job creation.⁶

⁴ Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13467.htm. Accessed on: 7/27/2018.

⁵ If the intention of the Labor Reform was only the possibility of negotiating, without reducing rights, this prediction already existed in the legislation previous to the Law 13.467 / 2017.

⁶ Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018.

For methodology purposes, this paper will only address points of the technical notes reasoned on violations of ILO International Conventions or international norms. Subjects such as access to justice, “outsourcing”, among others, just based on unconstitutionality, will not be addressed in depth, despite the importance of these topics and the clear violation of the fundamental rights of the employees.

The Technical Note n.1 prepared by the Prosecutor Ronaldo Fleury⁷ introduces the argument of the ILO study on “*World Employment and Social outlook: ILO, 2015*”.⁸ This study concludes that the decrease in protective labor rights of employees are not able to create new jobs and does not reduce the rate of unemployment, as support the favorable sectors to the changes adopted in the Labor Reform.

It addressed the violation of ILO Convention 117 ratified by Brazil in its Article 1, I and II,⁹ which states that policy must be directed towards the well-being and development of the population as well as to social progress. It also states that the Labor Reform violates the commitment made by Brazil regarding the promotion of decent work in May 2006.

Moreover, it states that the project of the Labor Reform as a whole is in breach of the International Covenant on Economic, Social and Cultural Rights ratified by Brazil in its article 7¹⁰ and of the Protocol of San Salvador, also ratified by Brazil in its article 7.^{11 12}

⁷ *Technical Note No. 1 of January 23, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018.

⁸ INTERNATIONAL LABOUR ORGANIZATION. *World employment and social outlook*. Geneva: ILO, 2015, p.15.

⁹ *ILO Convention 117, article 1, I and II, ratified by Decree Nº 66.496, 04/27/1970*. “1. All policies shall be primarily directed to the well-being and development of the population and to the promotion of its desire for social progress. 2. All policies of more general application shall be formulated with due regard to their effect upon the well-being of the population”. Available at: http://www.trtsp.jus.br/geral/tribunal2/LEGIS/CLT/OIT/OIT_117.html. Accessed on: 07/27/2018 (free translation).

¹⁰ *International Covenant on Economic, Social and Cultural Rights* ratified by 07/06/1992. “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays”. Available at: http://www.planalto.gov.br/ccivil_03/decreto/d3321.htm. Accessed on: 07/27/2018 (translation available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>).

¹¹ *San Salvador Protocol* ratified by Decree Nº 3.321, 12/30/1999. – Available at: http://www.planalto.gov.br/ccivil_03/decreto/d3321.htm. Accessed on: 07/27/2018.

¹² “*San Salvador Protocol – Article 7 – Just, Equitable, and Satisfactory Conditions of Work*

The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:

i) As regards the minimum level of remuneration

Technical Note no. 2 describes the provisions of International Conventions Nos. 26 and 131¹³ that determine the need to establish minimum wages to employees, which would be violated in case of the modalities of intermittent work and mobile contracting such as those brought by the Labor Reform

In addition to that, Technical Note no. 2 prepared by Prosecutor Ronaldo Fleury¹⁴ covers temporary work and the regime of part-time. Technical Note n.8 points out the breach to minimum level of remuneration in these cases and in the situation of payment of the rest break (interval) with compensation and non-remuneration nature. It is possible to identify violations to the Universal Declaration of Human Rights: “who works has the right to a fair and satisfactory remuneration that allows him and his family an existence consistent with human dignity and supplemented, if possible, by all other means of social protection”.¹⁵

This harmful change brought by the Labor Reform, which admits new forms of hiring without providing a minimum wage, causes precarious labor relations, as well as makes possible the reduction of amounts paid regarding the rest and feeding interval, clearly linked to workers health rights; in breach of ILO Conventions.

Technical Note n. 2 cites the same ILO study on World employment and Social Prospects for 2015, which concludes that the countries of the European Union,

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- a. Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;
 - b. The right of every worker to follow his vocation and to devote himself to the activity that best fulfills his expectations and to change employment in accordance with the pertinent national regulations;
 - c. The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority;
 - d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;
 - e. Safety and hygiene at work;
 - f. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received;
 - g. A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work;
 - h. Rest, leisure and paid vacations as well as remuneration for national holidays.”

Available at: <http://www.oas.org/juridico/english/treaties/a-52.html>. Accessed on: 05/06/2018.

¹³ ILO Convention 131 addresses the issue of the minimum wage for developing countries. ILO Convention 26 deals with the Institution of Methods of Fixing Minimum Wages.

