ANALYSIS OF THE BRAZILIAN MIGRATORY POLICY: THE MIGRATION LAW PRESIDENTIAL VETOES

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Abstract: This article analysis the legislation regarding Brazilian immigration policy, especially the presidential vetoes to the Migration Law to indicate compliance or not with constitutional norms and international human rights treaties. The deductive method is used, with the objective of analyzing the presidential vetoes made to the law and its possible violations of human rights. Thus, the question of the compatibility of vetoes with constitutional precepts and international treaties regarding migration is questioned. In this sense, the historical method is used to analyze the origin and the historicity of Brazilian migratory policies, to verify its possible influence on the motivation of the vetoes. Finally, it is concluded that the presidential vetoes do not observe the evolution regarding human rights, referring to the act of migrating, present in the international treaties adopted by Brazil, as well as are contrary to the humanitarian spirit of the Migration Law itself.

Keywords: Migration; Human right to migrate; Principle of human dignity; Vetoes.

INTRODUCTION

Migration is not a recent phenomenon, because society has migrated since its emergence and people do it for a variety of reasons, especially in search of better living conditions. The theme of migration has been used as electoral podium of parties to the right and far right of the political-ideological field, like the United States of America, which elected in 2016 the President who promised to build a wall on the border with Mexico, in addition of other conservative and retracted measures concerning migrants.

It occurs that this use is done in an irrational way and without compromise with the researches related to the migratory phenomenon, as they stimulate xenophobia. To the States, it is the legal protection of this act so that it can be exercised by the migrants in a healthy way, to carry out this practice with the legal certainty due and in line with respect for the dignity of the human being.

In this perspective, the laws and public policies focused on the theme of migration play an essential role in both protection and promotion of the right to migrate. In Brazil, it was sanctioned in May 2017 Law No. 13,445, the Migration Law. Thus, it revoked the Statute of the Foreigner then in force, which was elaborated in an undemocratic time, therefore, without commitment to

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human rights and democracy, using the militaristic premise of defending the national territory to criminalize the migrant.

The Law No. 13,445, which instituted the new legal diploma, was ordered based on the principle of the dignity of the human person, a significant advance in relation to the repealed law and was nevertheless the subject of eighteen presidential vetoes. Within this context, the vetoes were a cause for discussion among people who dedicate their lives to researching the migratory issue, because they maintain that they could alter the meaning of the said law. (BRASIL, 2017b).

In this sense, the present study aims to analyze the presidential vetoes to respond to the following research problem: the vetoes made in the Migration Law are compatible with human rights, as well as their respective guarantees fundamental and constitutional protected in the context of a Democratic State of Law?

As a method of approach, the deductive added to the historical research procedure was defined to investigate the historical evolution of human rights in Brazil concerning the issue of migrants. As a research technique, the bibliographical and documentary procedures are adopted. The bibliographical procedure is scoped to the use of books, articles, national legislation and other doctrinarian references for the development of the proposed theme. The documentary procedure is made with the observation in official Brazilian documents on the subject, such as laws, bills, conventions and signed pacts.

The article is divided into five parts; thus, the first part reveals the origin of the Brazilian migratory policy from Brazil Colony and racism hidden in the choice of migrants ideal for the settlement of the national territory. The second part examines xenophobia as the basis of the Foreign Statute, conceived during the military dictatorship. In the third part, we verify the Brazilian Constitution and the International Treaties ratified by the country in relation to the human rights of migrants, and the maintenance of the Foreign Statute. In addition, the non-recognition of the human right to migrate, despite the restoration of the Democratic State of Law in Brazil, is observed. The fourth part brings considerations about the innovation resulting from the Migration Law, although carried out in a late manner, compared to the revoked diploma that represented the non-recognition of the migrant as a subject of rights. In the fifth and last part, we analyze the concordance of the presidential vetoes with the constitutional text, with the human rights present in the international treaties on migration and with the Migration Law itself.

