

## ANAMATRA WHITE PAPER – EIGHTEENTH MONTHS OF LABOR REFORM AND EXECUTIVE SUMMARY OF ILO EXPERT REPORTS FOR THE INTERNATIONAL LABOR CONFERENCES OF 2017, 2018 AND 2019

The right to work under decent condition is consolidated in several international instruments<sup>1</sup> and in contemporary constitutional texts<sup>2</sup> as one of the main elements for the full enjoyment of human rights in all its dimensions (civil, political, social, economic and cultural rights), which are complementary to each other.

In its preamble, the Universal Declaration of Human Rights reaffirms the recognition of social progress and better living conditions as postulates of a wider freedom, considering the interrelation between equality, freedom and work. In this sense, the Declaration provides on the right to work, including free choice of employment on fair and favorable terms and protection against unemployment. It also provides for equal pay for equal work, without distinction (on grounds of sex, race or nationality) and payment of fair and satisfactory remuneration, to ensure that workers, together with their family, are compatible with human dignity and inclusion of other means of social protection (Article 23)<sup>3</sup>.

As preparation to the ILO's 100<sup>th</sup> anniversary celebrations at the 108<sup>th</sup> International Labor Conference in 2019, the international organization published a study entitled *Futuro do Trabalho no Brasil: perspectivas e diálogos tripartites* [Future of Labor in Brazil: tripartite perspectives and dialogues]<sup>4</sup>. It brings a summary of four National Dialogues held in the country in 2016 and 2017, both to stimulate the respective discussions in Brazil and to contribute to the World Commission created by the Director General of the ILO on the subject.

The flexibility of the labor market, especially in relation to the substitution of atypical forms of employment, high informality and unemployment for formal employment, were points that deserved attention in the study. The challenges brought about by telecommuting, intermittent work, subcontracting and others brought reflections on the regulatory, fiscal and social protection systems of the country.

The *pejotização*, which replaces the formal employment relationship with a business relationship (the service provider becomes a legal entity) was also reviewed, with remarks that

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<sup>1</sup> Such as in the Universal Declaration of Human Rights, adopted in 1948.

<sup>2</sup> The Brazilian Constitution designates labor as a fundamental social right (Article 6) and establishes human dignity as one of the foundations of the Federative Republic of Brazil (Article 1(III)).

<sup>3</sup> Available at: <<http://www.direitoshumanos.usp.br/index.php/Declaracao%20A7%20A3o-Universal-dos-Direitos-Humanos/declaracao-universal-dos-direitos-humanos.html>> Accessed on: Nov 05, 2018

<sup>4</sup> **Futuro do Trabalho no Brasil: perspectivas e diálogos tripartites.** Brazil: ILO. Available at: <[https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---ilo-brasil/documents/publication/wcms\\_626908.pdf](https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---ilo-brasil/documents/publication/wcms_626908.pdf)>. Accessed on: May 26, 2019.

new forms of work will coexist indefinitely with former ones, and in the case of Brazil, with unacceptable forms of work such as slave labor and child labor.

In addition to inequalities in the labor market, population issues and poor income distribution were also considered, especially those related to educational, gender, race, age and place of residence inequalities. The higher rate of youth unemployment was highlighted.

In view of the marked change in the labor market, the study also pointed to the difficulties in the representation of workers and the challenges to collective bargaining in Brazil, especially due to the current lack of union participation. The conclusions of the study emphasize the need to create new mechanisms for the protection of workers and social security that are adapted to the multiplicity of existing forms of work and contracting, thus mitigating the lack of protection of workers with no employment relationship and self-employed workers.

The study also pointed out the challenges for labor regulation and inspection, which requires greater integration. Besides promoting greater harmonization of the procedures and attributions between the bodies responsible for the protection and guarantee of labor rights (in particular Labor Courts, the Labor Inspection Secretariat and the Labor Prosecution Service), it was pointed out that these bodies' engagement with other governmental bodies responsible for the well-being of workers should be strengthened<sup>5</sup>.

The Brazilian "Labor Reform", Law no. 13467, 13 July 2017, reached 18 months in force in May 2019. In this context and in view of the provisions of Article 5 of the By-Laws of the National Association of Labor Court Judges - ANAMATRA<sup>6</sup>, it is important to review the current framework for labor relations in Brazil and the reflexes caused in the actions of Labor Courts.

Despite the promises of "modernizing" labor relations, officially released data reveals a deepening of social inequalities<sup>7</sup>, devaluation of human labor and greater vulnerability of workers, driven by the deliberate attempt to de-characterize the protective nature of Labor Law, with affronts to the Constitution and violations of International Labor Conventions.

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<sup>5</sup> **Futuro do Trabalho no Brasil:** perspectivas e diálogos tripartites. Brazil: ILO, p. 8-9. Available at: [https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---ilo-brasilia/documents/publication/wcms\\_626908.pdf](https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---ilo-brasilia/documents/publication/wcms_626908.pdf). Accessed on: May 26, 2019.

<sup>6</sup> Article 5 ANAMATRA shall act in the defense of the interests of society, in particular through the promotion of dignified labor, respect for citizenship and the implementation of social justice, striving for the preservation of public morality, the dignity of the human person, independence of the Branches of government and democratic principles.

