

## **ILO 158 Convention, the right to employment and the challenges to implementation in Brazil: contradictions and social tensions**

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This paper was written in the context of the online course on Global Workers Rights of the Global Labour University (GLU), a multi-campus course involving unionists and universities of three different continents and the ILO. This paper argues that despite constitutional provision and international legislation prohibiting arbitrary dismissal, it is an ongoing practice in Brazil, given the historical, economic and political make up of our society. First, the paper takes on how Brazil perpetuates a legacy of exclusion, in part due to its recent slavery history, and how such history relates to specific challenges faced in the country to re-ratify ILO's Convention 158 (denounced in 1996) and to implement article 7, I of the 1988 Brazilian Constitution. The latter protects workers from arbitrary dismissal or dismissal without fair cause. Second, after a historical overview (1930-1988) on how the Brazilian employment protection system was built, the current political and legal difficulties to make effective international and constitutional protections against arbitrary dismissal are analysed. Particularly, the investigation looks at barriers related to the ILO Convention 158 ratification and denunciation process and Court decisions on the issue, including recent interpretations from Brazilian Supreme Court Ministers. It is argued that a better understanding of the challenges that underpin the building of effective law and regulation facilitates the identification of the best strategies to introduce real obstacles to workers dismissal in Brazil.

### **ILO Convention 158, the right to employment and implementation problems in Brazil: contradictions and social tensions**

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Lining up ideas is one thing. Quite another is to toil over a country filled with people of flesh and blood and a thousand and one sufferings (Guimarães Rosa, *The Devil to Pay in the Backlands*).

#### **1. Introduction: *the Brazilian economic context***

On Sunday 30th March 2014, *Ilustríssima*, a supplement published with the newspaper *Folha de São Paulo*, printed an interesting piece by Samy Adghirni, *Veiled reality: what women can and can't do in Iran*. To sum it up, Iran's history has been marked by steps forward and steps back in both public and private life. It is

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one of the Islamic countries that are least hostile to their female inhabitants, who go to school and have access to the various spheres of professional and political life. And yet, they are subject to cultural, legal and financial discrimination.

The reality portrayed by the article had an impact. Immediately, it was compared with realities in Brazil, a country in which women, as long ago as 1932,<sup>2</sup> won the right to vote and to have their employment record books signed by the employer without needing their husbands' permission first, even though this was required under the 1916 Civil Code. But it also sparked deeper reflection on the difficulties encountered in limiting the right to dismiss and on the contradictions within Brazilian society where, despite the progress achieved by women, issues of gender and race continue to have a radical impact on the labour market<sup>3</sup>.

Hence the quotation chosen to head the present paper. The aim is to dialogue with one of the great Brazilian thinkers of the 1950s and try to reveal the enormous challenges which, even today, are associated with the process of building a more equal society - with labour protection standards that ensure effective, civilized outcomes and help put into practice the principles of human dignity and the social value of labour, as enshrined in the Brazilian Constitution of 1988. All this at a time when capitalism has been hegemonized by financial interests and is rebelling against the institutionalization of standard-setting provisions that protect employment, such as Convention 158 of the International Labour Organization (ILO), which is the main focus of the present paper.

The legacy inherited by Brazil is that of a slave-owning, patriarchal, single-crop society, organized as a primary commodity exporter. Its elites persistently purloined the human rights and citizenship of the vast majority,<sup>4</sup> and this was one of the great traumas caused by slavery.<sup>5</sup>

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<sup>2</sup> Brazil was the fourth country in the western hemisphere to grant women the vote. See BIAVASCHI, Magda Barros. *O Direito do Trabalho no Brasil – 1930-1932*. São Paulo: LTr, 2007.

<sup>3</sup> This paper was one of the references for the article on domestic workers' rights in Brazil: BIAVASCHI, Magda Barros. *Os direitos das trabalhadoras domésticas e as dificuldades e implementação no Brasil: contradições e tensões sociais*. Friedrich Ebert Stiftung, FES. Análise. São Paulo, dezembro de 2014.

<sup>4</sup> COSTA, Emília Viotti da. *Da monarquia à República*. 7. ed. São Paulo: Unesp, 1999.

<sup>5</sup> Cf. FREYRE, Gilberto. *Casa-grande & Senzala*. 25.ed. Rio de Janeiro: José Olympio, 1987.

To drive forward an economy based on the expansion of coffee-fuelled accumulation, the great monocultural producers used slaves. So Abolition in 1888 created new opportunities for migrant labour. Many former slaves stayed on the rural estates. Others roamed around, picking up work here and there. Others still ended up marginalized in the cities, sometimes developing very low-grade occupations. This consolidated the exploitation of cheap labour within a society whose whole fabric was profoundly unequal. Thus, the emergence of Brazilian capitalism was marked by social exclusion.

Abolition, though it came late, did rid the country of the disadvantages of slavery. But Blacks themselves were simply abandoned “to their own fate”.<sup>6</sup> Neither the elites nor the State bothered about them. Their concrete difficulties with integrating into society were put down to racial inferiority. These are traits inherited from Brazil’s time as a colony. By fire and sword, they were impressed upon the social, economic and political structures of this Brazil of “a thousand and one sufferings”.<sup>7</sup> In formal terms, the relationship between slave and master ultimately turned into one between “free” men, but the initial conditions of domination and subjection remained.<sup>8</sup>

Even today, traces of this legacy are still felt, whether in the lack of effective policies for democratizing access to the vital components of human dignity, such as land, income, housing, health and decent work; or in the difficulties currently being encountered in bringing domestic workers within the scope of the CLT<sup>9</sup>; or in the exploitation of labour under slavery-like conditions and the

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<sup>6</sup> COSTA, Emília Viotti da, *op cit.* See also BIAVASCHI, Magda Barros. O Direito do Trabalho no Brasil 1930-1932, *op. cit.*

<sup>7</sup> A quote from Guimarães Rosa, Grande Sertão: Veredas. (Translated in English under the Title *The Devil to Pay in the Backlands*. However, Guimarães Rosa quotations in the present paper are new translations from the Portuguese — translator’s note.

