Outlines Of The Recent Brazilian Legal Changes In The Field Of Labor And Industrial Relations

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Abstract

In this article one drafts some tendential outlines of the recent Brazilian legal changes in the field of labor and industrial relations law. Due to a remarkably state-driven provisions of legal protection, that goes established since the early nineteen thirties populist Vargas dictatorship, the Brazilian labor law have suffered-and to a certain extent deserved-increasing criticism about its rigidity, the central role played by labor courts and litigation to assure its enforcement, at the same time revealing visible incapacity to address effective protection towards new and non-standard forms of labor arrangements. Holding the purpose of improving flexibility to the labor rights, inspired by free-market regulatory beliefs, and according to explicit demands and policies advocated by the economic elites, the recent legal changes come in a moment when the economy shows its worst and most persistent crisis since 1929, combined with high rates of unemployment and increasing precariousness in the labor market. This article asserts that, in order to draft reliable scenarios about the extent and the depth of these recent legal changes, considering the current instability of the economic and political environment, one shall consider, furthermore, the prevailing role played by the upper courts; particularly by the Brazilian Supreme Court, on its duty to eventually and definitely state the possible inconsistencies of the legal changes, in respect to constitutional standards.

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1. Introduction

In this article one aims at drafting some tendential outlines of the Brazilian radical, depth and width legal changes in the field of labor and industrial relations law. It would be no exaggeration to consider these changes as the most important since it was passed the 1943 Consolidation of Labor Rights ACT-CLT.

Due to a remarkably state-driven repertoire of legal protection, that goes established since the early nineteen thirties populist Vargas dictatorship, the Brazilian labor law have suffered-and to a certain extent deserved-increasing criticism about its rigidity, the central role played by labor courts and litigation to assure its enforcement, at the same time revealing visible incapacity to address effective protection towards new and non-standard forms of labor arrangements.

Despite the criticism regarding the former old-fashion frame of legal provisions, that could be even shared by progressive legal observers, it should be highlighted that the recent changes have been held with the explicit purpose of improving flexibility to the labor rights, inspired by free-market regulatory beliefs, and according to well-known demands and policies advocated by the economic elites.

Furthermore, it seems to deserve attention the predictable social outcomes derived from these recent legal changes, particularly considering that they were passed precisely at the moment when the economy shows its worst and most persistent crisis since 1929, combined with its high rates of unemployment and increasing precariousness in the labor market.

2. The Authoritarian Foundations of the Brazilian Social Inequalities

Like it happened to other Latin American countries, such as Argentina, Mexico, and Peru, the Brazilian economy started to be industrialized by the first decades of the 20th. Century, under the twilight of the European colonial rule and the emerging signs of exhaustion of the plantation economic cycle.

According to what could be seen as a certain pattern, followed for these Latin American countries, the two initial decades of the 20th. Century had been characterized by 1) the overexploitation of migrant labor force (state policies devoted to import migrants to fulfill the scarcity in labor force caused by the abolition of slavery); 2) the denial of labor rights, (including for nationals), specially of the ones addressing limits to the employer's managing power; and, consistent with these two cited characteristics; 3) a hugely conflictual industrial relations environment, in which 3.1) the workers were organized and led under the anarchist doctrines, that had been brought by European migrants, and 3. 2.) the employers characterized by sharing authoritarian beliefs, mostly exhibiting repressive behavior, and aristocratic political practices.

This particular social formation, from Brazil during the three first decades of the 20th. century might be precisely classified, using the well-known Max Weber's typology, as a patrimonial-domination type of society.

One emphasizes the analytical importance of this period, not because of any historical curiosity, but because one assumes that, for a deeper understanding of the Brazilian nowadays institutional awkwardness, we must consider its patrimonial legacy. Some of its political, cultural, and institutional arrangements remain clearly fixing limits and pushing old misfortunes to the core of the 21st. Century political agenda (misfortunes such as social exclusion, deep economic inequality, low educational rates, underenforcement

for human rights, especially regarding poor, black and migrant people).

3. The Remaining Centrality of the State Corporatism in shaping the Brazilian Labor and Industrial Relations System

The populist dictator Getúlio Vargas has been considered the founding father of the urban and industrialized Brazil: he was the one responsible for designing the large majority of the most important and still existing Brazilian institutions.