Technical note No. 2 of January 23, 2017, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018.

¹⁴ Idem.

¹⁵ “This guarantee is contained in article 23, item 3, of the Universal Declaration of Human Rights” Technical Note no. 8 of June 26, 2017, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Access: 27/06/2018 (free translation).

which have introduced the possibility of partial employment, have closed approximately 3.3 million full-time jobs.

ii) As for the representation of employees

Concerning the question of union representation brought on Labor Reform, the Technical Note n. 9 addresses the violation to Convention no. 98 on the issue of anti-union practices¹⁶ and freedom of association¹⁷ and to Article 5¹⁸ of Convention No. 135 of the ILO,¹⁹ ratified by Brazil (likewise ILO Convention 154).

As regards to the representation in the workplace, the Technical Note no. 7 still considers that there are no mention as to the coexistence between workers' and trade union representatives in the workplace. In this sense, there is no provision for the necessary means for the proper functioning of union representation in the workplace.²⁰ It also mentions that the omissions in the Labor Reform may cause insecurities.²¹

¹⁶ Regarding the permanence of union unity, the technical notes point the disagreement of the MPT with the regime adopted in Brazil, understanding that this should be a point to be amended by the Labor Reform in order to conform to international standards. In this sense, "The consecration of the monopoly of union representation in Brazilian legislation is so internationally known for creating obstacles to freedom of association that the entry n. 314 of the ILO Committee on Freedom of Association expressly deals with the national case: "provisions of a national constitution concerning the prohibition of the creation of more than one union by professional or economic category, regardless of the degree of organization, in a given territorial basis, which may not be less than the area of a municipality, are not in conformity with the principles of freedom of association." *Technical Note No. 7 of May 9, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018. (free translation)

¹⁷ "The abolition of the union tax, of the the unity union rule and the regulation of a negotiation contribution would have the merit of adapting the Brazilian legislation to the international norms and the law of the union centrals". *Technical Note No. 2 of January 23, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 07/27/2018, p. 11.

¹⁸ *Convention of n. 135, promulgated by Decree No. 131, of May 22, 1991, article 5*: "Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives". Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280 Accessed on: 07/27/2018

¹⁹ "It can be seen that the attributions conferred on employees' representatives were not accompanied by the proper rights to the effective exercise of their activities, as well as to remove this figure from the union entities, which is in complete disagreement with Convention n. 135 of the ILO". *Technical Note No. 5 of April 19, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 07/27/2018, p. 8.

²⁰ From the reading of the proposal presented in PLC 38/2017, it can be noted that neither the lowest degree of representation and participation of workers in the workplace is ensured. There are seven attributions to representatives in the workplace (sections I to VII of article 510-B), but there is no recognition of the means necessary for the adequate performance of these functions. *Technical Note No. 7 of May 9, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018.

²¹ "Finally, we point out some omissions in the proposal presented and that may generate legal uncertainty in the implementation of the institute. In the "caput" of art. 510-C, there is provision regarding the convening of the election, but it is not pointed out who will be responsible for doing so. The lack of clarity in this regard is a potential source of conflict between company, union and workers. In paragraph 1, there is reference to the formation of an electoral commission to organize and monitor the electoral process, but without

It is also worth noting the above understanding leads to the conclusion that Labor Reform should serve to rectify the legal absences to prevent anti-union practices.²²

Technical Note no. 7 reopens the need for a proposal that would lead to the extinction of the monopoly of union representation, a rule that is in disagreement with the ILO Conventions ratified by Brazil, especially ILO Convention n. 87. Although the importance of a project that could extinct this monopoly, the Labor Reform did not observed or modified this topic. There were no justification for this maintenance.

The note above further states that there has been a failure to comply with Article 8 (1) of Convention 87 of the ILO²³ stating: “to recommend that the Labor Court should not analyze the content of collective instruments is to dismiss the right of access to the jurisdiction.”²⁴ In other words, everyone must respect the law.

iii) Concerning the reasonable limitation of working hours

The technical notes consider the permissibility of individual agreement for compensation of hours brought by the Reform as a breach of Article 4 of the Universal Declaration of Human Rights,²⁵ which provides a reasonable limitation of working hours (also in accordance with Article 7 (d) of the International Covenant on Economic, Social and Cultural Rights, 1966).

indication of who will form it. Despite the fact that the company or union's interference in this paragraph is not mentioned in this paragraph, the lack of clarity about the responsibility in the formation of the electoral commission also tends to generate conflicts between company, union and workers. Also, there is no mention of the way in which there will be coexistence between workers 'representatives in the workplace and trade union representatives, which may generate disputes detrimental to the protection of workers' interests, in addition to violating Convention n. 135, ratified by the Brazil.” *Technical Note No. 7 of May 9, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018.