Given that the right to migrate is, as a rule, governed by state legislations, it becomes the duty of the legal order to ensure it, as does the Migration Law in Brazil, which presupposes the development of migratory policies consistent with the principle of the dignity of the human person. However, from the analysis of the legislation that instituted the Brazilian migratory policy, it is verified that some presidential vetoes to the Migration Law represent the symbol of the retrograde reversal by a conservative portion of the Brazilian society.

1 ORIGIN OF THE BRAZILIAN MIGRATORY POLICY: RACISM AND HIDDEN

XENOPHOBIA

In the period of colonial Brazil, in the year 1747, the first law for immigrants appears, according to the Repertoire of Brazilian and Paulista Legislation Regarding Immigration. The provision of August 09 was geared towards the referral and settlement of Azorean couples in Brazil. In 1808, there is the decree of November 25th in which "Allows the granting of *sesmarias* to foreigners residing in Brazil" and in 1813, a Decree that benefits couples from the island of Azores that have settled in Brazil. Between 1817 and 1818 there were five more official acts between Ordinance, Decree and Royal Charter for the treatment regarding the immigration of Swiss in the until then Brazil colony (BASSANEZI, 2008 p. 11).

It is perceived, therefore, the favor of Portuguese and Swiss in the first laws of encouragement to foreign migrants, especially with regard to the reception and granting of land in Brazil. In this time of the country of legalized slavery, the core of the Brazilian immigration policy was 'veiled': racism. From this perspective, the idea of encouraging white and European immigration was disseminated to be the symbol of land distribution and population development. This, because it followed on the racist pretext of a supposed white hegemony, which demonstrates racism based on a process of bleaching of Brazilians. In this sense, the miscegenation that occurred due to this process, is a cause of concern for radical nationalists, which reveals even more the racist core of the migration elected to populate the Brazilian territory. Likewise, for Alencastro and Renaux (1997, p. 293), the imperial bureaucracy and the intellectuals of the time used the immigration policy as a mechanism of "civilization, which, at the time, referred to the bleaching of the country".

From 1823 and from the institution of the Empire, the Decision No. 154 of October 22 "prohibits the granting of *sesmarias* until the constituent and legislative General Assembly regulates this matter". In this context, there was a lot of effort in the elaboration of a "general plan of colonization that serves all the Provinces" (BASSANEZI, 2008, p. 12).

The issue of immigration (not black) is consecutively exploited to stimulate this practice, given the Law No. 99 of October 31, 1835 in which "exempt from the anchorage tax the vessels that lead more than 400 white settlers" (BASSANEZI, 2008, p. 14).

Likewise, the favoring of European immigration was completely accepted and justified from a racist premise. This social discrimination, based on differences between races and the presumed supremacy of the white race, is evident when considering the empty, racist and prejudiced discourse on African immigration. Even if Africans were taken from their continent in a compulsory manner, they were not considered immigrants, because they were not perceived as people, but as objects acquired to enrich the owners who bought them, and used their labor through slave labor. Thus, even after the hard work, unpaid and severely punished of Africans and their descendants, these were considered incapable by their tormentors, that is, they could not

work freely or be they land owners.

According to Seyferth (2002, p. 119), the German immigrant was regarded as an efficient farmer, which would be a standard in immigration legislation relating to colonization, "in the rules of admission of foreigners the ideal immigrant, the only deserving of subsidies, is the farmer; more than that, a white farmer who emigrates in the family".

The promotion of European immigrants follows, in 1846, with Law No. 313 of 16 March with the "establishment of agricultural colonies with German or Belgian settlers" (BASSANEZI, 2008, p. 15).

For Seyferth (2002, p. 120), it occurred simultaneously in 1850 the publication of the Land Law and the Euzébio de Queirós Law which banned the entry of enslaved Africans in Brazil. In this way, there is the privilege of European colonization and the impediment of the use of the enslaved labor of blacks in the colonies. However, as previously reported, not even free blacks were considered appropriate for work in the colonies.

In short, it is clear that Africans and their descendants were not even recognized as immigrants, and this would serve as motivation to try to justify the lack of incentive to work and establish themselves in Brazilian lands such as Europeans. Not even in a reparation attempt at the three and a half centuries of dehumanization of the slavery system to which they were subjected.