<sup>8</sup> KOJÈVE, Alexandre. *Introdução à leitura de Hegel*, pp. 157-187.

<sup>9</sup> CLT stands for *Consolidação das Leis do Trabalho* (Labour Law Consolidation). Dating back to the 1940s, the CLT is the main body of labour legislation in Brazil. People employed under the CLT, known as *celetistas*, are in formal employment relationship, marked by their possession of a Labour Law and Social Security Book (CTPS) which records their pay rates, employer, job description and entitlements. — translator’s note. Recently, a constitutional amendment that extended the rights guaranteed by labour laws to domestic workers was passed. The amendment still awaits further regulation by a bill. The bill has been questioned because it recognizes the status of employee under the CLT regime only when work lasts a minimum of three days. In addition, the bill allows for

obstacles being put in the way of implementing the recently approved constitutional amendment PEC 438/01, which authorizes the confiscation of land when labour is found being exploited under such conditions; or in the forms of prejudice and discrimination seen in various sections of society and politics, which crop up now and again as at living proof of O Rappa's refrain<sup>10</sup>: *The cheapest meat on the market/Is black meat*, an expression of the sadism and the masochism that went into the shaping of Brazilian society.

Hence the importance of these initial reflexes when considering the process of ratification and denunciation of ILO Convention 158. All this helps to explain the difficulties that our country has faced in putting it into effect.

This is the critical background to discussions on the importance of standard-setting provisions that curb arbitrary dismissals, such as ILO Convention 158, and the challenges faced when implementing Article 7, I of the Brazilian Constitution of 1988, which guarantees a fundamental social right of protection against arbitrary dismissal or termination without just cause.

Of course, it is clear that advances in the formalization of employment and the establishment of a fairer labour market are predicated upon economic growth, to the extent that they enable the placement of those who are outside the labour market, are unemployed or are in precarious occupations. However, this realization does not invalidate another one: that the labour institutional legal framework, which includes rules for the social protection of labour and public institutions equipped to supervise and guarantee their implementation, can contribute to the structuring of this labour market and the definition of certain parameters that give concrete expression to the principles of human dignity and the social value of work, which are enshrined in the Constitution of 1988 as pillars of the Brazilian Republic.<sup>11</sup>

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the adoption of Time Off in Lieu (TOIL), which in practice may hinder the right of domestic workers to be paid for overtime.

<sup>10</sup> O Rappa is a Brazilian rock-reggae band that was formed in the Baixada Fluminense region as a result of the work of FASE/RJ. Its protest songs are about violence and poverty.

<sup>11</sup> See NOBRE JÚNIOR, Hildeberto B; KREIN, José Dari; BIAVASCHI, Magda Barros. A Formalização dos Contratos e as Instituições Públicas. In: *Previdência Social: Como Incluir os Excluídos?* FAGNANI, Eduardo et al, Org. São Paulo: LTr, 2008, pp. 119-135.

According to 2013 published data, labour market figures do point to a significant increase in the formalization and expansion of jobs, together with a substantial decrease in social inequality and large-scale social mobility, but nonetheless, labour turnover, combined with the deepening out of subcontracting, is still a serious problem that needs to be tackled.<sup>12</sup> Compared to 2002, overall labour market data in 2015 still demonstrates improvement, despite the international crisis of 2008 and the most recent austerity measures adopted at the federal level.<sup>13</sup>

Brazilian history shows two contradictory realities in relation to the subject of this paper: the construction of the employment guarantee system alongside the process of industrialization and modernization, at times of anti-liberal responses to the crisis, a process that took place from the 1930s to the 1980s, culminating in the Constitution of 1988; and the dismantling of this system, with flexibilization of the principle of continuity of the employment relationship and of the social protection standards for labour. This began with the “liberal first wave”, marked by Law No. 5107 of 13 September 1966,<sup>14</sup> which brought in the Length of Service Guarantee Fund (FGTS) and introduced the right to dismiss, thus sounding the knell of the stability principle and greatly affecting labour relations, particularly for groups who had historically been in positions of subservience.

We will begin with some reflections on the ILO Conventions and Recommendations. Next, we will take a look back at the Brazil of the 1930s and the process of asserting employment protection standards, focussing on Law No. 62 of 1935, one of the substantive sources of the Labour Law Consolidation (CLT).<sup>15</sup> This will be followed by a consideration of Article 7, I of the Federal Constitution of 1988 and the difficulties encountered in putting it into effect. Against

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<sup>12</sup> Cf. BIAVASCHI, Magda Barros, 2007, op. cit.

<sup>13</sup> Indicadores Estruturais, Pesquisa Mensal de Emprego, 2015. For a complete overview of the evolution of labour market data in Brazil, see Pesquisa Mensal de Emprego do Instituto Brasileiro de Geografia e Estatística (IBGE). Available at: [http://ibge.gov.br/home/estatistica/pesquisas/pesquisa\\_resultados.php?indicador=1&id\\_pesquisa=38](http://ibge.gov.br/home/estatistica/pesquisas/pesquisa_resultados.php?indicador=1&id_pesquisa=38)

<sup>14</sup> This law came into force in January 1967.