²² “In this regard, it is important to remember that the Labor Public Prosecutors, as well as several union entities, pointed out the problems arising from the practice of anti-union acts in the country, as well as the need to take legislative changes to curb these behaviors. However, as seen from reading the report, no word was taken into account.” *Technical Note No. 7 of May 9, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018.

²³ *ILO Convention no. 87*, enacted – Article 8.1: “In exercising the rights conferred on them by this Convention, workers, employers and their respective organizations are obliged, as well as other persons or organized collectivities, to respect legality”. Available at: https://portal.mpt.mp.br/wps/wcm/connect/porta1_mpt/86d323ba-a2c8-4ad5-ac4a-bf75a43c54c5/Convencao_87_OIT_Sindicalismo.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_395C1B00K89D40AM2L613R2000-86d323ba-a2c8-4ad5-ac4a-bf75a43c54c5-kQPNdQ. Accessed on: 06/27/2018.

²⁴ *Technical Note No. 2 of January 23, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 07/27/2018, p. 14.

²⁵ “When art. 7th, XIII, of the Constitution, admits day work compensation stipulated by a collective bargaining, makes it as an exception, which automatically removes the regime of overtime, provided for in subsection XVI of the same device, only applicable to the normal eight hours. This overlap of extrapolation working hours schemes allowed by the Labor Reform Project corresponds, in practice, to the establishment of unlimited working hours, in violation of right under Article XXIV of the Universal Declaration of Human Rights of 1948”. *Technical Note No. 8 of June 26, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Access in: 27/06/2018.

Also, the prevalence of negotiated terms over the legislation, including the issue of working hours, with the express provision that “rules on working hours and intervals are not considered health, hygiene and safety norms “ and therefore can be negotiated, violates the terms of ILO Convention 155,²⁶ which sets forth the respect for the physical and mental capabilities of employees.

iv) As for the need of public consultations on Legislative Changes

The Technical Notes n.5²⁷ and n. 6 issued by the Labor Public Prosecutor appoint the disrespect to the legislative procedure known as “public consultations” in the approval of the Labor Reform confirming a direct breach to the ILO Convention 144 ratified by Brazil.²⁸

Technical Note no. 7 also addresses the hastiness in the debates of this Reform, preventing effective popular participation²⁹ and the prevalence of demands of the employers sector in the following terms:

Promote a comprehensive reform of labor legislation, built and continually altered for more than 70 years without allowing complete understanding and popular participation, implies a democratic deficit that compromises the legitimacy of the new legislation, in many points clearly detrimental to workers. In addition, it is important to

²⁶ Article 5 (b) of ILO Convention 155 promulgated by Legislative Decree No. 2, 1992: “The policy referred to in Article 4 of this Convention shall take account of the following main spheres of action in so far as they affect occupational safety and health and the working environment: (...) (b) relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment, working time, organisation of work and work processes to the physical and mental capacities of the workers;” Available at: http://www.trtsp.jus.br/geral/tribunal2/LEGIS/CLT/OIT/OIT_155.html. Access in: 06/27/2018. (free translation)

“The norms violate the fundamental right to” the reduction of risks inherent in work, through health, hygiene and safety norms “(CF / 1988, article 7, XXII), taking into account the the influence that the working day and the intervals exert on the time of exposure of the worker to the risks inherent in the working environment. This influence is regulated on Article 5 of ILO Convention 155, which describes the health and safety of workers, ratified by Brazil in May 1993”. *Technical Note no. 8 of June 26, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Access: 27/06/2018 (free translation).

²⁷ “It is relevant for the regulatory laws of the market to be the result of wide social dialogue, carried out in a concrete manner, and not merely formal”. *Technical note no. 5 of April 19, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018 (free translation).

²⁸ *ILO Convention 144* promulgated by Decree No. 2,518 of 12 March 1998 describing tripartite consultation on international labor norms. Available at: http://www.trtsp.jus.br/geral/tribunal2/LEGIS/CLT/OIT/OIT_144.html. Accessed on: 07/07/2018.