Since the first legal act of 1747, on colonization and immigration in Brazil until 1961 were 214 years of incentive to foreign immigration, especially European and white, according to the Repertoire of Brazilian and Paulista Legislation Regarding Immigration (BASSANEZI, 2008). Therefore, racism was the basis for the emergence of the first Brazilian immigration policy, which had as a preference in its model of perfect colonization, according to discriminatory racial criteria, the white and European farmers.

Moreover, the question of xenophobia was the essence of what would become the next Brazilian migratory policy. According to Seyferth (1997) between the years 1937 and 1945, there was a campaign of nationalization, in which the army was the great disseminator of the nationalist discourse that criticized the policy of colonization until then held. Furthermore, the author emphasizes that, for the military, immigrants were not absorbed by the culture of Brazilian society, "in the military view, an anomaly of this kind could only be eliminated through the civic action of all the patriots who intended to live in a Brazil unified, independent and strong" (SEYFERTH, 1997, p. 95). In this way, it is perceived that there was a very strong campaign to qualify immigrants as aliens, and therefore should be feared and fought by the nationals who shared this radical nationalist thought. Thus, according to Seyferth: "The campaign of nationalization was implemented during the New State (1937-1945), reaching all possible aliens, both in the colonial areas (considered the most enquired and affected of the Brazilian society) as in cities where ethnic organizations were more visible "(SEYFERTH, 1997, p. 96).

In this perspective, the disregard imposed on immigrants, in this context of authoritarian

and legalized state, began by the suppression of communication in their language and prohibition of their teaching. In this sense, "The first act of nationalization has reached the system of teaching in foreign language: the new legislation has forced the so-called "foreign schools" to modify their curriculum and dispense the "denationalized" teachers: those who did not succeed (or not wanted) to comply with the law were closed" (SEYFERTH, 1997, p. 96).

The nationalization campaign generated the attempt to eliminate foreign language, eradicate immigrant organizations, annihilation of their culture and search for a standard Brazilian citizen. This resulted in the labeling of foreigners as enemies of Brazil, especially in a context of war. "The participation of Brazil in the war, from 1942 onwards, increased the animosities, because the nationalizing action intensified with the immigrants (and descendants) Germans, Italians and Japanese – transformed, also, into potential "enemies of the homeland" (SEYFERTH, 1997, p. 97).

Therefore, the racism described above, implied by laws and decrees and, especially in the naturalized discourse of white and European migration, is the first significant factor of origin of the Brazilian migratory policy. As well as xenophobia, latent in nationalist discourses and consequently in its nationalization campaign in which it resulted in laws that guaranteed it[1], in view of the prohibition of foreign schools.

Therefore, racism and xenophobia are evidenced as the origin of the Brazilian migratory policy. The context of the authoritarian State present in the New State is repeated in the military coup of State of 1964, in which the military premise of national defense is adopted. However, as in the policy of settlement and distribution of land as a migratory policy, racism was implicit, xenophobia was underpinning the elaboration of the foreign statute, theme of the next topic.

2 FOREIGN STATUTE: THE INSTITUTIONALIZED XENOPHOBIA

The statute of the foreigner was a systematic legislation that brought together norms in a legal document concerning migration, as previously seen this issue until then was treated sparsely in the legal system, being linked to the colonization and settlement of the Brazilian territory. The xenophobic discourse disseminated by military of radical nationalist ideals, was literally normalized in this directed (contra) legislation for migrants. It was in the period when Brazil was being ruled undemocratically by the military that the law that instituted the foreign Statute, Law No. 8.615/1980, entered into force on August 19, 1980.