<sup>7</sup> According to UNICAMP researchers, the "Labor Reform" has increased social inequality and had more significant impacts in sectors marked by low wages and high turnover, such as trade. Available at: <https://www.valor.com.br/brasil/5617411/reforma-trabalhista-aumentou-desigualdade-dizem-pesquisadores>> Accessed on: Aug 24, 2018

The original text of the proposal submitted by the Government provided for the amendment of only 7 articles of the Consolidation of Labor Laws (CLT), but the final law, approved as a matter of urgency, had many additional provisions representing a further 200 changes (including many on working hours and salary) to 117 amended labor legislation articles, without adequate dialog with social actors and the promotion of authentic tripartite dialogue.

The promises that the "Labor Reform" would heat up the labor market have yet to materialize. On the contrary, the consequences of a more precarious national labor market can already be counted. Shortly after the start of changes to the CLT, there were mass layoffs of workers<sup>8</sup> and the unemployment rate has not decreased significantly; it still reaches around 13.4 million people<sup>9</sup>.

As for the topic of "job creation", although a few positions in the formal market were created in April 2019, it is important to note that the statistics also include intermittent part-time work positions<sup>10</sup>.

In intermittent work, the worker will earn according to the number of hours worked and, vacations, 13<sup>th</sup> salary (mandatory yearly bonus) and FGTS (mandatory severance compensation fund) will be paid based on the amounts received. Notice pay and FGTS payments for laid-off workers will be paid in half; the employee, even if dismissed without cause, will not be entitled to receive unemployment insurance. In case the worker receives less than one minimum wage per month, he/she must supplement the amounts collected to Social Security. In this type of employment contract, the worker does not have to be called to work for the entire month (zero-hour contracts). The study points to the losses resulting from such hiring in the United Kingdom, where it has been used on a large scale; this include wages 7% lower than other workers, lack of social protection and unpredictable contracting<sup>11</sup>.

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<sup>8</sup> Such as the dismissal of 1200 professors from the Estácio de Sá University for the creation of a reserve registry and their hiring as intermittent workers. Available at: <<https://www1.folha.uol.com.br/mercado/2017/12/1940980-estacio-de-sa-demite-12-mil-professores-apos-reforma-trabalhista.shtml>> Accessed on: Aug 24, 2018

<sup>9</sup> Unemployment rises to 12.7% in March and reaches 13.4 million Brazilians. This is the highest rate since the quarter ended May 2018. According to IBGE, the number of underutilized workers reached a record 28.3 million people. Available at: <<https://g1.globo.com/economia/noticia/2019/04/30/desemprego-sobe-para-127percent-em-marco-diz-ibge.ghtml>>. Retrieved on: May 25, 2019

<sup>10</sup> The Brazilian economy added 129,601 jobs with a formal contract in April 2019, according to figures from the General Register of Employed and Unemployed Person (Caged) released on Friday (24.MAY.2019) by the Ministry of Economy. This includes 5,422 intermittent job and 2,827 part-time positions. Available at: <<https://g1.globo.com/economia/noticia/2019/05/24/brasil-cria-129-mil-vagas-de-emprego-formal-no-melhor-mes-de-abril-em-6-anos.ghtml>>. Accessed on May 25,2019.

<sup>11</sup> Study presented by Marcelo Zero. Available at: <<https://www.josepimentel.com.br/sites/default/files/notas-tecnicas/alguns-dados-sobre-o-trabalho-intermitente-no-reino-unido.pdf>>. Accessed on May 26,2019.

The "Labor Reform" also increased the possibility of part-time work increasing from 25 to 30 hours per week, without the possibility of overtime, but in contracts of up to 26 hours per week, a further six-hour overtime is allowed (paid at a 50% bonus and possibility of compensation) and wages are calculated in proportion to the number of hours contracted for (Article 58-A of the CLT). This also impacts the 13<sup>th</sup> salary, holidays and FGTS, as well as contributions, which must also be complemented by the employee if they receive a wage lower than the minimum wage.<sup>12</sup>.

Extreme poverty among Brazilians increased from 25.7% to 26.5% from 2016 to 2017, as pointed out by the National Household Sample Survey (PNAD) by the IBGE (Brazilian Institute of Geography and Statistics). Unemployment and increasing informality are driving causes of this decrease<sup>13</sup>.

According to the Committee of Experts of the International Labor Organization (ILO), the Brazilian "Labor Reform" violates International Labor Conventions, as explained in the Committee's Reports of the 106<sup>th</sup>, 107<sup>th</sup> and 108<sup>th</sup> International Labor Conferences of 2017<sup>14</sup>, 2018<sup>15</sup> and 2019<sup>16</sup>, respectively.

## 1. The "Brazil case" at the International Labor Conferences of 2017 and 2018

When the "Labor Reform" was still under way in the National Congress, it was included in the discussions of the 106<sup>th</sup> International Labor Conference, held in June 2017. The ILO Committee of Experts alerted Brazil then to the fact that the language of bill, as presented, was in violation of Conventions Nos. 98, 151 and 154 of the ILO.

In summary, the ILO Committee of Experts has identified an offense against the aforementioned International Labor Conventions due to the prevalence of "negotiated over

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<sup>12</sup> The measure was considered harmful by the Labor Ministry, since, in addition to traditionally generating earnings below the minimum wage, it can discourage hiring with a 44-hour working week and minimum wage payment. This has already been seen in Europe, according to a study by the 2015 ILO Convention. Available at:

<<http://www.prt22.mpt.mp.br/2-uncategorised/289-reforma-trabalhista>>. Retrieved on: May 26, 2019

<sup>13</sup> Brazil's 55 million people living in poverty and 15.2 million living in extreme poverty expose the concentration of wealth in the country. The richest 10% accounted for 43% of total income in the country, while the poorest 40% accounted for only 12% of the total. Black and mixed-race people are the majority in this group. According to IPEA [Applied Economic Research Institute] researcher Miguel Nathan Foguel, there has been an increase in unemployment and informality since the economic crisis began in 2014, which has culminated in an increase in poverty and extreme poverty. Available at: <<https://g1.globo.com/jornal-nacional/noticia/2018/12/05/no-brasil-152-milhoes-vivem-abaixo-da-linha-da-extrema-pobreza-diz-ibge.ghtml>>. Accessed on May 25, 2019.