<sup>15</sup> Brazil is a country of legislative tradition. The CLT, which dates from 1943, is still in force.

this backdrop, the process of ratifying ILO Convention 158 will be examined, as will certain relevant judicial rulings and the Direct Action for Unconstitutionality (ADIN) in progress before the Federal Supreme Court.

The final conclusions will emphasize that, despite the positive figures for the Brazilian labour market according to 2013 data,<sup>16</sup> labour turnover remains high, and it is therefore important to discuss the relevance of an effective regulatory system that would introduce real obstacles to the dismissal of workers in this country, thus helping to reduce labour turnover.

## **2. The ILO: *Recommendations and Conventions***<sup>17</sup>

On the one hand, the 1919 Treaty of Versailles did a bad job of tackling Europe's economic issues. For instance, it made impossible demands, notably of Germany, as well as hard, unaffordable commitments. But on the other hand, where labour issues were concerned, it was sensitive to pressure from the workers' organizations present at the Conference. Thus, it finally included, in Part XIII, Articles 387 to 426, and also in Section I, Article 427, on General Principles, clear recommendations on organizing workers and labour protection standards. This was crucial to the expansion and internationalization of the Right to Employment.

The Peace Conference's creation of the ILO, together with the League of Nations, is a fundamental sign of the process of internationalizing labour protection standards, with a view to making Social Justice universal. Tripartite in character, the ILO draws up Declarations, International Conventions and Recommendations.

Its International Conventions, once ratified by Member States, become part of their domestic legal framework by providing formal sources of law, with standard-setting force. Even its Recommendations, although not ratifiable, are material sources of law, acting as important subsidiary tools in the process of legislative construction. Brazil is one of the ILO's Member States and has ratified a

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<sup>16</sup> See footnote 13.

<sup>17</sup> See, in this connection, Discussion Text 03, *Padrão de regulação trabalhista no Brasil para as MPE: balanço do marco legal vigente*, produced as part of the research developed by CESIT/IR/UNICAMP, under an agreement between FECAMP and the Assistance Service to Small and Medium-Scale Enterprises (SEBRAE), Campinas, 2003-2005, mimeo.

number of its International Conventions.<sup>18</sup> A look at all the ILO's International Conventions, whether or not they have been ratified by Brazil, shows that they enshrine rights in a universal form.

The ILO Declaration of 1998 sets out fundamental labour principles and rights, recommending that Member States ensure a linkage between social progress and economic growth, so as to enable everyone to achieve their full human potential.

The International Conventions ratified by Brazil guarantee all workers, among other things, the following rights: annual paid leave, equal pay for work of equal value, maternity protection, the abolition of forced labour, non-discrimination as regards employment and occupation, protection for workers' representatives, and health protection.

Discussing the process of ratifying these Conventions - and more particularly Convention 158, given the specificities of its process of ratification and denunciation - is one of the challenges taken up in the present paper.

### **3. Brazil. The framing of rules guaranteeing employment. Historical retrospective. From the CLT to the 1988 Constitution.**

From 1930 onwards, Brazil began struggling to overcome the characteristics that had, up to then, marked its economic, social and political structure: its vestiges of a slave-owning, patriarchal, single-crop order inherited from colonial times; its eminently agrarian nature; the subordination of its economy to an export-led primary commodity model; a sparse, unorganized urban working class; a "café au lait" alternance policy dominated by the rural property-owners along the Minas/São Paulo axis<sup>19</sup>; suffrage that was neither universal nor secret and which excluded women; and the generic treatment of the Social Issue as a matter for the police.<sup>20</sup>

This was a difficult, complex journey of capitalist transformation

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<sup>18</sup> See SÜSSEKIND, Arnaldo. *Convenções da OIT*. 2ªed. São Paulo: LTr, 1998.

<sup>19</sup> From 1930 onwards, the "café au lait" policy meant that the Presidency of the country alternated between the São Paulo Republican Party and the Mineiro Republican Party. Voting was not secret, and those who were outside this spectrum stood no chance of getting into government.

<sup>20</sup> See VARGAS, Getúlio. *A nova política do Brasil*, V.1, pp. 15-54.

involving economic expansion built on new foundations, within a specific, idiosyncratic process of constituting the material conditions for capitalism, forming its classes and building the State apparatus. Concretely, the State came to supervise the industrialization process and coordinate politically the different interests that were in play and which asserted themselves in the course of this process. The Labour Rights issue is part of this complexity.

Without losing sight of long-standing labour demands, concrete action was being taken to secure the institutionalization of legal rules that would guarantee labour rights to the workers. In this way, labour protection standards were being built, and at the same time State institutions were being created with a mandate to set and monitor them, under the watchful eye of the Ministry of Labour, Industry and Commerce, created in 1930.<sup>21</sup>

Thus, the 1930s were marked by vigorous production of labour standards. Starting with the Two-Thirds Law,<sup>22</sup> this production continued with women's achievement of universal suffrage and also, from 1932, of the right to sign employment contracts without their husbands' permission. Next, in 1935, came Law No. 62, which gave workers in industry and commerce the right to stability of employment once they had been in a job for ten years. This right had already been secured by railway workers in 1923, through the Eloy Chaves Law which prohibited the dismissal of workers with ten years or more of service, except in cases of gross misconduct which had to be proved to an inquiry. This process, which moved on to the construction of the CLT and the creation of a specialized justice system that could rule on this new body of law that was being built up, culminated in the citizen Constitution of 1988, promulgated in the midst of the crisis that hit the European Welfare State.

