

BRAZILIAN MIGRATION POLICIES AND THE PROTECTION OF MIGRANTS' HUMAN RIGHTS: ADVANCES AND SETBACKS

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Abstract

This study aims to analyze the pendular movement between democracy and authoritarianism in Brazilian migration policies, from the immigration programs of the beginning of the 20th century to the adoption of the new Migration Law. The first section of the text assesses the gradual opening of Brazilian migration legislation to International Human Rights Law, notably after Law No. 13445/2017 came into effect, establishing a counterpoint with previous historical periods. The second section of the article addresses the setbacks observed nowadays, more than three years after the new legislation came into force, which prevent the realization of migrants' human rights on Brazilian soil and impose a critical reading of the country's migration policies.

Keywords

Migration policies, Brazil, Human Rights.

Summary

Introduction; 1 Brazilian migration laws from the 20th through 21st century and its gradual opening to International Human Rights Law; 2 Authoritarian setbacks in contemporary Brazilian migration policies; Conclusion; References.

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INTRODUCTION

When analyzing the history of Brazilian migration policies, from the programs aimed at promoting the arrival of migrants in Brazil at the beginning of the 19th century as a way of replacing slave labor, through the restrictions observed in the first half of the 20th century, which implied the establishment of a quota system to avoid the concentration of migrants of certain nationalities (as in the provisions of Decree-Law No. 406/1938), which saw these migration policies marked by a utilitarian and restrictive character that shows all its vigor within the scope of the so-called Foreigner Statute (Law No. 6815/1980). This legislation crystallized the utilitarian bias of Brazil's migration policies as it conditioned the entry of migrants to the demands of the labor market; on the other hand, the repressive bias was expressed in the prohibition on the entry of foreigners who represented some kind of threat to national security - evidencing a very clear mark of the influence of the dictatorial regime then in force over migration policies. After more than thirty years of its adoption, and driven by a movement of severe criticisms of its authoritarian profile and incompatible with the Democratic Rule-of-Law State established in Brazil by the Federal Constitution of 1988, the Foreigner Statute was replaced by the Migration Law (Law No. 13445/2017), which advocated a real paradigmatic break in the way in which the issue of migration would be legally addressed in the country. This law is guided by the idea of the realization of migrants' Human Rights, rejection of xenophobia and a greater openness to the International Human Rights Treaties.

However, the legislative change, by itself, has not brought substantial changes in the way the issue of migration has been addressed in the country. Even after the new law came into effect, many setbacks have been observed. One of them concerns the way in which the new Migration Law was regulated by Decree n° 9199/2017 - which reiterates biases and an authoritarian stance when using the term "illegal immigrant" - in a clear affront to the principle adopted in Law n° 13445/2017. Another setback is

Brazil's break with “United Nations Global Compact for Safe, Orderly and Regular Migration (GCM)”, at the beginning of 2019.

In view of this scenario, the this article is structured in two sections that address, respectively: a) the opening of Brazilian migration laws to International Human Rights Law, notably after Law No. 13445/2017; and b) the setbacks seen today, more than three years after the entry into force of the new legislation, which impose a critical reading of the pendular movement between democracy and authoritarianism that permeates migration policies in the country.

The article used the hypothetical-deductive method. The research technique employed is bibliographic and document analysis.

1 BRAZILIAN MIGRATION LAWS FROM THE 20TH THROUGH THE 21ST CENTURY AND ITS GRADUAL OPENING TO INTERNATIONAL HUMAN RIGHTS LAW

Between the end of the 19th century and the first quarter of the 20th, due to the abolition of slavery and the consequent increase in demand for labor in agriculture as well as in the incipient national industry, Brazil began to encourage the arrival of European immigrants to the country. During this period, more than 800,000 Italian immigrants came to Brazil and, until the middle of the 20th century, more than 200,000 Japanese² arrived; between the end of the 19th century and the beginning of the 20th, Brazil received about 4.4 million immigrants, mostly from Portugal, Italy, Spain, Japan and Germany³. Immigration, in this period, was directly focused on a strategy of replacing labor, that is, marked by a very utilitarian bias; on the other hand, the migrant who arrived in Brazil had to adjust to an image that was required of him/her, that is, “that of an honest, qualified and exemplary worker, and

² ORGANIZAÇÃO INTERNACIONAL PARA AS MIGRAÇÕES, 2010, 10.

³ LEVY, 1974, 52.

always away from national political issues”, ⁴showing, in parallel with the utilitarian bias, the repressive dimension that marked national migration policies.