<sup>14</sup> Available at: <<https://br.sputniknews.com/brasil/201706098612035-oit-pode-apreciar-denuncias-reforma-trabalhista/>> Accessed on: Aug 25, 2018

<sup>15</sup> Available at: <<http://economia.estadao.com.br/noticias/geral,reforma-trabalhista-viola-convencoes-internacionais-diz-oit,70001884924>> Accessed on Aug 25, 2018.

<sup>16</sup> Available at: <<https://sinait.org.br/site/noticia-view?id=15406/comite%20de%20peritos%20da%20oit%20condena%20reforma%20trabalhista%20do%20brasil>>. Accessed on May 25, 2019.

legislated”, the main motto of the "Labor Reform", with the possibility of disregarding the minimum rights protected by labor legislation.

The Experts noted that collective agreements prevail over the law in 14 issues (Article 611-A of the CLT); these issues relate to several aspects of the labor relationship and comprise a non-exhaustive list of matters. This makes it possible for collective bargaining to prevail any provisions of all legal provisions, with the sole exception of labor rights enshrined in the Constitution, per Article 611-B of the CLT.

According to the Experts' report, the general objective of ILO Conventions 98, 151 and 154 is the promotion of collective bargaining that results in more favorable working conditions than those provided for in legislation.

At the time, because it was still a legislative proposal and there was a possibility of amendment by the National Congress, the discussion on the "Brazil case" was postponed to the following year by the ILO. Contrary to what was reported in the media by the then rapporteur of the "Reform Labor", former deputy Rogério Marinho (PSDB-RN)<sup>17</sup>, the country continued to be monitored by the international body<sup>18</sup>.

At the 107<sup>th</sup> International Labor Conference, held between May and June 2018, as it had announced, the ILO re-examined "the Brazil case", no longer as a bill but as the "Labor Reform" adopted by Congress. The discussion on "the Brazil case" generated strong resistance, not only by employers<sup>19</sup>, but the Government itself<sup>20</sup>, with then Minister of Labor Helton Yomura<sup>21</sup> making serious accusations towards the Experts<sup>22</sup> and criticism of the ILO system<sup>23</sup>.

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<sup>17</sup> Available at: <<http://blogs.oglobo.globo.com/eissomesmo/post/psdb-altera-entendimento-da-oit-para-fortalecer-reforma-trabalhista.html>> Accessed on: July 01, 2017.

<sup>18</sup> On the subject, with clarifications about the alleged "withdrawal of the Brazil case" from the 106<sup>th</sup> ILO Conference, please see: "A Reforma Trabalhista e suas modernidades". FELICIANO, Guilherme Guimarães; CONFORTI, Luciana Paula, PORTO, Noemia Garcia. Available at: <<https://www.anamatra.org.br/artigos/25537-a-reforma-trabalhista-e-suas-modernidades>> Accessed on: Aug 25, 2018.

<sup>19</sup> Available at: <<http://agenciabrasil.ebc.com.br/internacional/noticia/2018-06/em-genebra-presidente-da-cni-defende-reforma-trabalhista>> Accessed on: Aug 26, 2018

<sup>20</sup> Available at: <<https://www.redebrasilatual.com.br/trabalho/2018/06/governo-e-patroes-se-juntam-na-oit-para-defender-reforma>> Accessed on: Aug 26, 2018

<sup>21</sup> Helton Yomura resigned from Congress in July 2018 after being removed from the post of Minister of Labor by Supreme Court Justice Edson Fachin after being implicated as part of investigations of the "Espúrio" operation led by the Federal Police, which uncovered corruption in the granting of union accreditation by the Ministry of Labor, together with other congresspeople. Available at: <<http://g1.globo.com/jornal-nacional/noticia/2018/07/ministro-do-trabalho-helton-yomura-do-ptb-e-afastado-e-pede-demissao.html>> Accessed on: Aug 26, 2018.

<sup>22</sup> The ILO Committee of Experts was established by a Resolution of the International Labor Conference in 1926, together with the Standards Commission, and is "composed of 20 independent jurists, who come from different legal systems with different languages [...]." ACHERMAN, Mário. **A contribuição da comissão de peritos da OIT para a efetividade dos princípios e direitos fundamentais no trabalho**. Available at:

ANAMATRA disagrees with the statements of representatives of the Brazilian Government and patronage to the 107<sup>th</sup> International Labor Conference, whether in plenary or in the document *Information Supplemented Supplied by Governments on the Application of Ratified Conventions* (Government's defense), since they run counter to the tripartite dialog that the ILO intends to promote, as embodied in Convention No. 144, ratified by Brazil. This is especially true for the part of the communications which sought to diminish the work of the Experts and the ILO Standards Department, linking them to supposed political action; the passage in which they denied the official rate of non-job-seeking and unemployed persons; and the part in which they celebrated the lower number of lawsuits in the Labor Courts as an advantage resulting from the approval of the law – without establishing any relation with the difficulties in access to Justice, a matter now under discussion in the Federal Supreme Court.