It was Law No. 62/35, much of which was incorporated into the CLT in 1943, that guaranteed employment stability to industrial and commercial workers after ten years' service, as well as the right to compensation if they were not put on

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<sup>21</sup> These reflections are to be found in BIAVASCHI, Magda Barros, op. cit. A considerable part of the present paper is based on them.

<sup>22</sup> The Two-Thirds Law (Decree 19398 of 11 November 1930) stipulated that two-thirds of all employment contracts must go to Brazilians.

permanent contracts and were unjustly dismissed. Further, it made clear that any change in the ownership of an establishment or in the management of an enterprise would be without prejudice to employment, as it would not affect length-of-service calculations for compensation purposes, and that, in case of bankruptcy or collective insolvency, compensation for dismissal would have priority status. Pay cuts were prohibited.<sup>23</sup> Other equally relevant rights included priority for rehiring or for maintenance of the previous wage in cases where force majeure might justify dismissal or reduced earnings. This law was complemented by another that provided for solidarity among enterprises belonging to the same economic group. These were defined as one single employer for the purpose of calculating years of service.

A strong sense of belonging and continuity was embodied in Law No. 62/35, and in 1943, these principles were incorporated into the CLT,<sup>24</sup> which devoted a special chapter to them and enshrined the principle of job stability after ten years into its Articles 492 to 500 – based on the provisions in Law 62/35, but in greater depth.

Earlier, in 1937, the stability principle gained constitutional status in Article 137.f of the 1937 Constitution. The Constitution of 1946, in its Article 157, XII, maintained the principle of *stability in the enterprise or rural estates, and compensation for dismissed workers, in the cases and under the conditions to be determined by law*.

The resistance from the employer side was enormous. Repeated cheating, with people being fired on the eve of reaching “stability” status, led to intense litigation. To curb these anti-stability dismissals, the Upper Labour Court (TST), basing itself on a whole series of precedents, issued Summary Enunciation N° 26, which reads as follows<sup>25</sup>:

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<sup>23</sup> Except in case of jeopardy or force majeure.

<sup>24</sup> The CLT, which is still in force, was approved by Legislative Decree No. 5452, on 1 May 1943.

<sup>25</sup> Cf. MARTINS DE FREITAS, Guilherme. *A Estabilidade Jurídica e Econômica do Servidor Público Celetista de Entidade Fundacional: Garantia Fundamental da Constituição Federal de 1988*. Post-graduate thesis in Law, with a specialism in Labour Law, UFRGS, Porto Alegre, 2014 (mimeo).

**STABILITY (cancelled) - Res. 121/2003, DJ 19, 20 and 21.11.2003.**

A hindrance to stability is to be presumed in the case of the dismissal, without due cause, of an employee who reaches nine years of service to the enterprise.

But history is never linear. The civil-military coup of 1964 was followed by a period of major inward attraction of international capital. This scenario dealt a heavy blow to the institution of stability. In January 1967, Law No. 5107 came into force. This was the previously mentioned law on the Length of Service Guarantee Fund (FGTS). It marked the *first wave*<sup>26</sup> of liberalization of the Brazilian labour market, being the legal embodiment of an employer's right to dismiss. For the stability after ten years previously extended to industrial and commercial workers by Law No. 62/35, it substituted a Fund, the FGTS. The *second wave* came in the 1990s, when measures were introduced that directly or indirectly impacted on labour rights and, in short, flexibilized hiring and firing procedures and the rights inherent to the employment relationship.

From that day forward, visible changes took place in Brazil, notably during and after the world crisis of 2008, which was met with an overdose of unfettered capitalism.<sup>27</sup> In Brazil, that crisis was tackled through action by government and the public banks, with policies aimed at reducing interest rates and stimulating credit, coupled with a policy of increasing the minimum wage. Even though, today, GDP is seen to have declined, with consequent concerns about the figures for industry, the situation in the world of work is one of higher employment and earnings. Thousands of people have been lifted out of poverty up to 2013. The indicators for unemployment and informal employment had a significant reduction when we considered the period of 2002-2013, but still when 2015 figures are compared to 200.<sup>28</sup> Many young people have left the *economically active*

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<sup>26</sup>POCHMANN, Márcio. A segunda onda liberal sobre o trabalho no Brasil. *Folha de São Paulo*, 25 Jan 1998, p. 2-2.

<sup>27</sup> Cf BELLUZZO, Luiz Gonzaga. *Ensaio sobre o capitalismo no século XX*. Organização Frederico Mazzuchelli. São Paulo: UNESP; Campinas: UNICAMP, IE, 2004.

<sup>28</sup> See footnote 13.

*population* (EAP) in order to study, given policies aimed at stimulating them to do so. The improvement was real. Insecurity was reduced.

In 2015, figures show a decreasing employment rate and showcase real problems concerning the industrialization process in Brazil, that is suffering economically due to the never ending international crises and, recently, with the adoption of austerity measures in country. This has impacted economic growth and labour market indexes. And yet the overall scenario is still better than in 2002.<sup>29</sup>

Reality is that deep conflicts and tensions are still throwing down a challenge to find alternatives to the predations of global economic interests and of a capitalism driven by the insatiable desire to accumulate abstract wealth, as Professor Luiz Gonzaga Belluzzo correctly points out.<sup>30</sup> It is true that we still have to tackle social inequality, through rules that guarantee employment and reduce labour turnover.