²⁹ “Naturally, the legitimacy of such a reform is linked to a wide prior debate with society and especially with the categories affected, which was not the case in the Chamber of Deputies, given that the proposal dealt with unusual celerity, not allowing the population to even understand all the repercussions that will be generated in labor relations. The proposal currently underway in the Senate has at no time been debated, whether in parliament or with society. The vast majority of the proposals, presented only in the Substitute, were presented as a surprise”. *Technical Note No. 7 of May 9, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018 (free translation).

note that, notwithstanding the public hearings held, both in the Chamber of Deputies and in the States of the Federation, it is clear that the numerous made by a significant portion of the social actors in the world of work were not taken into account at all, given that in the current text of PLC 38/2017, there are no consensus or possible points of approximation expressed by participants in these events. **However, only new proposals have been incorporated that only advance the demands of a sector of the labor relation – in this case, the employers,** as demonstrated in a report published by “The Intercept”³⁰ (our emphasis)

It also describes the non-observance of Conventions 98 (collective bargaining), 151 (labor relations in public administration) and 154 (encouragement of collective bargaining),³¹ which brings serious risk of negotiating beyond the provisions of law regarding the protection of the fundamental rights of the worker.³² This could even be a reason to Brazil be brought before the ILO Committee on the Application of Norms and the Committee on Freedom of Association.

v) As for the conditions analogous to slavery

Technical Note no. 5 points out violation of the Protocol to Convention 29 as corporate accountability, relying on Article 4, “j” which “*provides that companies must take effective measures to identify, prevent and mitigate the existence of slave labor in their supply chains*”.³³ Accordingly, Technical Note no. 8 also demonstrates that unlimited outsourcing will lead the labor relations and the new conditions

³⁰ *Technical Note No. 7* of May 9, 2017, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018.

³¹ “According to the report, ‘the Committee recalls that the general objective of Conventions Nos. 98, 151 and 154 is to promote collective bargaining under the prospect of more favorable working conditions than those established by law’, as well as ‘the Committee emphasizes that the definition of collective bargaining as a process that seeks to improve the protection of employees guaranteed by law was recognized in the preparatory work for Convention No. 154. As a consequence of the negotiated prevalence on legislated, it states that, from a practical point of view, the Committee considers that the introduction of measures to reduce legal minimum wages through collective bargaining has the effect of excluding collective bargaining and may weaken its legitimacy in the long term.’ Finally, the report points out that measures of this nature ‘would be contrary to the objective of promoting free and voluntary collective bargaining under the terms of the Convention’.” *Technical note No. 5 of April 19, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 07/27/2018, p. 7. (free translation).

³² “(...) the Committee recalls that the general objective of Conventions Nos 98, 151 and 154 is to promote collective bargaining with a view to agreeing on terms and conditions of employment that are more favourable than those already established by law”. INTERNATIONAL LABOUR ORGANIZATION. Application of international labour standards 2017 (I): Report of the committee of experts on the application of conventions and recommendations. Geneva: International labour office, 2017, p. 65:

³³ *Technical Note No. 5 of April 19, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 07/27/2018, p. 18.

imposed by the Reform (such as intermittent labor) to condition analogous to that of slaves.³⁴

vi) Concerning the risks inherent in the work environment

Technical Note no. 6 addresses the issue of occupational safety, health and environment.³⁵ It stress that Brazil is signatory of several conventions on international level that protect rights that the Labor Reform made precarious. Specifically on this subject, ILO Convention 155 provides in Article 4³⁶:

Article 4 – 1. Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. – **2. The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.** (our emphasis)

5 The violations to the ratified International Conventions and the application by the Courts

Conventionality control can be defined as “the analysis of the compatibility of internal norms with the norms of international human rights treaties ratified by Brazil”.³⁷

This is not a new mechanism, as it has already been discussed over the last decades. In this sense, it is worth mentioning the history of the Conventionality Control, supported in Brazil in the words of the exponent Prof. Dr. André de Carvalho Ramos:

³⁴ *Technical Note no. 8 of June 26, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Access: 27/06 /2018.

³⁵ “At the international level, minimum guarantees of Labor Law, especially labor health and safety norms, are increasingly identified with the theory of human rights, which should be understood as a range of rights necessary to enshrine the dignity of the human person. There is a very high affinity between human rights and the right to health and safety at work. This is because the old idea that human rights was only civil and political rights was abandoned. In the current conception, human rights also cover social, cultural, economic and solidarity rights.” *Technical Note no. 6 of May 4 of 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018.

³⁶ *ILO Convention 155*. Available at: http://www.trtsp.jus.br/geral/tribunal2/LEGIS/CLT/OIT/OIT_155.html. Accessed on: 06/15/2018 (translation dispoñible at: https://www.ilo.org/dyn/normlex/en/f?p=normlexpub:12100:0::no::p12100_instrument_id:312300.)