Some changes promoted by Law 13,467 of July 13, 2017 were the subject of a Direct Unconstitutionality Action filed by the Attorney General's Office before the Federal Supreme Court (ADI No. 5766), whose trial began but has not yet been finalized. In his vote on the matter, Justice Luiz Edson Fachin diverged from the rapporteur of the case, Justice Luís Roberto Barroso. Fachin considered several passages of the new law to be unconstitutional and, in particular, those that restrict access to justice for the beneficiaries of free legal counsel.

The rapporteur of the case himself, Mr. Barroso, in spite of not having considered the aforementioned provisions to be unconstitutional, set limits so that the workers benefiting from free legal counsel could bear procedural costs<sup>24</sup>.

Given the above, data from the Superior Labor Court reveals that there was a 34% drop in Brazilian Labor Court actions in 2018<sup>25</sup>, with a consequent reduction in the collection of social

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<[https://juslaboris.tst.jus.br/bitstream/handle/20.500.12178/18796/001\\_ackerman.pdf?sequence=4&isAllowed=y](https://juslaboris.tst.jus.br/bitstream/handle/20.500.12178/18796/001_ackerman.pdf?sequence=4&isAllowed=y)>

Accessed on: Aug 26, 2018

<sup>23</sup> The Minister of Labor accused the ILO of having been subjected to a "political game" by anticipating the country's monitoring of compliance with the International Labor Conventions on grounds of the "Labor Reform."

<<http://agenciabrasil.ebc.com.br/economia/noticia/2018-06/em-genebra-helton-yomura-defende-reforma-trabalhista>>

Accessed on: Aug 26, 2018

<sup>24</sup> Available at:

<<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=378076&caixaBusca=N>> Accessed on: Aug 26, 2018 The Human Rights Commission of the Federal Senate approved an opinion on Draft Law (PLS) n° 267/2017, which recovers the original wording of Article 844 of the CLT (regarding the free legal aid to workers), due to considering that the "Labor Reform" restricted access to justice. Available at: <<https://economia.uol.com.br/empregos-e-carreiras/noticias/redacao/2019/05/23/comissao-senado-reforma-trabalhista-justica-trabalho-gratuita.htm>>. Retrieved on: May 26, 2019

<sup>25</sup> The number of actions in the first instance of the Labor Courts decreased by 1 million, driven by restrictions on access to justice. Available at: <<https://www.redebrasilatual.com.br/trabalho/2019/01/numero-de-processos-trabalhistas-despenca-em-2018/>>. Accessed on May 25, 2019.

security contributions and costs - a fact which casts doubt on the very institutional survival of the Labor Courts<sup>26</sup>.

It is important to note that most labor cases deal with basic rights not observed by employers, such as severance pay<sup>27</sup>. Frequent noncompliance with labor legislation is a predominant characteristic in the Brazilian scenario.

Despite the above, labor judges were threatened in their judicial independence if they did not apply the "Labor Reform" literally, including threats of extinction of Labor Courts<sup>28</sup>.

It happens that the "Labor Reform" created the unusual principle of minimum judicial intervention in the autonomy of collective will (Article 8(3) of the CLT), which forces labor court judges to only consider formal issues of Collective Bargaining Agreements and prevents them from reviewing whether provisions of collective agreements may violate labor laws themselves and the Brazilian Constitution, a fact which - we repeat - defies judicial independence and restricts access to justice.

In addition, the budget limit imposed by Proposed Constitutional Amendment 241/2016 (PEC 55 in the Senate) may lead to an exhaustion of financial funds in 2020, seriously jeopardizing the labor judiciary system and other bodies<sup>29</sup>.

Thus, the lack of access to justice is highlighted, which, in addition to violating the Brazilian Constitution (Article 5(XXXV)), also violates the International Covenant on Civil and Political Rights of the United Nations (Article 14) and the American Convention on Human Rights (Article 8).

As has been stated, according to public data, the harmful effects of Law no. 13,467 of 2017 were felt in the first months of its validity, especially in the form mass unemployment, hiring of workers as intermittent<sup>30</sup> or autonomous<sup>31</sup> workers, declining unionization<sup>32</sup> and, as has been

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<sup>26</sup> Available at: <<http://www.espacovital.com.br/publicacao-35489-congresso-comeca-a-avaliar-a-extincao-da-justica-do-trabalho>> Accessed on: May 14, 2018.

<sup>27</sup> More than 40% of labor actions are to collect severance pay, according to the Justice in Numbers report released by the National Council of Justice. Available at: <<https://www.conjur.com.br/2015-set-15/40-acoes-trabalhistas-tratam-verbos-rescisorios>> Accessed on: May 14, 2018

<sup>28</sup> Available at: <<http://www.espacovital.com.br/publicacao-35489-congresso-comeca-a-avaliar-a-extincao-da-justica-do-trabalho>> Accessed on May 14, 2018. As an example of government retaliation, ANAMATRA - the National Association of Labor Court Judges, which participated as an observer in all International Labor Conferences since 2007, had its accreditation to the Brazilian delegation for the 107<sup>th</sup> International Labor Conference stripped away by the Ministry of Labor in 2018. It attended the event as an international trade union guest, a result of the recognized technical work it has done to clarify labor rights issues as part of its collaboration to tripartite dialog.

<sup>29</sup> Available at:

<[https://www.correiobraziliense.com.br/app/noticia/economia/2019/03/10/internas\\_economia,741986/justica-do-trabalho-tem-ajuda-de-r-1-bi-da-uniao-para-nao-estourar.shtml](https://www.correiobraziliense.com.br/app/noticia/economia/2019/03/10/internas_economia,741986/justica-do-trabalho-tem-ajuda-de-r-1-bi-da-uniao-para-nao-estourar.shtml)>. Accessed on May 25, 2019.