#### **4. Brazil and the affirmation of standards safeguarding employment. ILO Convention 158: ratification and denunciation. The Direct Action for Unconstitutionality (ADIN) and workers' action.**

The primacy of social protection in Brazilian labour law was, as we have seen, maintained against all the odds when the *first liberal wave* hit the labour market, and it continued up to the end of the 1980s, when the response to the crisis revived the old liberal refrain that had already proved so ineffectual before the two great world wars. Under a scenario of marked transition from industrial to financial capital, the factors of instability in the world of work began to spell precarization and the sapping of rights, including the stability concept. In Brazil, ILO Convention 158, ratified by Parliament, was, shortly after being incorporated into the standard-setting regulations, denounced again in 1996.

The downward slide of the right to employment stability in Brazil is an excellent example on which to base a discussion of: a) our historical legacy of

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

inequality; b) the industrialization process and the constitution of capitalism and, these days, the prevalence of financial interests; and c) the relationship between factors attracting this capital and political power. These elements have had an impact both on the process of ratifying ILO Convention 158 in this country and on its denunciation - as well as, more recently, on action aimed at reversing that denunciation. In fact, the contents of the Convention had previously been backed by Article 7, I of the 1988 Federal Constitution, which elevated the right to protection against arbitrary dismissal to the status of a fundamental social right.

This discussion will also include a look at the limitations on the application of international labour law in various countries, due to their specificities and their own structures. On the other hand, as far as Brazil is concerned, it will lead us to reflect upon why protection against arbitrary dismissal has not proved effective, despite its constitutional enshrinement as a fundamental social right. That reflection will need to take place in the light of a deeper reality, which is structurally bound up with the nature of social relations in a given country. In Brazil's case, it will also need to cover Law as a power relationship and the State as a material condensation of forces.<sup>31</sup>

Thus, in order to discuss the significance of ILO Convention 158 at a time when capitalism has been globalized and hegemonized by financial interests, an attempt absolutely must be made to understand the dynamics between the process of affirming labour social protection standards and the tensions and conflicts arising in a given society, notably in times of precarization, especially in the central countries.

It is important to note that insecurity in the world of work is directly linked to the constant threat of unemployment which in this country, even though the improvements in the labour market are real, is expressed by extremely high labour turnover, short contract durations and the absence of mechanisms to guarantee employment. Hence the relevance of the debate proposed in the present paper.

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<sup>31</sup>Cf. the relational theory of power in: POULANTZAS, Nico. *O Estado, o poder, o socialismo*. 3.ed. Rio de Janeiro: Graal, 1990. On labour law as a power relationship, see: NEUMANN, Franz. *Il diritto del lavoro fra democrazia e dittatura*. Bologna: Il Mulino, 1983.

#### **4.1 Employment guarantees and the Constitution of 1988**

An arbitrary dismissal is taken to mean one that is not made for disciplinary, technical, economic or financial reasons. That understanding, by the way, is in line with Article 165 of the CLT. If a dismissal breaches the legal and constitutional provisions, the consequences are that it is null and void and the dismissed person must be reinstated.

In Brazil, the right to protection against arbitrary dismissal or termination without just cause is enshrined as a fundamental social right by Article 7, I of the 1988 Federal Constitution. However, this provision delegates the regulation of this right to a law which, up to now, does not exist. On the other hand, although the Brazilian Parliament ratified ILO Convention 158, which deals with the same issue, it has since been denounced, as we shall see.

As Martins de Freitas emphasizes,<sup>32</sup> Brazilian Constitution of 1988 extended FGTS coverage to all workers, urban and rural, and, in compensation, embodied the right to employment in Article 7, I, as a safeguard against arbitrary or unjustified dismissals. In the Transitional Constitutional Provisions Act, an additional payment of 40% was required on contributions to the FGTS.

Despite this surcharge, the indicators for labour turnover, which is related to the lack of mechanisms to prevent dismissals, are still alarming in this country, as the study cited also makes clear. The reality is that new contracts are being signed at lower pay rates for the same jobs. This may be seen from the Ministry of Labour and Employment statistics (CAGED), which reveal that about one-third of dismissals take place before the worker has completed one year in the enterprise concerned.

Despite the clarity of the constitutional text enshrining protection against arbitrary dismissal or against termination without just cause as a fundamental social right, a restrictive interpretation has prevailed in the case law. So a complementary law would be needed in order to achieve the original intent, but so far no such law has been drafted:

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<sup>32</sup> MARTINS DE FREITAS, Guilherme. Course thesis cited above.

- DIGEST: EXTRAORDINARY APPEAL. JUDGEMENT OF THE UPPER LABOUR COURT, WHICH GRANTED TO A TEACHER IN A HIGHER EDUCATION INSTITUTION THE STABILITY FOR WHICH PROVISION IS MADE IN ART. 37 OF LAW NO. 5540/68. ALLEGED INCOMPATIBILITY WITH ART. 7, I, OF THE FEDERAL CONSTITUTION. The Charter of 1988 abolished labour stability, while providing in Art. 7, I, as a protection against the arbitrary dismissal or termination without just cause of workers, both urban and rural, a compensatory indemnity, to be provided for in a complementary law, a protection which, the law concerned not having been promulgated, has come to be limited to the indemnity procedure stipulated in the transitional provisions (Art. 10, I). The appeal having been recognized and upheld, the stability provided for in Art. 37 of Law No. 5540/68, determining the reinstatement of teaching staff in the institution, negated the effects of the standard embodied in Art. 7, I, which was, therefore, violated. Extraordinary appeal recognized and upheld.<sup>33</sup>

However, this is not a universally accepted interpretation. Some academics and members of the judiciary argue that the constitutional safeguard has immediate effect, as it is a fundamental social right. That is the position taken by the constitutionalist José Afonso da Silva, reproduced here with our own emphasis added:

[...]