Regarding labor issues, it should be underlined the creation, by Vargas, of 1) the workers (and "employers") official unions (as an alternative to the precedent anarchist unionism); 2) the passing of the Consolidation of Labor Rights Act – CLT; and 3) of no less importance, the creation of the Labor Court, strictly devoted to labor issues.

Yes, it should be said: creation! Under the Vargas industrial and labor relations systems: 1) the unions were supposed to be created by or at least remain authorized and controlled by the state; 2) most of the labor rights should be legally prescribed, as a requirement for its enforcement; and 3) the labor disputes, including collective conflicts and strikes (considered by the 1937 Constitution as an "antisocial misconduct"), were mandatorily addressed to courts.

"Nothing before, nothing above and nothing beyond the state"; this was the state corporatist motto, that summarized the ethos of Vargas institutional architecture.

Despite the particularities of each national experience, one should not lose sight that the statist and authoritarian Brazilian political regime, under Vargas, was not at all an isolated one. By the erosion of many individualist democracies, particularly between the nineteen twenties and nineteen forties, the state corporatist doctrines had strongly influenced many western political

regimes, as one can exemplify by the cases of Italy, Spain, Portugal, Argentina, and Peru.

The notion of state corporatism seems to be a key-concept to a deeper understanding of these political regimes, the political atmosphere in which they were conceived, and what do they have in common in terms of needs and goals. The concept was originally proposed by Philippe Schimitter, in his seminal book published during the nineteen seventies, titled "Still the Century of Corporatism?"; the title paraphrases the most important doctrinal book devoted to promoting the corporatism as a political trend to the modern age: "Le Siècle du Corporatisme. Doctrine du corporatisme intégral et pur", by the Romanian author named Mihaïl Manoïlesco; this one published during the nineteen thirties.

To summarize its founding principles: state corporatism is a political doctrine, that advocates to shifting of the central role of the parliament, as the Republican "house of sovereignty" devoted do mediate the political competition, towards the attributes of professional "social" chambers. (in Italy the Central Chamber had been even created; though in the Brazilian experience it was only prescribed by the 1937 authoritarian Constitution).

To the same extent and according to the same reasons, state corporatism supports to move, from political parties towards workers unions and employer associations, the central role of providing identity, and organizing the ethos and the action of the political actors. By means of avoiding the "decadent influence of conflictual ideologies" (as if corporatism was not itself a roughly ideologized doctrine), that erodes the "few possible virtues of Democracy" dividing compatriots through different thoughts and beliefs, the corporatism postulated the "functional and professional" affinities as the pillar of the associative bond.

Assuming the risk of being too much simplistic, one could assert that the

core feelings of the corporatist doctrine consist of mistrusting the capacity of the political parties, ideologies and of the autonomous associations, as well as of all the institutions that characterize the "declining" liberal democracies (Parliament, political rotation in the Office, freedom of association), to support efficiently a "peaceful" and collaborative society, in which labors and employers could both organically cooperate and benefits from the welfare. According to the prevailing political science literature, devoted to examining authoritarian regimes, the state corporatism can be considered one of the most efficient key strategies for leading the conservative modernization in semi-peripheral countries: the so-called "modernization from above", that occurred during the first haft of the 20th. Century, that in some cases remaining until the late nineteen seventies (Spain, Portugal, Argentina, Brazil, etc.).

This historical and political landscape can also easily explain why the Brazilian union system is organized mainly by the branch of activities, instead of by enterprise that characterizes the Japanese and north-American unionism. The same ideological standpoint supported the compulsory existence of no more than one union as the formal representative of each worker an employer: the rule of "union exclusiveness-unicidade sindical" (untranslatable), which remains explicitly prescribed in all the Brazilian Constitutions in a row, since 1937.

Vargas ruled Brazil from 1930 to 1945. Once defeated by a military coup, Vargas returned by-election for one more, though unfinished, term, which ended with his suicide, in August 1954. In the farewell letter he stated, in order to "rescue his people from oppression", he decided to "leave the life to enter history", and one can admit: at large he's statement means a perfect metaphor for Brazilian next seventy years of history: tragic political either-or choices, institutional instabilities, fiscal irresponsibility and economic

awkwardness.