<sup>30</sup> Even before the "Labor Reform" was in force, there were 70 job positions for intermittent workers, with pay at R\$ 4.45 per hour worked. The job positions were announced by an economic group that works in the construction,

explained, threats of extinction of the Labor Courts<sup>33</sup>. In addition, there is intimidation towards independent performance of labor inspectors, including the maintenance of a sufficient number of fiscal inspectors (there is currently a deficit of 3,000 inspectors) and successive budget cuts, all the way to effective extinction of the Ministry of Labor, in 2019 as an autonomous and specialized body<sup>34</sup>.

There was also a marked reduction in union revenues, including employers' unions,<sup>35</sup> and the fall of collective bargaining<sup>36</sup>, with individual negotiations being prioritized without adequate protection for workers.

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shopping and franchising sector, mainly in Espírito Santo and Rio de Janeiro. Available at <<https://economia.uol.com.br/noticias/redacao/2017/10/31/empresas-ja-anuncia-vagas-de-trabalho-intermitente-novidade-da-reforma.htm>> Accessed on Aug 30, 2018.

<sup>31</sup> Although the migration of formal workers to employment as freelancers or being hired as legal entities has not increased significantly after the "Labor Reform" entered into force, experts are concerned about the incentive to the phenomenon (called *pejotização*) and the drop in Social Security collection through such work modalities. with 52.6% of those employed without social protection, including workers linked to digital platforms, while workers with a formal contract accounted for only 38.9%. Available at: <<https://www.infomoney.com.br/minhas-financas/aposentadoria/noticia/8078305/salario-alto-fora-da-clt-afeta-arrecadacao>>. Retrieved on: May 26, 2019

<sup>32</sup> After the "Labor Reform" came into force, according to IBGE, the unionization rate in 2018 was the lowest in 6 years. Available at: <<https://g1.globo.com/economia/noticia/2018/11/08/sindicalizacao-no-brasil-tem-a-menor-taxa-em-seis-anos-aponta-ibge.ghtml>>. Retrieved on: May 26, 2019

<sup>33</sup> ANAMATRA, together with judge entities and members of the Prosecution Service which integrate FRENTAS, issued a public note in defense of the Labor Courts after an interview with the President of the Republic in which he admitted to the possibility of discussing its extinction. Available at: <<https://www.anamatra.org.br/imprensa/noticias/27435-frente-associativa-divulga-nota-publica-em-defesa-da-justica-do-trabalho>>. Retrieved on: May 26, 2019

<sup>34</sup> According to Provisional Measure No. 870, 1 January 2019. Available at: <<https://www.congressonacional.leg.br/materias/medidas-provisorias/-/mpv/135064>>. Accessed on May 25, 2019. After the extinction of the Ministry of Labor and the redistribution of part of its duties to the Ministry of Economy's Special Secretariat for Social Security and Labor, the Labor Reform rapporteur, former deputy Rogério Marinho (PSDB-RN), was appointed its Secretary. Available at: <<https://istoe.com.br/rogerio-marinho-e-nomeado-secretario-especial-de-previdencia-e-trabalho/>>. Retrieved on: May 26, 2019

<sup>35</sup> Worker's and employers' unions saw a 90% decrease in resources in 2018, with the end of the obligation to pay union dues. Available at: <<https://economia.estadao.com.br/noticias/geral/sindicatos-perdem-90-da-contribuicao-sindical-no-1-ano-da-reforma-trabalhista,70002743950>>. Retrieved on: May 26, 2019 Union entities also foresee an even greater decrease in contributions if Provisional Measure No. 873/2019 is definitively approved. The PM prevents the discount of union contributions from workers' salaries, even if authorized by collective bargaining, requiring payment by bank bill. The Government's justification for the legislative change was that the measure is due to "judicial activism", which has allowed union discounts on labor claims. Available at:

<<https://g1.globo.com/economia/noticia/2019/03/02/governo-impede-desconto-da-contribuicao-sindical-de-salarios-e-determina-pagamento-via-boleto.ghtml>>. Retrieved on: May 26, 2019 The Provisional Measure in question is being challenged in the Federal Supreme Court under ADIs No. 6,092 and 6,093 (rapporteur Justice Edson Fachin). Available at: <<https://www.redebrasilatual.com.br/trabalho/2019/03/mp-contra-sindicatos-contraria-logica-da-reforma-trabalhista-e-e-caminho-para-caos/>>. Retrieved on: May 26, 2019

<sup>36</sup> After the "Labor Reform" went into force, there was a 45.2% decrease in the number of Collective Bargaining Agreements and 34% in the Collective Labor Agreements, representing an average reduction of 39.6% in collective bargaining; Available at: <<https://extra.globo.com/noticias/economia/numero-de-acordos-em-convencoes-coletivas-tem-queda-de-45-apos-reforma-trabalhista-22968277.html>>. Accessed on May 26, 2019.

At the International Labor Conference held in 2018, Brazil was included in the short list of the 24 countries suspected of imposing the worst working conditions, a topic that arouses great interest in the ILO, due not only to non-compliance with international labor standards, but also to the possibility of social dumping.

Considering the Government's allegations that the discussion on the "Brazil case" was premature and in light of the controversy over whether or not the country had submitted legislative changes to the participation of workers' trade unions<sup>37</sup>, the ILO granted a deadline of October 2018 for Brazil to provide detailed information on the "Labor Reform", postponing its review of the matter<sup>38</sup>.