The debates in the Constituent Assembly on this issue were very heated, with positions ranging from the free unilateral annulment of employment contracts to an almost absolute ban on annulment. The formula that won through is by no means satisfactory, in line with the provisions of Art. 7, I, which guarantees that an employment relationship will be protected against arbitrary dismissal or termination without just cause by the terms of the complementary law, which will provide for compensatory indemnities, among other rights. The employment relationship is protected against arbitrary dismissal or termination without just cause, in the terms of the complementary law. But what is it that ends up depending on the complementary law: the definition of protection of the employment relationship or the definition of what constitutes arbitrary dismissal or termination without just cause? We believe that the guarantee of employment is a right sufficient in itself, in terms of the Constitution, **or, for that matter, that the standard set by Art. 7, I, is sufficient in itself to regulate the right that it embodies. In technical terms, it is immediately applicable, so that the complementary law will scarcely be able to determine the limits of its applicability**, with the definition of the elements (arbitrary dismissal and just cause) that delimit its effects, including for the possible conversion, into compensatory indemnities, of the guarantee of the permanence of employment.<sup>34</sup>

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<sup>33</sup> Brazilia. Federal Supreme Court. RE 217207. Rapporteur: Justice ILMAR GALVÃO, First Panel, judgement on 17/11/1998, DJ 07-05-1999. Online at: <http://www.stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000024455&base=baseAcordados>. Accessed on 18 Jan. 2014

<sup>34</sup> SILVA, José Afonso da. *Curso de Direito Constitucional Positivo*. 22<sup>a</sup> ed. São Paulo: Malheiros, 2003, p. 289.

Along the same lines, Jorge Luiz Souto Maior affirms that “[...] the Constitution established the rule that employment relationships are guaranteed against arbitrary dismissal”,<sup>35</sup> reasoning that no other interpretation is possible in the light of §§ 1 and 2 of Article 5 of the Constitution, which lays down that “[...] The defining standards of fundamental rights and guarantees have immediate effect.”

In this regard, Article 7, I of the Federal Constitution stipulates:

[...]

Art. 7 Rights of urban and rural workers, apart from other rights intended to improve their social conditions, are:

I – an employment relationship protected against arbitrary dismissal or termination without just cause, within the terms of the complementary law, which shall provide for compensatory indemnities, among other rights;

Souto Maior says that Article 7, I delegates to the Complementary Law the question of indemnities as a concrete manifestation of the constitutional guarantee and that, for as long as this law does not exist, the indemnity is that provided for in Article 10, i of the ADCT, namely 40% of the FGTS values. However, he emphasizes that the Constitution, by prohibiting arbitrary dismissal, in effect creates a qualified type of dismissal.

#### **4.2 Convention 158: ratification and denunciation**

ILO Convention 158 erects obstacles to arbitrary dismissal. Its ratification by Brazil depended on the assent of the National Congress, which was given in 1982 through Legislative Decree No. 68, on 17 September of that year. Once it had been approved by the National Congress, it was for the Brazilian Government to request the ILO Director-General to register its ratification.

On 5 January 1995, the Government deposited the Instrument of Ratification. This began the 12-month countdown to the entry into force of Convention 158, which took place on 5 January 1996 when, in accordance with its Article 16, it became part of the national legal framework. Subsequently, it was denounced. At the time when it was incorporated into the Brazilian legal fabric, the practice of promoting arbitrary dismissals or terminations without just cause was

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<sup>35</sup> MAIOR, Jorge Luiz Souto. *Curso de direito do trabalho: a relação de emprego*. V. II. São Paulo: LTr, 2008, p. 307.

spreading. To this day, Brazil remains one of the labour turnover champions. While the Convention was in effect, lawyers held differing views of its meaning and scope, and this divergence was expressed in various judgements.

The debates about the effectiveness of the ratification really hinged on whether or not the Convention had automatic force. In other words, whether the ratification took immediate effect or a law would be needed to make it part of the legal order. This latter position, incidentally, was at odds with Brazilian traditions regarding international treaties on individual and collective guarantees. Which is why Brazil opted for direct application, in line with Article 5, § 2 of the Constitution. Nonetheless, the direct effects and incorporation of Convention 158 and certain treaties on human and social rights have not become a reality.

As regards Convention 158, the reaction of many Brazilian employers to the curbs on the right to dismiss spoke volumes. They maintained that, for it to take effect, a specific regulatory law was indispensable, and they cited Article 7, I of the Constitution in support of that view. From the economic point of view, they regarded the restrictions on dismissals as an imported retrograde step, in the words of the then President of the National Confederation of Industry (CNI), Armando Monteiro Neto. From the workers' side, there was strong pressure for the Convention to be maintained. Amid heated debates, featuring both positive and negative assessments of its force and effectiveness, President Fernando Henrique Cardoso denounced the Convention by decree on 20 December 1996. The prevailing argument was that, by adhering to it, Brazil would become less competitive – plus the fact that this measure did guide certain decisions by the courts during the short time that it was in force in Brazil.

#### **4.2 The ratified Convention 158 and case law**

The divergent positions taken in labour court judgements reflected the balance of forces in Brazilian society at that time. Also, the door was left wide open to the kind of formalistic interpretation that was used to block the effects of ratifying Convention 158, and this demonstrated employer resistance to curbs on dismissals.

Below are a few rulings. First, a pragmatic judgement by the labour court of the 17<sup>th</sup> Region. It is followed by DIGESTS of decisions by the Upper Labour Court (TST).