4. Guidelines of the recent Legal Changes

The Brazilian industrial and labor relations currently face great instabilities and still not reasonably established legal changes, both on the economic and on the political field. In addition to that, one highlight the strong feeling that, in order to draft reliable scenarios that go through the extent and the depth of these recent legal changes, one shall consider the prevailing role played by the upper courts, particularly by the Brazilian Supreme Court, on its duty to state eventually and conclusively its possible inconsistencies in respect to constitutional standards.

Despite the huge uncertainties of the nowadays period of changes, one can identify at least three strong trends in the changing scenario, that shall prevail to a certain extent: 1.1.) the increasing flexibility in balancing legal and even collective agreement prescriptions; 1.2.) the strengthening in the role of collective bargaining, now enhanced to become the main regulatory tool for the labor relations; and 1.3.) a pervasive diminishment in the role and in the importance of labor courts, in fixing labor standards, patterns for labor liability, and even prescribing guidelines for fair labor practices.

One can summarize these changes as a movement from a state/legal/homogeneous pattern of labor protection, to a market/autonomous/diversified one.

4.1. Brief Description of the Legal Changes

During 2017, it was passed two ambitious and radical Labor Reform Acts 4.1.1.) the Subcontracting workers Act – 13.429, March, 31st. 2017, (SWA), which enlarged and widespread the field of legally permitted outsourcing services (hitherto confined to secondary supporting activities); and 4.1.2.) the

Labor Relations Reform Act – 13.467, July, 13th., 2017-(LRRA), promoting transitions towards a flexible and fragmented labor relation system, by means of creating two categories of workers according to its salary 1) the workers for whom the legally stated provisions should keep enforceable ("protected workers") and 2) the workers, whose wage goes upper to US$ 3. 300 monthly, with higher education, who turned to be allowed to set, individually and by means of individual labor contract clauses, the large majority of their labor provisions, including to settle the arbitration clause, though always observing the rights clearly stated by constitutional provisions.

The Labor Relations Reform Act also introduced, in the Brazilian industrial relation system, the legal acceptance of the concessive collective bargaining, which comprehend the possibility to bargain contrary to legal provisions, including the above-mentioned workers of lower wage or without higher education.

Just to give one idea of the ambition of these two legal changes, one can observe that only the Labor Relations Reform Act brought more than one hundred dispositions changing the old Vargas Consolidation of Labor Rights.

Now concerning the old-fashion union organization system, unfortunately, say the ones that support the principle of freedom of association, there have been passed few and shy legal changes over the state corporatist legacy. The state corporatist framework that characterizes Brazilian workers union system since Vargas remained mostly untouched. Apart from suppressing one of the hitherto remaining compulsory tax funding, imposed to every formal worker or employer in order to support the state recognized workers and employers (sic!) "unions", nothing of remarkable had been done in this respect.

4.2. Some Preliminary Comments

It is far from the sight of the ruling political elite any substantial intent to move our workers union system towards the International Labor Organization-ILO pattern of freedom of association, as a fundamental human right. That is, the corporatist system of union organization remained substantially apart from the political agenda along the current legal changes period, despite the fact that it deeply challenges the ILO principle of freedom of association. Let us remind the fact that the principle of freedom of association, established by the Versailles Treaty a hundred years ago, has been most recently reinforced by 1998 ILO Declaration. The ILO Declaration on Fundamental Principles and Rights at Work prescribes that respecting the freedom of association principle, among three other fundamental ones, is a duty enforceable to all ILO country-members, even if the country-member, likewise Brazil, has not yet ratified the correspondent 87 ILO Convention.

The 2017 Labor Relations Reform Act innovatively transferred, from the legal regulatory spheres to the field of collective bargaining, the power of derogating labor provisions as fixed by law, even though if it's against worker's interest. This particular legal change explicitly and intentionally overwhelms one of the core paradigmatic interpretative devices, hitherto ruling Brazilian legal doctrine: the well-known "principle of prevailing the most favorable provision to the worker", in case existing conflicts between provisions.