It was at the beginning of the 20th century that the so-called "Law on the Unwanted People" came in 1907, which provided for the expulsion of immigrants accused of anarchism, vagrancy, swindling and sexual and patrimonial crimes. This legislation marks a historic period of repression against the workers' movement, very present at the time⁵, which explains, to a large extent, the arbitrary way - without any right to defense - with which many immigrants were expelled from Brazil between 1907 and 1930, as a result of situations of unemployment or participation in union movements⁶.

The worldwide economic crisis of 1929 also had repercussions in Brazil, implying restrictions - through the fixing of immigration quotas in the Constitutions of 1934 and 1937 - in the scope of migration policies. Parallel to the economic crisis, it was feared that immigrants would form, in the country, concentrations of dissent in relation to the central government⁷, which caused issue of Decree-Law n° 406/1938, which determined that “no colonial nucleus, agricultural center, or colony made up of foreigners of a single nationality ⁸was allowed.” Thus, “the immigrant was only interesting when he/she agreed to the creation of a national identity, taking part in the construction of the future Brazilian workforce, and not as an element of disaggregation and discord.”⁹

During World War II, migration flows into Brazil were practically interrupted, due to the adoption of restrictive immigration policies. For

⁴ SILVA, 2007, 142.

⁵ SHETTINI, 2012, 56.

⁶ SILVA, 2007, 144

⁷ LOPES, 2009

⁸ BRASIL, 1938.

⁹ SILVA, 2007, 145.

example, Decree-Law No. 3175, of 1941, suspended the granting of temporary visas to foreigners (except Americans, and those who could prove possession of means of subsistence), as well as permanent visas (except for Portuguese and family members of Brazilians in general¹⁰). This situation remained for a good part of the second half of the 20th century, and it is possible to state that “until the mid-1980s, Brazil, in demographic terms, could be considered a country closed to migration¹¹”.

In fact, from the 1970s onwards, the country was undergoing an industrialization process, with a population practically concentrated in urban areas, which is why the interest in attracting immigrants declined considerably. In addition, the spread of the doctrine of national security by the civil-military dictatorship that prevailed in the country between 1967 and 1986 inspired a very restrictive legislation on the rights of immigrants in the country: “nationalism was converted into anti-communism and the country protected itself from international influences”, so that “foreigners were imposed several prohibitions in the political, associative and action sectors within areas considered strategic¹².”

This is the scenario in which Law 6815/1980 was enacted, the so-called Foreigner Statute, whose article 2 established the “defense of the national worker”, whereas article 16, in its sole paragraph, was concerned with the “attraction of qualified labor” to the country - to demonstrate its utilitarian character. On the other hand, the Foreigner Statute provided for restrictions on the fundamental rights of immigrants, placing them in a constant situation of suspicion before the national security ideology that permeated the dictatorial regime¹³.

¹⁰ BRASIL, 1941.

¹¹ PATARRA, 2012, 10.

¹² LOPES, 2009, 169.

¹³ WERMUTH, 2014.

Such legislation, evidently, was no longer in line with the contemporary migration scenario in Brazil - when Brazil started to project itself as an important actor in the international relations scenario. This context has posed several challenges to the country, among which was to present adequate solutions to the issue of migration, also considering the large number of migrants who have arrived in Brazil in recent years, with an emphasis on Senegalese, Haitians, Bolivians and Venezuelans.

Parallel to this, Law No. 6815/1980, since 1988, was absolutely incompatible with the political regime established in the country - Democratic Rule-of-Law State - by the current Federal Constitution, imposing its urgent review/update. Bill No. 288/2013, of the Brazilian Federal Senate¹⁴ was born with this objective and, from a fruitful dialogue with social movements - such as the Conference on Migration and Refuge (COMIGRAR), of the World Social Forum on Migration (FSMM) and the I Social Participation Dialogue promoted by the National Immigration Council (CNIg), between 2013 and 2016 - gave rise to the Migration Law (Law No. 13445/2017) currently in place, which revoked the Foreigner Statute.

The new legislation represents, in relation to the previous one, a paradigmatic rupture because it is deeply aligned with international human rights law and the principle of conventionality. Art. 2 of the Migration Law provides that its application "does not jeopardize the application of specific internal and international rules on refugees, asylum seekers, agents and diplomatic or consular personnel, employees of international organizations and their families".¹⁵ Thus, the current legislation establishes a greater coordination of the treatment of migration in line with the principles established by the Federal Constitution of 1988 and to the International Treaties in force on the subject (with emphasis on the UN Universal

¹⁴ BRASIL, 2013.

¹⁵ BRASIL, 2017a.