The military dictatorial regime in which the State and part of the population were subjected,

[1] The Italian, Japanese and German languages were banned in Brazil in 1942, because of the declaration of War on Germany; the immigrants who lived here for decades have been silted. Available in: http://www2.camara.leg.br/camaranoticias/radio/materias/REPORTAGEM-ESPECIAL/405454-SEGUNDA-GUERRA-MUNDIAL-AS-RESTRICOES-ENFRENTADAS-POR-ESTRANGEIROS-QUE-VIVIAM-NO-BRASIL-BLOCO-2.html. Access in 14 Oct. 2018.

was based on the militaristic premise in defense of national security, according to its idealizers in "combating the communist subversion" jointly with part of entrepreneurs Brazilians, international companies, a portion of the press and the Catholic Church, which according to their perspectives would be concerned with the Brazilian economic crisis and the maintenance of order. In this sense, it can be affirmed that: "The military, associated with the interests of the great national and international bourgeoisie, encouraged and backed by the North American government, justified the coup as a defense of the order of institutions against the danger communist". (HABERT, 1992, p. 8-9).

In this way, we verify the union of privileged layers of society around a common cause: the maintenance of its advantages as opposed to a possible rise of lower layers. As in the time of Brazil colony, in which part of the wealth-holding society disqualified the African immigration and encouraged European migrations with the aim of whitening the Brazilian population. Likewise, through the nationalizing campaign imposed by the Brazilian Army, xenophobia was systematized in laws, which enabled the promotion of enemies, in this case foreigners, to maintain the state of things.

In this sense, it is verified that the socio-economic division present in society is directly related to the fact that those who elaborate the laws and to which purposes they employ, in which the political and economic power, from the wealthy classes, is the reason for success in this venture (BECKER, 2008, p.29).

Thus, the Law No. 8.615/1980 (BRASIL, 1980), finally puts into practice what the Army in its nationalization campaign, had discussed, and in the name of the defense of national security promulgates the Statute of the Foreigner. The article 1 of the Statute of the Foreigner already begins by warning that this law is valid in peacetime, that is, in the absence of peace or in time of war or its imminence, the rights of foreigners would no longer be worth. In its article 2 it indicates that its use will be to meet national security, institutional organization, political, socio-economic and cultural interests of Brazil, and also the defense of the national worker. In other words, the law for foreigners was not made for them, but rather to protect their Brazilian nation, in this nationalist, military and xenophobic logic. Thus, by differentiating the national worker from abroad, he instigated fear in the nationals of the foreigners who lived here and worked in the sense that they would steal their job vacancies. What can contribute to the precarization[2] in working conditions[3] of non-nationals.

Article 3 of the Statute orders that the granting of visas, their extension, or transformation

[2] See, for example, the journalistic matter that informs the enslavement of Haitian immigrants in Brazil, in the year 2014. Available in: https://reporterbrasil.org.br/2014/01/imigrantes-haitianos-sao-escravizados-no-brasil/. Access in: Oct. 25, 2018.

[3] See more in a note issued by MIGRAIDH on the repression of the city hall of Santa Maria to the street trade mainly exercised by migrants. Available in: http://www.migraidh.ufsm.br/index.php/2016-03-29-11-45-18/49-nota-sobre-a-repressao-ao-comercio-de-rua-em-santa-maria. Access in: Oct. 25, 2018.

will always be conditional on national interests, which shows, according to an authoritarian and sovereign State perspective, the supreme value protected from this legislation: the national interest. A national interest cannot be in the interest of a foreigner, since it has not been assimilated or absorbed by the Brazilian culture. This stems from a propaganda of incitement against foreigners, because a national must always be opposed to foreign, in the culture of fear imposed and instigated by the dictatorship of this and other times.

In this context, it is noted that there is a total lack of human rights relating to migrants, which were not considered as subjects of law, which is in agreement with the justification for the creation of the said Statute. Moreover, the search for the fortification of national sovereignty and the defense of its territory against the (produced) foreign enemies, are their motivations.

Therefore, the defense of national security was the term used to camouflage within a military perspective, racism and xenophobia previously hidden by the pretense policy of settlement and distribution of land in the Brazilian territory since colonization. As previously reported, the ideals of a pure Brazilian nationality, present in the extreme nationalist discourse, were not in agreement with the colonization policy made until then. Thus, the Brazilian Army, when taking power in an arbitrary way, could institutionalize the xenophobia present in its discourses, which can be verified in the elaboration of the Foreign Statute.