³⁷ RAMOS, André de Carvalho. *SUPREMO TRIBUNAL FEDERAL BRASILEIRO E O CONTROLE DE CONVENCIONALIDADE: levando a sério os tratados de Direitos Humanos*. In: Revista da Faculdade de Direito da Universidade de São Paulo, 2009, v. 104, p. 245. (free translation).

Ten years ago, in my doctoral dissertation deposited in 1999, I was one of the first Brazilian authors to defend the existence of a “conventionality control”, in which the compatibility of an internal norm with international human rights law would be analyzed. At the time, I was one of the first to defend the possibility even of constitutional norms in violation of international norms of Human Rights. In my words, “the conventionality control only examines whether the international norm has been violated by the very application of the constitutional norm.” In 2001, in a book on the jurisprudence of the Inter-American Court of Human Rights (the first book in Portuguese comparing the jurisprudence of Human Rights of the Court of San José and the Brazilian positions), I also argued that it was possible to control conventionality in the abstract, according to the internal norms, even without any concrete application, with the American Convention on Human Rights. (...) After the historic decision of Extraordinary Appeal no. 466.343 above, it is possible to retake these pioneering considerations for the following situation. From the constitutional status of international human rights treaties to treaties approved by the special rite, we have a “constitutionality block” composed of the norms of the Constitution and the norms of international human rights treaties. In turn, human rights treaties approved prior to Amendment No. 45 would be endowed with the attribute of supralegality. (Free translation)³⁸

When considering the conventionality control and the changes in the Brazilian Labor Reform, it is necessary to look back to the fact that labor law was created based on the principle of employee protection, that is, always seeking to protect the most fragile part of this relationship.

In this sense, in view of the principle of employee protection, it is possible to verify a range of minimum rights enshrined both by the domestic legal system and by the international legal order, through ILO International Conventions and other international norms.

And even a brief review of the international diplomas mentioned by the technical notes referred above as violated by the Labor Reform confirms the purpose of protecting the employees: guarantee of minimum remuneration, preservation of dignity, freedom, equality, right to rest, health and security at work, right to union representation, among others.

The focal point of this relationship is the balance between the parts that needs to be preserved. In this sense, Dray understands that “Certainly the degree and intensity in which this protection occurs may vary. The general meaning of Labor

³⁸ RAMOS, André de Carvalho. Supremo Tribunal Federal Brasileiro e o Controle de Convencionalidade: levando a sério os tratados de Direitos Humanos. *Revista da Faculdade de Direito da Universidade de São Paulo*, 2009, v. 104, p. 258.

Law, however, remains and it is based on the aforementioned protection of the weaker contractor”.³⁹

In this respect, the technical notes have pointed out that the Labor Reform is favoring only one side of the employment relationship and that this side would **not** be the weakest part, but rather the employers’ sector.⁴⁰ This is a clear orientation of all the modifications of the Labor Reform, which in itself would already causes serious damage the core of the existence of Labor Law⁴¹ and the rules of international law ratified by Brazil; enabling aforementioned Conventionality Control.

This control can even be carried out diffusely,⁴² for instance, in the course of a concrete judicial lawsuit.

Just as a clarification because it is not the main point of this paper, it is worth mentioning that ANAMATRA,⁴³ in the formation of plenary theses at its Annual Congress, also addressed the theme of conventionality control⁴⁴ for the Labor Reform in several points.

³⁹ “In this sense, everything is easier to understand, as regards the evolution of Labor Law: the changes made in Labor Law should, in short, have the scope to be updated, but not the role of replacing them; the changes made in the labor rules may act on certain concrete solutions, but they should not change the spirit and meaning of Labor Law, expressed in its basic idea, that is, in the principle of employee protection.” DRAY, Guilherme. *Direitos fundamentais e retrocesso social: o sentido do direito do trabalho, a experiencia portuguesa e o caso brasileiro*. In: Revista do TST, São Paulo, Vol. 83, n. 3, Jul- Sep 2017, p. 85 and p. 88. (free translation).

⁴⁰ *Technical note No. 7 of May 9, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 07/27/2018, p. 18.

⁴¹ “The Intercept Brazil examined the 850 amendments tabled by 82 deputies during the discussion of the Project in the special commission on Labor Reform. 292 (34.3%) of these proposals were fully written on computers of representatives of the National Transportation Confederation (CNT), the National Confederation of Financial Institutions (CNF), the National Confederation of Industry (CNI) and National Association of Freight Transport and Logistics (NTC & Logistics)”. Disponível at: <https://theintercept.com/2017/04/26/lobistas-de-bancos-industrias-and-transportes-who-are-by-for-the-feminations-of-reform-worker/>. Accessed on: 06/28/2018.