Despite the above, the Government officially disclosed the information that "the Brazil case" had been withdrawn from the short list and that the ILO had recognized that the "Labor Reform" complied with the International Labor Conventions<sup>39</sup>, which was contradicted by the international body<sup>40</sup>.

## 2. The "Brazil case" at the 108<sup>th</sup> International Labor Conference

### 2.1 The "Labor Reform" and ILO Convention 98

Given the information provided by workers 'and employers' organizations, the ILO Committee of Experts, in its Report to the 108<sup>th</sup> International Labor Conference in 2019, stressed that, although it could be in accordance with ILO Convention 98 to sign collective bargaining agreement on certain working conditions, the provision that establishes the possibility of general

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<sup>37</sup> According to the ILO: "Social dialog includes all types of negotiation, consultation and exchange of information between government representatives, employers and workers on issues of common interest to socio-economic policies. [...] Social dialog is central to the proper functioning of the ILO itself and is integrated into virtually all ILO Conventions and Recommendations and the Decent Work Agenda. [...] " ILO - Report IV. *Diálogo social e tripartismo [Social dialogue and tripartism]*. International Labor Conference, 107<sup>th</sup> Session, 2018, International Labor Bureau, Geneva, p. 3. Available at: <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_630701.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_630701.pdf)> Accessed on: Aug 26, 2018

<sup>38</sup> As Mario Ackerman teaches about the ILO's regular monitoring of compliance with international standards, detailed reports must be presented: "[...] one year after the entry into force of a Convention, when a major legislative change operates or when it is requested by the committee of experts or the confederations' standards committee."

ACKERMAN, Mário. **A contribuição da comissão de peritos da OIT para a efetividade dos princípios e direitos fundamentais no trabalho**. Available at:

<[https://juslaboris.tst.jus.br/bitstream/handle/20.500.12178/18796/001\\_ackerman.pdf?sequence=4&isAllowed=y](https://juslaboris.tst.jus.br/bitstream/handle/20.500.12178/18796/001_ackerman.pdf?sequence=4&isAllowed=y)> Accessed on: Aug 26, 2018

<sup>39</sup> In the version of the note published on the website of the Ministry of Labor, the ILO "did not find enough elements to support the complaint that Brazil had failed to comply with Convention 98 and only requested additional information by November 2018." The objective would be only "to better know the aspects of the labor modernization carried out by the country." Available at: <<https://www.nexojournal.com.br/expresso/2018/06/14/Quais-as-diverg%C3%AAs-sobre-a-reforma-trabalhista-na-OIT>> Accessed on Aug 26, 2018.

<sup>40</sup> Available at: <<https://economia.uol.com.br/noticias/redacao/2018/06/12/oit-reforma-trabalhista.htm>> Accessed on: Aug 26, 2018.

waiver of labor legislation in favor of collective bargaining violates Article 4 of the aforementioned international standards, which aims to promote free and voluntary collective bargaining to the benefit of workers. In this sense, the Experts emphasized, to the extent possible, the importance of tripartite consensus on the basic rules of collective bargaining, including a revision of Articles 611-A and 611-B of the CLT in order to clarify the situations in which collective bargaining clauses can supersede the law and with what reach. They further requested that Brazil provide detailed information on the progress of concluded collective bargaining negotiations and on the content and scope of collective bargaining agreements that superseded labor legislation.

Also with regard to ILO Convention 98, the Expert Report pointed to a possible violation of Article 4 by Article 444 of the CLT, which allows workers who have a higher education diploma and who earn salaries around eleven thousand reais (R\$ 11,000.00), equivalent to approximately three thousand, three hundred and ninety dollars (US\$ 3,390), to deviate from the provisions of their labor contracts and collective bargaining agreements. The ILO requested the Brazilian Government to adopt prior consultation with social partners in order to ensure compatibility between CLT Article 444 Convention No. 98, and to report any progress made on the subject.

Also with regard to ILO Convention 98, the Committee of Experts highlighted Article 442-B of the CLT, which addresses self-employed workers working for a single company. It requested the Brazilian Government to consult with interested parties to ensure that all self-employed workers are authorized to participate in free and voluntary collective bargaining, further noting that such consultations can identify the necessary adaptations so that such collective bargaining can take place. It further requested that the Brazilian Government provide information on the progress made in this field.

## **2.2. Employment policy and ILO Convention No. 122**

On the subject of "employment policy" and compliance with ILO Convention No. 122<sup>41</sup>, the Committee of Experts once again requested Brazil to provide information on the application of Article 442-B of the CLT, which provides on self-employed workers, including, if one exists, a copy of a judicial decision on the application of the legal provision in question. The request for information took into account the fact that legal provisions can have negative effects on job creation policy, since, according to union allegations, it suggests a de-characterization of the concept of the employment contract itself by allowing workers exclusively employed by a single company to be hired as self-employed.

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<sup>41</sup> According to Article 1(1) of ILO Convention 122: "1. With a view to stimulating economic growth and development, raising living standards, meeting labor needs and solving the problem of unemployment and underemployment, each Member shall declare and implement, as an essential goal, an active policy aiming to promote full, productive and freely chosen employment."

Another issue that is directly related to the "employment policy" refers to the "Pension Reform".

Given the low value of pensions and the high unemployment rate, retirees are working to supplement their own or family income<sup>42</sup>, a scenario that may be aggravated by the approval of the "Pension Reform", in view of the capitalization system it adopts.