Declaration of Human Rights, for the UN Convention on Workers Migrants, for the 1951 UN Convention on the Status of Refugees and for the Protocols on Trafficking in Persons and Migrant Smuggling, among other important legal instruments not mentioned here, but no less important). Art. 3 of Law No. 13445 / 2017 also highlights the paradigmatic rupture signaled above, to the extent that it establishes, among others, the principles and guidelines of Brazilian migration policy as: the universality, indivisibility and interdependence of human rights; repudiation and prevention of xenophobia, racism and any forms of discrimination; compliance with the provisions of the treaty; the recognition of migration and human development at the place of origin as inalienable rights of all people.¹⁶

In addition to establishing these principles and guidelines, art. 3 of the current legislation calls for the non-criminalization of migration (item III); non-discrimination due to criteria or procedures by which the person was admitted to national territory (item IV); humanitarian reception (item VI); the guarantee of the right to family reunion (item VIII) and equal treatment and opportunity for migrants and their families (item IX); the social, labor and productive inclusion of migrants through public policies (item X); enabling migrants' equal and free access to services, programs and social benefits, public goods, education, comprehensive public legal assistance, work, housing, banking and social security (item XI); the promotion and dissemination of the migrant's rights, freedoms, guarantees and obligations (item XII).¹⁷

In the scope of international relations, art. 3 of Law No. 13445/2017 is concerned with strengthening the economic, political, social and cultural integration of the peoples of Latin America, through the establishment of spaces for citizenship and free movement of people (item XIV); with

¹⁶ BRASIL, 2017a.

¹⁷ BRASIL, 2017a.

international cooperation with States of origin, transit and destination of migratory movements, in order to guarantee effective protection of migrants' human rights (item XV); with the integration and development of border regions and articulation of regional public policies capable of guaranteeing the effectiveness of the rights of border residents (item XVI) and, finally, with the rejection of practices of collective expulsion or deportation (item XXII).¹⁸ Likewise, the new legislation prohibits the entry impediment based on nationality, race, religion, social group or political opinion, establishing the possibility of accountability for agents who practice arbitrary acts in primary border areas.

These principles and guidelines, among others established by the legislation under analysis, show a clear “democratic turn” in the way Brazil starts to deal with the issue of international migration, definitively overcoming the authoritarian sentiment based on the idea of “national security” and a purely utilitarian management of migration flows focused on economic interests and the labor market - just as the way of approaching the subject from the revoked Foreigner Statute perspective.¹⁹

2 AUTHORITARIAN BACKGROUNDS IN CONTEMPORARY BRAZILIAN MIGRATION POLICIES

Already in the period of its legislative procedure, and new Brazilian migration legislation was the target of numerous authoritarian and conservative attacks, which point to the permanence of a logic of continuous suspicion of foreigners, “that are part of all legislative formulation of the last years of the Empire and the Republic, would not cease to exist, as if by magic, in contemporary Brazil.”²⁰ Quite the contrary,

¹⁸ BRASIL, 2017a.

¹⁹ WERMUTH, 2020.

²⁰ SPRANDEL, 2018, 54-55.

these perspectives remain, “fueled by narratives about the need to strengthen security forces and by the agenda for the withdrawal of rights, which, with mishaps and some contradictions, had been solidifying in the country since the 1988 Constitution²¹.”

As highlighted in the previous section, the current legislation presents numerous advances when compared to the legislation introduced throughout the 20th century - particularly in relation to Law No. 6815/1980. This is because Law No. 13445/2017 brings respect for Human Rights as a central issue.

However, even in the face of the progress already signaled, it is important to note that there are indications of significant setbacks in Brazilian migration policies in contemporary times. One of these authoritarian setbacks can be observed in Decree n° 9199/2017, which aims to regulate Law n° 13445/2017, but which marks a movement of recrudescence in relation to the openness represented by the new Migration Law to Human Rights, appearing as “a serious threat to historical conquests, both with regard to the rights of migrants and with regard to Brazil’s ability to formulate appropriate policies related to this topic of increasing relevance.”

²²This is quite evident through the use, in the Regulatory Decree, of the expression “clandestine”, in the heart of art. 172. The use of this expression by the Decree under analysis demonstrates a total disregard, at national level, of the entire international debate about the protection of the migrants’ Human Rights, based on the idea that “no human being is illegal”. Effectively, the adjectives illegal/clandestine objectify the migrant, placing the text of art. 172 of the Decree against the recommendation of the United Nations (UN) - which since the 1970s recommends the use of the expressions “undocumented” or “irregular”.²³

²¹ SPRANDEL, 2018, 54-55.

²² RAMOS *et al*, 2017.

²³ WERMUTH, 2020.