PROC. TRT.RO 02854/96

17th Region, Espirito Santo.

RAPPORTEUR: Judge Danilo Augusto Abreu de Carvalho.

APPELLANTS: Leandro de Lima Ost and Others and the Brotherhood of Santa Casa de Misericórdia de Vitória (associated). RESPONDENTS: The same.

#### **JUDGEMENT**

**DIGEST: ILO CONVENTION 158.** International Law has adopted, and this is not disputed, the concept of socially justifiable dismissals. That is to say, neither fish nor flesh: neither the rigid ten-year stability of the (practically non-existent) Labour Law Consolidation, nor the juridical instability of a complete right to dismiss. Labour Justice today is, to use an image, less a case for the doctor than for the coroner: nine times out of ten, it is about corpses (employment relationships that have already perished), rather than patients (employment relationships that are current), and this is a distortion in itself. Not in every situation should the Judge rule in favour of reinstating the employee. Many circumstances will have to be weighed in each concrete case. Courage, serenity, respect for Capital – producer of wealth, factor of progress -, dignity for Labour – the recipient of progress, these are the parameters by which Labour Justice will have to be guided in order to extract from Convention 158 an interpretation that is not anachronistic, but is rather an instrument for improving Citizenship, and also a passport to the Labour Law of the third millennium. Only if there is a guarantee of employment can true collective bargaining take place. Convention 158 is constitutional and self-enforcing and it prevents dismissals that are not socially justifiable throughout the national territory. It establishes procedures for collective dismissals. It requires that workers be given prior knowledge of the reasons for which they are being dismissed, thus affording them the opportunity to defend themselves, except in cases where this would not be reasonable. It permits reinstatement, at the discretion of the Judicial Power, even when this is not necessarily a consequence of an unjustifiable dismissal. Ordinary appeal upheld so as to determine the reinstatement of the appellants.

[Judgement TST RR-4.898.907.619.985.175.555](#)

10 April 2002

CONVENTION No. 158/ILO. REINSTATEMENT IN EMPLOYMENT. UNJUST DISMISSAL. The question of the existence of a right to stability of employment in the enterprise by virtue of the contents of ILO Convention No. 158 has already been settled in this Court, the predominant position being that said Convention is inapplicable within the national juridical order, as it is hierarchically inferior to the provisions of the constitutional standard, as the appropriate legislative procedure has not been followed by inserting a complementary law, and as said Convention has been denounced by the Brazilian Government and has been found unconstitutional by the exalted Federal Supreme Court. DIRTY-WORK BONUS. LEGAL STATUS AS PART OF WAGES. INCLUSION IN REMUNERATION FOR ALL LEGAL PURPOSES. The example of SBDI-1 has already confirmed the understanding that the dirty-work bonus has the status of wages. Thus, where such a bonus is received, its value is integrated into the calculation of the amounts that are based upon the wage or remuneration of the employees, for all legal purposes. Inteligência da O.J. No. 102 for the SDI/TST example. Appeal partly recognized and upheld.

TST - APPEAL RR 114000219975170007 11400-02.1997.5.17.0007

**Publication date: 22/05/2009**

**Digest:** The understanding reached in this Court by way of the publication of Jurisprudential Guidance 247, I, of SDI-I and of Summary 390, II, in which prior approval of the worker in a public examination for his/her admission affects or annuls the full right to dismiss, voids the employment contract that is also recognized for companies in the mixed economy. Obstacle to Art. 896 , § 4, of the CLT and Summary 333 of the TST. Appeal not upheld, in this respect. INVALIDITY OF THE DISMISSAL. VIOLATION OF ILO CONVENTION 158. Following the understanding of the STF, this Court has confirmed jurisprudence to the effect that **ILO** Convention 158, ratified by Brazil on 05.01.1995 and denounced on 20.11.1996, while in force, was of a programmatic nature and was of limited effect, being dependent, for its enforcement, on regulation by a complementary law, in the form laid down in Art. 7, I, of the Constitution. Thus, the reception, into national law, of the international standard was not sufficient to guarantee permanence of employment and to authorize an order to reinstate or indemnify. Precedents from SDI-I. Appeal not recognized, for this item.

#### **4.3 The denunciation of Convention 158 and the Direct Action for Unconstitutionality (ADIN)**

Responding to pressure from the workers, organized in their Trade Union Centres, the then President of Brazil, Luiz Ignácio Lula da Silva, placed before the National Congress on 14 February 2008 a process of “re-ratification” of Convention 158, involving some difficult and contradictory steps. This proposition has not moved forward. *Pari passu*, discussion has continued in the STF as to the validity of the denunciation of the Convention.

At issue is a Direct Action for Unconstitutionality (ADIN) brought by the National Confederation of Agricultural Workers (CONTAG) and the Unified Workers’ Centre (CUT).<sup>36</sup> In their action, ADIN 1625,<sup>37</sup> they question the validity of the denunciation of Convention 158 by the President of the Republic, by asserting that it is up to the Legislature, which ratified it, to denounce it. So they are pointing to a procedural flaw. In the initial petition, they ask, in summary, that:

[...] the unconstitutionality be declared of Decree 2100 of 20 December 1996, which denounced ILO Convention 158, given that the provision in Article 49, item I of the Federal Constitution was not observed.

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<sup>36</sup> As of today, CONTAG is the sole petitioner.

<sup>37</sup> There was also another ADIN, ADIN 1480, brought by the National Confederations of Transport and Industry in 1996, which argued that Convention 158 was incompatible with the Federal Constitution of 1988. Given the subsequent denunciation of Convention 158, this ADIN was dismissed as no longer founded.