According to the Proposed Constitutional Amendment of the "New Social Security", currently pending before the National Congress (PEC 06/2019), a capitalization system with individual accounts will be created under which contributions become a savings account whose resources are invested to generate income for retirement<sup>43</sup>.

According to a study published by the ILO on the "Reversal of the Privatization of Social Security", 30 countries totally or partially privatized their Social Security systems from 1981 to 2014, 14 of which are from Latin America. This includes Chile (whose model has inspired Brazil's), the first to be privatized in 1981. Of the total of these countries, 18 promoted "re-reforms", totally or partially reversing the privatization of their pension systems, due to the negative social and economic impacts of privatization. The main considerations include: a) coverage rates stagnated or declined, despite promises that the capitalization system would be more profitable and adequate to cover pensions; b) social security benefits deteriorated, resulting in serious social problems, with the payment of 20% of the average salary of the activity in Bolivia and 15% in Chile, which drastically accentuated old-age poverty<sup>44</sup>. This compromised the main objective of the social security systems, which is to provide the worker with dignified living after retirement<sup>45</sup>.

In addition, other negative effects were verified, such as the increase in gender and income inequality; increased tax pressures due to the high costs of transition from one regime to another; high administrative costs, which also contributed to lower pensions; fragile governance and

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<sup>42</sup> A survey has identified that 91% of retirees contribute to family income, given the financial crisis and the precarious employment policy. This should be taken into account as part of "Pension Reform", so that it is not conceived only as a budget cut. Available at: <<https://jornalgggn.com.br/previdencia-social/idosos-sao-os-principais-responsaveis-pelo-sustento-da-familia-aponta-cndl-spc/>>. Accessed on May 26, 2019. According to IBGE, the number of households whose main source of income are retirement benefits and pensions has been growing since 2016. Available at: <https://www1.folha.uol.com.br/mercado/2018/08/aposentados-idosos-voltam-a-ser-os-chefes-da-familia.shtml> Accessed on: May 26, 2019

<sup>43</sup> Available at: <<http://www.brasil.gov.br/novaprevidencia/noticias/ultimas-noticias/nova-previdencia-preve-sistema-de-capitalizacao>>. Retrieved on: May 26, 2019

<sup>44</sup> The Ministry of Health, in partnership with the National Institute of Statistics (INE), published a study showing that 936 adults over 70 years of age took their own lives between 2010 and 2015 a rate of 17.7 elderly people aged 80 and over for every 100 thousand inhabitants. As a result, Chile currently ranks first position among the number of suicides in Latin America. Available at: <<https://www.hypeness.com.br/2018/08/sem-previdencia-publica-chile-tem-numero-recorde-de-suicidio-de-idosos/>>. Retrieved on: May 26, 2019

<sup>45</sup> Available at: <[https://www.abrasco.org.br/site/wp-content/uploads/2019/03/estudo\\_OIT.pdf](https://www.abrasco.org.br/site/wp-content/uploads/2019/03/estudo_OIT.pdf)>. Accessed on May 26, 2019.

capture of regulatory and supervisory functions; concentration of the private insurance sector without the advertised competition; benefits only for the financial sector with retirement cuts; limited effect on capital markets in developing countries; demographic and financial market risks transferred to individuals; impaired social dialog<sup>46</sup>.

Thus, the "Pension Reform" should consider factors such as the financial crisis, poor employment policy, increased life expectancy, impoverishment and indebtedness of the population, among others, to ensure its reflexes do not translate to negative results already verified in countries where the same pension model was adopted and had to be reversed due to its harmful social and economic impacts.

### **2.3. Child labor, its worst forms and ILO Conventions No. 138 and No. 182**

With regard to ILO Convention 138 on the minimum age for work, the Committee of Experts urged the Brazilian Government to take the necessary measures to strengthen capacity and expand the scope of labor inspection services to ensure the detection of cases of child labor in the informal economy and under-16 labor in family farming, thus allowing those individuals to benefit from the provisions of the Convention. The government was also urged report on the measures adopted and progress made.

Regarding ILO Convention No. 182, which addresses the worst forms of child labor, the Committee of Experts remarked on the sexual exploitation of children and trafficking in children for sexual exploitation and requested the Brazilian Government to continue its efforts to ensure that children under the age of 18 do not carry out forms of domestic work included in the list of activities included among the worst forms of child labor in Decree 6,481/2008. It further requested that measures adopted in this regard and the results achieved be reported, including on the number of child domestic workers found and rehabilitated.

On the occasion of the celebrations for the abolition of legal slavery in Brazil on May 13, 2019, the ILO warned of the need to combat contemporary forms of slavery, which also affect children and young people in Brazil and in the world. Of the more than 40 million global victims of contemporary slavery, 25 percent are children. The ILO highlighted goal 8.7 of the United Nations 2030 Agenda Sustainable Development Goals (SDGs), which calls for immediate and effective measures to eradicate forced labor and end contemporary slavery and trafficking in persons, as

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<sup>46</sup> Available at: <[https://www.abrasco.org.br/site/wp-content/uploads/2019/03/estudo\\_OIT.pdf](https://www.abrasco.org.br/site/wp-content/uploads/2019/03/estudo_OIT.pdf)>. Accessed on May 26,2019.

well as to ensure a ban and elimination of the worst forms of child labor, including the recruitment of and use of child-soldiers, and to put an end to child labor in all its forms by 2025<sup>47</sup>.