It is understood, however, that there is no problem with the question of nationality itself, as long as it is not used as an excuse to discriminate people who were born elsewhere, that is, as subterfuge. As occurred in the case of the aforementioned campaign, the radicalization of the perception of being a national was used to instigate nationals against non-nationals. Thus, it is possible for a person to have their nationality and in conjunction with others to be able to constitute a nation with objectives and rights and that they are guaranteed by a State power. This, in turn, will be able to ensure its citizens and maintain relations with other States. However, being a national of a place does not mean being a national opponent elsewhere.

The historian Yuval Noah Harari, in his work 21 lessons for the 21st century, has a chapter on nationalism, in which he state that mankind lives in a single civilization in which people share challenges and opportunities in common and asks why some groups such as British, American and Russian prefer nationalist isolation. In this sense, the author understands that the problems of mankind are global, such as the preservation of the environment and the nuclear defense, as they reach everyone in greater or lesser degree, in this way the responses to these must be global and there is no point in closing in a nationalism that puts the country first rather than the livelihood of the entire community. Even because a single country could not defend itself or defend the world, without the cooperation of others, no matter how rich and developed it is (HARARI, 2018, p.144).

Hannah Arendt, who understands that, on the other hand, sees the theme nationality, differently: "In its essence, nationalism is the expression of this wicked transformation of the State into an instrument of the nation and the identification of the citizen with the member of the nation.

The relationship between the State and society was determined by the class struggle, which had supplanted the ancient feudal order" (ARENDT, 2012, p. 324).

In fact, the question of class struggle, especially in an unequal country like Brazil makes perfect sense, because there is a discriminatory perception of the migrant "legislated" by the Brazilian dominant class, in the context of the anti-democratic regime. In the same way, the non-compensation of the Afro-Brazilians by means of distribution of land, in virtue of abolition of the slavery tackled not the first topic. Furthermore, the prohibition of foreign language education, especially the German, Italian and Japanese languages. Which corroborates the view that the difference between classes is linked to power and that explains who makes the rules and who should fulfill (BECKER, 2008, p. 30).

The said statute is the most faithful expression of what is meant by national security, because at any time the executive branch could expel a foreigner from the Brazilian territory, according to his understanding, if he judged a threat (ILLES; VENTURA, 2010, p. 14). For this reason, and all the others already explained, again is noticeable the non-understanding of the migrant as a subject of rights in Brazil commanded by a military dictatorship.

The institutionalization of xenophobia as a migratory policy, and the political incentive for the non-recognition of fundamental rights for foreigners was legitimized by the Statute, which was equally legitimized by a State of exception. This last dictatorial period lasted about twenty-one years and after its extinction Brazil was redemocratized, being the Federal Constitution of 1988 the main declaration of a Democratic State of Law (BRASIL, 2019). However, the result of more than two decades of a military regime that consecrated the Statute of the Foreigner, and the entire period of nationalizing campaign promoted by the Brazilian Army, together with the aforementioned policy of settlement and bleaching of Brazilian population, would not be changed with the restitution of democracy. Much less with the restoration of the Democratic State of Law.

In this sense, the promulgation of the Constitutional Charter and its term of thirty years did not revoke the unconstitutional Statute of the Foreigner in the country, nor did it assert one of its fundamental objectives, the construction of a free, fair and solidary society, as well as the promotion of the good of all, without prejudice of origin, race, gender, color, age and any other forms of discrimination.

3 BRAZILIAN CONSTITUTION[4] AND INTERNATIONAL TREATIES: THE NON-RECOGNITION OF THE HUMAN RIGHT TO MIGRATE

When the state is the vehicle of human rights violations against its citizens, as in the case of the two World Wars, there is an urgency to create defense mechanisms against this arbitrariness. The author Hannah Arendt in her work Origins of totalitarianism observes that the period between wars and after its termination, was a time of great human displacements. Because of the consequences of these terrible events, including inflation and unemployment, the groups that migrated were not accepted in any part and could not return to the place of origin. Thus, they became stateless and without human rights had nothing, "they were the scrap of the Earth" (ARENDT, 2012, p. 369). For this reason, it was necessary to have a reaction of humanity contrary to legally nodded barbarism and thus the construction of a legal document that protects human beings against possible arbitraries committed by the State, as in the case of the Nazi regime.