In the grounds for the petition, it is argued that:

[...] the competent Power for the approval of standard-setting treaties (the National Congress), whose dispositions, including approval and consequent ratification (a complex legal act), are incorporated into the legislation, is also competent for approving or endorsing a denunciation of an initiative of the Executive Power. By an undisputed principle of law, a complex legal act must be revoked in the same manner as it was adopted.<sup>38</sup>

ADIN 1625, which is ongoing, and reached partial judgement with three votes for and one against, has been with Minister Rosa Weber, since May 2014, with a view to setting procedures. Minister Rosa succeeded Minister Ellen Gracie Northfleet, who retired from her post without voting on the matter. The following is part of the declaration of judgement, which stands by until now:

ADI 1625  
Origin:UF - UNIÃO FEDERAL  
Rapporteur: JUSTICE MAURÍCIO CORRÊA  
PETITIONER(S): NATIONAL CONFEDERATION OF AGRICULTURAL  
WORKERS (CONTAG) AND ANOTHER  
COUNSEL (ss.) MARTHIUS SÁVIO CAVALCANTE LOBATO AND OTHERS  
COUNSEL (ss.) JOSÉ EYMARD LOGUERCIO  
SUMMONED (ss.) PRESIDENT OF THE REPUBLIC

DECISION: FOLLOWING THE VOTES BY JUSTICES MAURÍCIO CORRÊA (RAPPORTEUR) AND CARLOS BRITTO, WHO UPHELD, IN PART, THE ACTION GIVING TO FEDERAL DECREE No. 2100, OF 20 DECEMBER 1996, AN INTERPRETATION IN CONFORMITY WITH ARTICLE 49, ITEM I OF THE FEDERAL CONSTITUTION, IN ORDER TO DETERMINE THAT THE DENUNCIATION OF ILO CONVENTION 158 IS CONDITIONAL UPON THE ENDORSEMENT OF THE NATIONAL CONGRESS, FROM WHICH ITS EFFECTS ARE DERIVED [...]<sup>39</sup>

The dissenting voice was that of the then President of the Federal Supreme Court (STF), Justice Nelson Jobim, now retired, who disagreed with the Rapporteur concerning the case reports, and who argued for dismissal of the case, as in STF bulletin No. 421:

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<sup>38</sup> Full content online at:  
<<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=404157#0%20-%20Peticao%20inicial>>

<sup>39</sup> Available in the Federal Supreme Court's online case archive. Search for ADI 1625 at <<http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp>>.

[...] considering that the Head of the Executive Power, as the representative of the Union within the international order, can, by an isolated act and without the assent of the National Congress, denounce international treaties, conventions and acts. He noted that the act of approval of the treaty, by the National Congress, included a tacit acceptance of the possibility that the Executive Power might denounce it, emphasizing that, in this case, the denunciation was made also on the basis of the explicit provision in Art. 17 of the Convention itself. He declared that the President of the Republic has sole competence, by virtue of Art. 84, VIII, of the Federal Constitution, to conclude international treaties, conventions and acts.<sup>40</sup>

Back in 2009, the current President of the STF, Justice Joaquim Barbosa, had already come down in favour of proceeding with the Action (which has, by the way, been in the Presidential Cabinet Office since February 2014), according to STF bulletin No. 549:

[...]

Justice Joaquim Barbosa, by his judicial vote, upheld in full the petition to declare the unconstitutionality of the contested decree, on the grounds that it is not possible for the President of the Republic to denounce treaties without the assent of the National Congress. Initially, he emphasized that none of the Brazilian Constitutions specifically dealt with the question of denouncing international treaties and that, although Articles 49, I and 84, VIII of the 1988 Federal Constitution do not admit of the participation of the National Congress in the denunciation of treaties, neither do they expressly preclude such participation.<sup>41</sup>

If the ADIN is upheld, as forecasts suggest, ILO Convention 158 will be reincorporated into the Brazilian legal system. In that case, questions will remain about the effects of this ruling and the impact that it will have on employment relationships in Brazil.

## **5. In conclusion**

In substance, ILO Convention 158 is comparable to Article 7, I of the Brazilian Federal Constitution, an instrument that has immediate effect when it comes to guaranteeing a fundamental social right to the workers. Thus, the lack of a Complementary Law does not invalidate the constitutional precept, nor did it negate the effects of the Convention ratified by the National Congress, at the time when that Convention was fully in force. What the debate has really done, however, is to highlight the profound difficulties within the Brazilian social fabric

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<sup>40</sup> Informativo STF, Brasília, 27-31 March 2006 – No. 421.

<sup>41</sup> Informativo STF, Brasília, 1-5 June 2009 – No. 549. On the request to study the case files, see: Acompanhamento Processual Detalhado Supremo Tribunal Federal ADI 1625: <<http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp>>.

when it comes to curbing the right to dismiss. Indeed, this is a major topic of debate, not least because Convention 158 deals with a fundamental guarantee, which constitutes a human right at work.

An attempt has been made here to point up the main historical, legal and political barriers that the institution of employment stability is facing in this country, from the perspective both of the ratification of Convention 158 and of the difficulties in giving effect to Article 7, I of the 1988 Federal Constitution. This issue is about more than sound constitutional doctrine. It exists at a deeper level, in a dialogue with the need to grow, to distribute land and income and to build a less unjust, more equal society in which everyone can be included.

As has been seen, there are real difficulties about making this happen in practice. For, as Brazil's great thinker put it, and not just on this issue: *Lining up ideas is one thing. Quite another is to toil over a country filled with people of flesh and blood and a thousand and one sufferings.*