According to data from the National Household Sample Survey (PNADC), there were 2.4 million children and adolescents aged 5 to 17 engaged in child labor in 2016, which represents 6% of the population (40.1 million) in this age group. It should be noted that, of the 2.4 million child laborers, 1.7 million also worked domestically alongside work and, probably, studies. The highest concentration of child labor is of children aged 14 to 17, which totals 1.940 million. There are 104 thousand working children aged 5 to 9 in the country<sup>48</sup>.

In this sense, measures such as the extinction of the Ministry of Labor as an autonomous and specialized body<sup>49</sup> and of the National Commission for the Eradication of Slave Labor - CONATRAE<sup>50</sup> have concerned experts and entities engaged in the fight against child labor and slave labor. This requires further discussion so that structural changes and budget cuts do not effectively damage Brazil's State policies vis-à-vis the international community.

Other statistics that concern experts and have direct relation with the outstanding themes are those of accidents and deaths of children and young people. According to data from the National Health Information System (SINAN) of the Ministry of Health, Brazil recorded 43,777 work accidents with children and adolescents aged 5 to 17 in the last 11 years (2007 to 2018). Over the same period, 261 boys and girls lost their lives working<sup>51</sup>.

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<sup>47</sup> Available at: <<https://nacoesunidas.org/oit-alerta-para-formas-contemporaneas-de-escravidao-no-brasil-e-mundo/>>. Retrieved on: May 25, 2019

<sup>48</sup> Data released by the National Forum for the Protection and Eradication of Child Labor - FNPETI. Available at: <<https://fnpeti.org.br/cenario..>>. Retrieved on: May 25, 2019

<sup>49</sup> CONATRAE has published a note expressing concern about the extinction of the Ministry of Labor, in view of the possible retrogression in the policy of eradicating slave labor. Available at: <[https://www.anamatra.org.br/images/Nota\\_Conatrae\\_Manutenao-da-Politica-de-Combate-ao-T.E-1.pdf](https://www.anamatra.org.br/images/Nota_Conatrae_Manutenao-da-Politica-de-Combate-ao-T.E-1.pdf)>. Retrieved on: May 25, 2019 ANAMATRA, as a member of CONATRAE, supported the initiative. Available at: <<https://www.anamatra.org.br/imprensa/noticias/27375-conatrae-possivel-extincao-do-mte-e-tema-de-nova-reuniao-da-comissao>>. Retrieved on: May 26, 2019

<sup>50</sup> Decree No. 9759, 11 April 2019 provides for the extinction of several collegiate councils and commissions in the Federal Government, including CONATRAE; The measure was the subject of a circular letter issued by the Attorney General of the Republic to the National Secretary of Global Protection of the Ministry of Women, Family and Human Rights. The letter stated that maintaining the commission is essential for the permanent public policy of fighting slave labor, seeking the guarantee of human dignity and the fundamental rights established in the 1988 Constitution and the Universal Declaration of Human Rights. Available at: <<http://www.mpf.mp.br/pgr/documentos/oficio-extincao-conatrae/view>>. Retrieved on: May 25, 2019 ANAMATRA participated in a CONATRAE meeting that discussed the harmful effects of the Decree on the fight against slave labor and the preparation of a draft report calling for the maintenance of the Commission. Available at: <<https://www.anamatra.org.br/imprensa/noticias/28027-trabalho-escravo-conatrae-debate-manutencao-da-comissao-no-cenario-do-decreto-n-9-759-2011>>. Retrieved on: May 25, 2019

<sup>51</sup> Available at: <<http://www.fnpeti.org.br/noticia/2130-mais-de-43-mil-criancas-e-adolescentes-sofreram-acidentes-de-trabalho-nos-ultimos-11-anos-no-pais.html>>. Retrieved on: May 25, 2019

In light of this alarming situation, the announcement by the Brazilian Government that it will review 90% of the Regulatory Norms of the Ministry of Labor<sup>52</sup> which address occupational health and safety conditions, has caused worried reactions from specialists, mainly due to the risk of increased rates of accidents and death among workers<sup>53</sup> – which includes children and young people, as already demonstrated.

The issue also raises concern regarding compliance with ILO Convention 155 and the National Police for Occupational Health and Safety (Decree 7,602 of November 7, 2011).

In this context, the Labor Courts, the Labor Prosecution Service and Labor Inspectors fulfill an institutional mission in the protection of workers' lives, health, integrity and dignity. Therefore, we understood it to be essential that there be a solid structure directed to the effectiveness of Labor Law, including specialized, speedy and efficient mechanisms for access to the Judiciary and legal enforcement.

Faced with such scenario, it is important to highlight the changes in labor legislation and the announcement of other changes in the field of social protection, thus ensuring that discussions and analyses of the impacts are broadened and can contribute to the respective debates.

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<sup>52</sup> The objective, according to the Government's announcement, is to "simplify the rules and increase productivity", starting with NR [*Regulatory Standard*] 12, which addresses machinery and equipment. According to official data, machinery and equipment caused 2,058 deaths of workers in Brazil from 2012 to 2018, according to data from the Digital Health and Safety Observatory of the Labor Prosecution Service. The estimated cost is R\$ 732 million with retirement benefits and pensions that were granted after accidents with machinery. Available at: <<https://oglobo.globo.com/economia/governo-quer-reduzir-em-90-as-normas-de-seguranca-saude-do-trabalho-vigentes-no-pais-23661380>>. Retrieved on: May 26, 2019

<sup>53</sup> Available at: <<http://spbancarios.com.br/05/2019/bolsonaro-quer-acabar-com-nrs-que-fiscalizam-saude-e-seguranca-no-trabalho>>. Retrieved on: May 26, 2019