Thus, to prevent the state from being a transgressor of rights and thus commit new barbarities against the people under their protection, it was constituted, in 1948, the Universal Declaration of Human Rights. A legal response against the delinquent State, which in a legalized way nodded the horror of the holocaust. According to Comparato, the Universal Declaration is technically a recommendation that the United Nations General Assembly has made to its members, but this understanding "sins over formalism. It is recognized today, everywhere, that the validity of human rights is independent of its declaration in constitutions, laws and international treaties, precisely because it is facing demands of respect for human dignity" (COMPARATO, 2008, p. 223-224).

Thus, in view of the formalist ponderations, there was an effort in the sense that the human rights instrument of protection had real legal efficacy and had no limited scope for a purely formal question (PES, 2010, p. 78). In this way, two pacts were subsequently instituted to give binding force to the rights provided for in Declaration of 1948, they are: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural.

Among the pacts, we emphasize the International Covenant on Civil and Political Rights Pact of 1966, ratified by the Brazilian State on July 06, 1992 by Decree No. 592, which declares in its article 2 that every person will have the right to leave freely from any country, including his / her own country and article 4, exposes that no one can be arbitrarily deprived of the right to enter their own country. (BRASIL, 1992a)

In addition to the International Covenant on Civil and Political Rights Pact, the most important document on migration is the International Convention on the Protection of the Rights

[4] (BRASIL, 2016).

of All Migrant Workers and their Relatives, of 1990. Only that this Convention has not been ratified by Brazil and has been around since 2010 waiting in the National Congress, which demonstrates the lack of interest of this in recognizing the human right to migrate. According to Deisy Ventura, this Convention recognizes the fundamental rights of all, in a regular or non-migratory situation (VENTURA, 2014). The non-recognition of human rights[5] to migrate, violates the dignity of the human person who is based on the Brazilian Major Law.

The dignity of the human person is the supreme value that is implied in any legal document committed to the essentiality of the human being, because this promotes the continuity of mankind. And that is independent of religion, color, gender, politics or place of birth.

According to João Hélio Ferreira Pes, the current understanding that human rights, grounded in the dignity of the human person, are not solely the foundations of rights, but also the basis of the legal order, that is, the dignity of the human person is Fundamental for the development of the legal system in its entirety (PES, 2010, p. 29). Therefore, it is so essential that the human right in the dignity of the human person is the reason for the principle that guides the norms by which it is governed by society, and that this is reflected in the state activities that are limited in its power so that people have respected their individuality and dignity. The failure to observe this, and the fact that the legal system was not grounded in human rights, implied the two great wars as seen in the horrors of the holocaust.

Thus, the internationalization of human rights is indispensable both for the progress of humanity and for its preservation, in the perspective of a human and global international law. In this way, the recognition of human rights in an international level is of paramount importance as well as an alert to the risks that may arise from their non-observance.

In view of this, the Magna Carta represents an important milestone in the legal history of Brazil, because it systematizes clearly and objectively the recognition of social and economic inequalities present in society, which is foreseen in article 3 of the Magna Carta, to the IV. Because the Federal Constitution of 1988 in its initial article exalt the dignity of the human person as its main base, which should guide the entire legal system.

The opening of Democratic Brazil to an internationalization of human rights is present in § 2 of article 5, in which it is described that the rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and the principles adopted, or the international treaties in which the Federative Republic of Brazil is a party. Thus, the most important legal document informs that the international treaties in which Brazil has agreed on human rights are constitutional and must be respected. In this perspective, according to Mazzuoli: "The constitutional hierarchy of the treaties for the protection of human rights is not just a complement

[5] See, for example, the doctoral thesis of Professor Giuliana Redin, general coordinator of the research group, teaching and extension human rights and international mobility of the Universidade Federal de Santa Maria (UFSM). Available in: http://bdtd.ibict.br/vufind/Record/P_PR_96b59a82969feccea69aa7d6d4d3b612. Access in Apr. 30, 2018.

to the dogmatic part of the Constitution, implying, moreover, the necessary exercise of all public power – including the judiciary – in respecting and guaranteeing the full validity of these instruments" (MAZZUOLI, 2006, p. 396).