⁴² “Regarding the diffuse mode of conventionality control, it must be carried out in the same way as the diffuse constitutionality control, which is considered to be” in the course of a concrete judicial action, and as an incident of it, by any court or tribunal. “Likewise, it is possible to conceptualize the conventionality control in its diffuse mode as the control of the laws and normative acts of a given legal order, in the incidental scope of a certain judicial demand, carried out and applied by any Judge or Court, having as a parameter the international agreements on human rights ratified in Brazil and in force in Brazil, producing inter partes effects”. FILHO, Rodolfo Pamplona. ROCHA, Matheus Lins. *O Trabalho como um direito humano fundamental e a possibilidade da aplicação do controle de convencionalidade à Reforma Trabalhista*. In: Revista dos tribunais, 2018, v. 107, n. 990, p. 129-158. (free translation).

⁴³ ANAMATRA is the National Association of Magistrates of Labor Justice. Available at: <https://www.anamatra.org.br/conamat/teses-plenaria-final>. Accessed on: 7/27/2018.

⁴⁴ As an example, “Labor reform. Law 13,467 / 2017. Vertical incompatibility with ILO conventions. Absence of tripartite consultation. Offense to the ILO Conventions 122, 144 and 154, as well as to entries 1075, 1081 and 1082 of the freedom committee of the board of the ILO. Absence of prior consultation with workers’ organizations. Conventionality Control in the labor reform. Possibility. Legal nature of international labor standards. Supralegality. Even if the unconventionality of the whole labor reform is not acknowledged, it is mandatory the Conventionality Control of the specific articles modified. The Federal Supreme Court has recognized the supralegal character of international conventions, and ordinary laws must be in line with international norms, especially with regard to human rights” In: <https://www.anamatra.org.br/conamat/thesis-plenary-final>. Accessed on: 06/04/2018.

Hence, it is already possible to find in the Brazilian labor courts understandings that take into account the application of the Conventionality Control to decide that the harmful rules brought by the Labor Reform should not be applied.

In a brief research, made by sampling, on the website of the TST – LexML – by typing “conventionality control” and filter into the law-making, it is possible to find in the period after the Labor Reform came into force (i.e., 8 months) – 19 cases. In this respect, it is worth noting that the topic of Conventional Control – so little applied before the Labor Reform (with only 21 decisions found by applying the same criteria of search above mentioned from 2013 until 2017, ie, five years or 60 months) – has truly increased. In fact, one can conclude that is beginning to be more frequent, also considering it as a mean of preventing the collapse of civilization before this unmeasured flexibilization of workers’ rights.⁴⁵

Despite this increase in Brazilian Labor Courts, enforcement is difficult and may even be considered incipient compared to the number of international treaties and conventions violated. It is worth mentioning that this is not only a difficulty faced in Brazil, but also in many countries, especially when it comes to collective labor law⁴⁶

6 Conclusion

This paper presented the main changes occurred in Labor Law in Brazil as a result of Law 13467/2017, also situating the moment of labor relations in the world, generally affected by a relaxation of rights, systematic violations and substitution of manpower (labor) by technological advances due to scientific advances.

The main International Labor Conventions – ILO ratified by Brazil, which were pointed out as violated by the technical notes of the Labor Public Prosecutors regarding the proposals for the Labor Reform were also discussed in details.

It was noted that Labor Law establishes a minimum level of rights. Its most important foundation is parametrized by the principle of employee protection as a way of equalizing the labor relationships, which in itself is already an unequal relationship in favor of the employers. Hence, the paper made possible to relate the breaches on ILO International Conventions and the disrespect to the “*basic idea*” of this protective right.

⁴⁵ This search was made on the LEXML website – federal government. Available at: <http://www.lexml.gov.br/busca/search?keyword=control+of+conventionality>. Accessed on 07/20/2018.

⁴⁶ “There is no simple way to measure the impact of international labour law on national law and practice. In the first place, it is more difficult to translate Conventions concerning collective labour law than individual law into national practice for, as von Potobsky points out, “collective labour law directly affects the balance of power between political, social and economic forces.””. *Introduction: Labour Rights, Human Rights*, 137 Int’l Lab. Rev. 127 (1998), p. 132.

It also pointed out the relevant role of the Judiciary in order to approximate the notion of Conventionality Control, once so little applied by Brazil's Labor Courts. In this sense, Conventionality Control is now increasingly present with the objective of avoiding social regression.