Notwithstanding formally passed, the approval of the Labor Reform Acts launched a long-term season of doctrinal and judicial debate, showing clear propensity to end in the Supreme Court, because of being, at large, matters directly linked with explicit constitutional prescriptions.

4.3. Innovating in the field of conflict resolution: beyond the framework of labor courts

Talking about the dispute resolution on the field of labor relations, apart from the mentioned decreasing of the courts normative and political role, the Labor Relations Reform Act innovatively permitted the use of arbitrage for settling individual disputes. This surprising legal innovation has been considered both, challenging and risky, depending on how efficiently it will be submitted to public external control. By public and external control, one means not necessarily state control, particularly nor court-control: one has in mind the need to take under external control, at least 1) the arbitration, as a fair, balanced and equitable procedure; 2) the arbitrator, as a technically prepared and a morally reliable decider; and 3) to what extent the arbitral decision might remain judicially revisable; which is at large a counterproductive and therefore unintended possibility.

5. Some preliminary conclusions considering the economic and political environment

Some additional and important remarks have to be made, regarding the economic and the political environment in which the 2017 Reform Acts had been passed:

5.1) Some notes about the economic environment

From the economic standpoint, it looks like it couldn't have been chosen a more inconvenient and inappropriate moment to start such extensive and sensitive agenda of changes. Since 2014, the country has been facing the deepest and the most persistent economic crises in the Brazilian history.

The recession established in 2015 is extremely aggressive: 2015 shows the decrease of the negative -3.5% out of the GNP; 2016 shows other negative

-3.5% out of GNP; and 2017, still a negative one -0.2% out of the GNP during the 1st. trimester. Considering an economically active population of about 88.9 million workers, the unemployment rate jumped, from 6.6 million unemployed workers, in February 2014, up to 14.2 million in the same period of 2017; which means a current rate exhibiting something about 13, 7% of the total economically active population. Recent data show that the slow resumption of the job offers growth exhibits an additional perversity: new positions have become dominantly at a cheaper wage and increasingly by means of precarious/informal jobs.

5.2. A Divided Country approaches Presidential Elections

Now focusing on the political dimension of the moment, it is important to observe that the economic crises, derived mainly from the fast increasing of the public expenditures, was due to the irresponsible fiscal management drove by the same Government shared by both: the current Sir in the Office and the former President, who left the Presidency by means of a deeply traumatic impeachment process. That is, the present economic crises exhibit a clear political genesis that tends to jeopardize the legitimacy of political representation itself.

One considers, furthermore, that the instability and the uncertainties of the Brazilian political environment are far from sending signs of exhaustion: in the best predictable scenario, they will persist at least until the next presidential election, to be held at the end of 2018.

The existence of a deep economic crisis, plus the low rate of political and moral approval for the ongoing Brazilian government, are likely to undermine the legitimacy of the reformist effort, even though part of its changes could be welcome by some union leader and labor scholars, in a different environment.

Again, uncertainties lead this current period of crises and changes, but

crises and changes could become fruitful as an opportunity for renewal the Brazilians commitment to political morality and fiscal responsibility, both required as preconditions for social welfare and labor protection.[2]

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Bibliography

1) For the references regarding the Brazilian state corporatism heritage, you can see, among an extensive literature, the ones referee in the bibliography in: FREITAS JÚNIOR, Antonio Rodrigues de. *Sindicato: domesticação e ruptura: um estudo da representação sindical no direito Brasileiro*. 1. ed. São Paulo: Departamento Editorial da OAB/SP, 1989. v. 1. 197 pp., mainly the well-known works by Philippe C. Schimitter.

2) For the data related to Brazilian current rate of unemployment and economic recession, it had been used the ones officially delivered by BRASIL. FUNDAÇÃO INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA-FIBGE as well as the ones available in BRASIL-GOVERNO FEDERAL-MINISTÉRIO DO TRABALHO. For some of the most reliable and balanced comments about the fiscal crisis and its role triggering the recession and the unemployment, which is out of the core subject of this article, can additionally be found in VALOR ECONÔMICO, particularly in the issues from 2016.

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3) There have being stated some lower-court-decisions that by no means seem to anticipate the upper court reaction to the new legal provisions and, for this reason, one didn't mention it yet in this version.