In addition to the vernacular issue, the Decree also highlights an authoritarian “sentiment” that does not fit in with the environment of a Democratic Rule-of-Law State that has just one of its supporting pillars in the dignity of the human being (art. Federal Constitution), entering into a collision course with the Law that aims to regulate, insofar as, as already pointed out, art. 3 of Law No. 13445/2017 recognizes the universality, indivisibility and interdependence of human rights, repudiating and preventing xenophobia, racism and any other forms of discrimination, and also committing to observe the provisions on the subject of migrations provided for in International Treaties.

In addition to the setback represented by the Regulatory Decree of Law No. 13445/2017 - analyzed, within the limits of this article, only in some aspects - the pendulum movement leans, after the 2018 elections, towards an even more authoritarian logic in the treatment of issues involving migration. This is very clear from Brazil's break with the UN “Global Compact for Safe, Orderly and Regular Migration” in early 2019. The “Global Compact for Safe, Orderly and Regular Migration” is the first agreement created that is concerned, in a thorough and comprehensive way, with the phenomenon of migration on an international scale. The agreement is rooted in the United Nations Charter and the Universal Declaration of Human Rights, and reaffirms the New York Declaration for Refugees and Migrants²⁴. It was adopted in Marrakesh, Morocco, in December 2018 and aims to improve international cooperation in relation to migration flows. The document does not have the means to make state sovereignty more flexible, but to strengthen it through intergovernmental cooperation, so that measures are taken to ensure safe, orderly and regular/continuous migration. In this sense, it is evident that the pact “does not aim to open the borders of countries”, nor does it restrict “the exercise of national sovereignty”, insofar as it “expressly recognizes the right of

²⁴ UNITED NATIONS, 2018

States to determine their migration policies" and establishes "Guiding principles that aim at rational migration management", taking them "as a global issue that deserves concerted attention"²⁵. It is, therefore, a Pact that establishes several parameters so that migrations are, globally, safe, orderly and regular, recognizing the vulnerability of migrants and concerned, at the same time, with the issues of territorial government and national sovereignty, seeking, consequently, to promote security and development under the aegis of human rights - characterizing, therefore, as a sharing of responsibility and ratification of human rights²⁶.

Brazil signed the Pact during Michel Temer administration, but withdrew and broke with its initial position, which was one of the first measures taken by the government of Jair Bolsonaro, on January 8, 2019. Former Chancellor Ernesto Araújo announced, at the time, the breach of the Pact through a social network, stating that "immigration should not be treated as a global issue, but rather according to the reality and sovereignty of each country", which is why the Global Pact is considered an "Inappropriate tool to deal with the problem"²⁷. In total disagreement with the principles and guidelines of Law No. 13445/2017, the chancellor stated that immigration "is welcome, but cannot be indiscriminate", but be "at the service of national interests and the cohesion of each society"²⁸.

The referred "retreat" movement of Brazil in the international stage with regard to the protection of the migrants' Human Rights shows a movement that, in the country's pendular history of the subject, is not new. The novelty of our 21st century consists, here, of the emptying of the rule of law in the face of the question of population displacements, which calls into question "the insufficiency of the answers that the rule of law has been able to offer".

²⁵ FIGUEIRA; ORTIZ, 2020, 687-688.

²⁶ UNITED NATIONS, 2018.

²⁷ JORNAL DA USP, 2019.

²⁸ HEBDO LATINO, 2018.

In effect, "although formally, the state legality guides these responses, it is clear how far they are from being effective, from being legitimate and, in the end, from being fair."²⁹

These setbacks can be considered as unnecessary damage that the country inflicts on itself "by abandoning the implementation of legal resources that have been positioning it as an example of a country with advanced mechanisms of regulated hospitality"³⁰. Ultimately, it is a movement that culminates in the production of a picture of indistinction between law and violence, responsible for producing lives that are exposed to the most different forms of violence.

CONCLUSION

This brief study sought to highlight the pendular movement between democracy and authoritarianism that permeates the Brazilian migration policies, from the 19th century immigration programs, through the restrictive policies that marked the first half of the 20th century and which result in the introduction, during dictatorship, of the "Foreigner Statute" (Law No. 6815/1980), which prevented, from entering the country, immigrants who might pose a risk to "national security" and/or who were not relevant in view of the demands of the labor market.

This pendular movement was also analyzed from the enactment of the new Migration Law (Law No. 13445/2017), which points to a paradigmatic rupture guided by the realization of the Human Rights of migrants, but which hinders its effectiveness in its very Regulatory Decree (Decree n° 9199/2017), marked by setbacks such as the use of the term "illegal immigrant". This gap shows a continuity of the authoritarian perspective in the management of migration inflows, which culminates in the rupture of

²⁹ FONSECA, 2016, 979.

³⁰ FIGUEIRA; ORTIZ, 2020.

Brazil with the United Nations' Global Compact for Safe, Ordered and Regular Migration.

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