It is worth mentioning the analysis of what happened in Portugal with the relaxation of Labor Law according to Dray studies. It reveals the importance of the Portuguese Constitutional Court to ensure the principle of employee protection and labor law in its "basic idea" when ruling unconstitutional the harmful changes by the Labor Reform set forth in Portugal after the 2008 crisis.⁴⁷

It was not the purpose of this work to clarify the supralegality or constitutionality of the ratified conventions, since the author's understanding is the same as the one pacified by the Federal Supreme Court (STF), which is also the understanding adopted in the technical notes of the MPT.⁴⁸

It is important to clarify that the Labor Public Prosecutors could have improved their studies, given that some unconstitutional and breaches on International Conventions especially on the issue of access to justice and precedents (especially the Inter-American Court of Human Rights) were not addressed by the technical notes, although this topic be so current in other dialogues on this subject.⁴⁹

⁴⁷ DRAY, Guilherme. *Direitos fundamentais e retrocesso social: o sentido do direito do trabalho, a experiência portuguesa e o caso brasileiro*. In: Revista do TST, São Paulo, Vol. 83, n. 3, Jul- Sep 2017, p. 82-113.

⁴⁸ "As recognized by the STF, human rights norms incorporated into the country's legal system have the status of supralegality, pursuant to the provisions of §2 of art. 5 of the Constitution. In this sense, the judgment of the STF in ADI-MC 1.675-1 / DF, Minister Sepúlveda Pertence. Therefore, the ordinary legal norm, object of PLC 38/2017, must obey the rights provided for in international human rights treaties, under penalty of unconstitutionality" *Technical Note no. 8 of June 26, 2017*, of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 06/27/2018.

Another factor that supports the inapplicability of the Labor Legislation precept is the introduction into the internal legal system of ILO International Conventions Nos. 148 and 155, with a status of a materially constitutional norm or, at least, supralegal, as decided by the STF. The first establishes the need for constant updating of legislation on harmful working conditions and the second requires that "health risks arising from simultaneous exposure to various substances or agents" be taken into account. In this context, there is no longer room for the application of Article 193, §2, of the CLT. Appeal of a journal that is known and dismissed (TST, 7ª T. 1072-72.2011.5.02.0384. Rel. Cláudio Brandão. DEJT 10.03.2014).

⁴⁹ Document of Process no. 0011311-05.2016.5.03.0103 (RO), TRT of the Third Region, Publication date – 05/25/2018. HONORARY OF SUCCESS. ACCESS TO JUSTICE. Law No. 13,467 / 2017. REFORM WORKER. CONTROL OF CONVENTIONALITY.

1. The fundamental right to access to justice is guaranteed not only by the Constitution (Article 5, XXXV, of the Constitution) but also by the human rights conventions to which Brazil is a signatory, as in Article XVIII of the American Declaration of the Rights and Duties, 1948, and Article 8 (1) of the Pact of San José, Costa Rica, 1969.

2. These conventions have status of supralegality, according to STF (RE 466.343), and prevail over ordinary laws, such as Law 13467/17.

3. The Inter-American Court of Human Rights has ruled that legal rules that impede access to justice through the imposition of attorney fees and costs do not go through the Conventionality Control, as in the case of "Petroperú et al. "Peru – November 23, 2017 – and the case" Cantos vs. Argentina "– December 20, 2017 (In: CHAVES JUNIOR, José Eduardo Resende Access with risks to fundamenatis rights and bagatelization of work In: [//pepe-ponto-rede.blogspot.com.br/2017/12/acesso-com-risco-refundamental.html](http://pepe-ponto-rede.blogspot.com.br/2017/12/acesso-com-risco-refundamental.html))

Direito do Trabalho Internacional (Convenções da OIT) e a Reforma Trabalhista no Brasil, nos termos das notas técnicas do Ministério Público do Trabalho

Resumo: Esse artigo pretende analisar as possíveis afrontas às Convenções Internacionais ratificadas pelo Brasil no contexto da Organização Internacional do Trabalho (OIT), por meio das notas técnicas elaboradas pelo Ministério Público do Trabalho (MPT), considerando a aprovação da Lei 13.467/2017, também conhecida como Reforma Trabalhista. Com intenção de aprofundar essa análise, também serão analisados temas relacionados ao Direito do Trabalho como Direito Fundamental e também o controle de convencionalidade pelo Poder Judiciário.

Palavras-chave: Trabalho. Reforma. Direito. Internacional.

Bibliography

ALSTON, Philip. "Core Labour Standards" and the transformation of the international labour rights regime. In: EJIL, Vol. 15, n. 3, p. 457-521.

AMARAL JUNIOR, Alberto do. *Introdução ao Direito Internacional Público*, 1ª Ed, São Paulo: Atlas, 2008.

DRAY, Guilherme. *Direitos fundamentais e retrocesso social: o sentido do direito do trabalho, a experiência portuguesa e o caso brasileiro*. In: Revista do TST, São Paulo, Vol. 83, n. 3, Jul- Sep 2017, p. 82-113.

Introduction: *Labour Rights, Human Rights*, 137 Int'l Lab. Rev. 127 (1998).

INTERNATIONAL LABOUR ORGANIZATION. *World employment and social outlook*. Geneva: ILO, 2015.

INTERNATIONAL LABOUR ORGANIZATION. *Application of international labour standards 2017 (I): Report of the committee of experts on the application of conventions and recommendations*. Geneva: International labour office, 2017.

JUNIOR, Edson Beas Rodrigues. DARONCHO, Leomar. *Reforma trabalhista*. Article originally published on the website Conjur, June 23, 2018 and available at: <https://www.conjur.com.br/2018-jun-23/opinioao-reforma-trabalhista-normas-internacionais> . Accessed on: 7/27/2018

RAMOS, André de Carvalho. *SUPREMO TRIBUNAL FEDERAL BRASILEIRO E O CONTROLE DE CONVENCIONALIDADE*: levando a sério os tratados de Direitos Humanos. In: Revista da Faculdade de Direito da Universidade de São Paulo, 2009, v. 104, p. 241 – 286.

FILHO, Rodolfo Pamplona. ROCHA, Matheus Lins. *O Trabalho como um direito humano fundamental e a possibilidade da aplicação do controle de convencionalidade à Reforma Trabalhista*. In: Revista dos tribunais, 2018, v. 107, n. 990, p. 129-158.

ILO CONVENTIONS

ILO Convention 26, ratified by Decree N° 41.721, 1957. Available at: http://www.trtsp.jus.br/geral/tribunal2/LEGIS/CLT/OIT/OIT_026.html. Accessed on: 07/27/2018

ILO Convention 87. Available at: https://portal.mpt.mp.br/wps/wcm/connect/portal_mpt/86d323ba-a2c8-4ad5-ac4a-bf75a43c54c5/Convencao_87_OIT_Sindicalismo.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_395C1B00K89D40AM

4. Provision granted to exclude the payment of attorneys' fees." Available at: <https://as1.trt3.jus.br/juris/exporta.htm?conversationId=4620>. Accessed on: 7/26/2018.

2L613R2000-86d323ba-a2c8-4ad5-ac4a-bf75a43c54c5-kQPNDq . Accessed on : 06/27/2018. (free translation)

ILO Convention 117, ratified by Decree N° 66.496, 04/27/1970. Available at: http://www.trtsp.jus.br/geral/tribunal2/LEGIS/CLT/OIT/OIT_117.html. Accessed on: 07/27/2018 (free translation)

ILO Convention 131, ratified by Decree N° 89.686, 1984. Available at: http://www.trtsp.jus.br/geral/tribunal2/LEGIS/CLT/OIT/OIT_131.html. Accessed on: 07/27/2018 (free translation)

ILO Convention 135, promulgated by Decree No. 131, of May 22, 1991. Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280
Accessed on: 07/27/2018 (free translation)

ILO Convention 144 promulgated by Decree No. 2,518 of March 12, 1998. Available at: http://www.trtsp.jus.br/geral/tribunal2/LEGIS/CLT/OIT/OIT_144.html . Accessed on: 07/07/2018.

ILO Convention 155 promulgated by Legislative Decree No. 2, 1992. Available at: http://www.trtsp.jus.br/geral/tribunal2/LEGIS/CLT/OIT/OIT_155.html . Access in: 06/27/2018. (free translation)

Others:

Constitution of the Federative Republic of Brazil 1988 – Available at: http://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11. Accessed on: 06/02/2018.

International Covenant on Economic, Social and Cultural Rights ratified by 07/06/1992. Available at: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0591.htm. Accessed on: 07/27/2018 (translation available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>)

San Salvador Protocol ratified by Decree N° 3.321, 12/30/1999. – Available at: http://www.planalto.gov.br/ccivil_03/decreto/d3321.htm. Accessed on: 07/27/2018.

Site LexMI: Federal Government. Available at: <http://www.lexml.gov.br/busca/search?keyword=control+of+conventionality>. Accessed on: 07/20/2018.

Technical Notes No. 1 until No. 8 of the Secretariat of Institutional Relations of the Labor Public Prosecutors. Available at: <http://portal.mpt.mp.br>. Accessed on: 7/27/2018

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