Naturally, the international human rights treaties ratified by Brazil begin to have immediate efficacy, as it has a constitutional nature, in addition to being incorporated as petrous clauses, which means that they cannot be extinct. Thus, Brazil ratifies on November 6 of the American Convention on Human Rights, or Pact of St. Joseph of Costa Rica, promulgated on November 22, 1969. (BRASIL, 1992b)

In the preamble to the Convention, it is expressed that the essential rights of the human being are recognized and that they are not tied to the fact that this is a national of a particular country, but that their rights come from being a person. As regards the Universal Declaration of Human Rights, signed and promulgated in 1948, the same date on which it was signed by Brazil, it is expressed in article 13 that every human being has the right to leave any country, or his own and to return if he wishes. This means that migrating was recognized as a human right in an international context, and in the Brazilian context, although the International Covenant on Civil and Political Rights Pact was internalized, it did not have this recognition, despite the binding force of same. In view of this, the democratic opening of the country, the establishment of the Democratic State of Law and the ratification of international treaties on human rights, this right has not been acknowledged, given the non-extinction of the Statute of Foreign.

It is evident that Brazil has a recent democracy after having lived so many years of authoritarian regime. Therefore, the remnants of violations of law, the non-recognition of human rights and the fear of a new era that recognizes all this is an impeditive for the country to advance in public policies aimed at migrants.

In this perspective, the principles governing the legal order must be fully understood, in the case of the Federal Constitution of 1988, its guiding principle is that of the dignity of the human person, and in the lesson of Celso Antônio Bandeira de Mello, the principle it should be viewed as follows: “It is by definition a core commandment of a system, the very foundation of it, a fundamental disposition that errs on different norms composing their spirit and serving as a criterion for their exact understanding and intelligence.” (MELO, 2004, p. 841).

As a consequence of these findings, the statute was a serious offense to the principle of the dignity of the human person and more than that, the entire national and international legal structure in force in Brazil, the violation of this principle was enshrined in the said Statute the commitment of the legal order to this assumption.

With the passage of almost three decades of a democratic political regime, it was clear that the Statute should be revoked as soon as before. In this way, the need for a new law for the theme, based on the dignity of the human person and not in defense of the homeland is that it proposes the creation of the new legal code, the Migration Law, Law No. 13.445/2017.

4 NEW MIGRATION LAW: A NECESSARY AND DELAYED ADVANCE

The Migration Law, Law No. 13.445/2017, was published in the Official Gazette of the Union on May 25, 2017, revoking the statute of the foreigner altogether. It is perceived by the nomenclature of the legal diploma the first difference between the retracted Statute and the advanced law. This, with the premise of recognizing the human right to migrate, is based on the militaristic ideology of defending the order. The yet extemporaneous change of the law is of utmost importance to meet the demands imposed, especially by this current moment of intense human displacements, because the presence of people of the most varied cultures and customs is a factor that collaborates for the development of a solidary and diverse society, which are respectively the fundamental principle and objective of the Federative Republic of Brazil.

However, the Decree Law No. 9,199 of November 2017 that regulates the text of the Migration Law (BRASIL, 2017a), was criticized by specialists in the subject of migration, because according to Deisy Ventura, there was not a timely time for public consultation and the contributions sent by researchers were not taken into account (VENTURA, 2017 a).

After all, the new law for migrants was so anticipated by the specialists in the subject, the social entities, the migrants and the institutions that are responsible for the immigration issue in Brazil, for example, the Permanent Forum for Human Mobility/RS (Portuguese acronym: FPMH), the which is classified as "a movement that departed from institutions aimed at defending the rights of people in the process of mobility: migrants, refugees, stateless persons, victims of trafficking in people and international students" (FÓRUM PERMANENTE DE MOBILIDADE HUMANA, [201-]). It should be emphasized that during this wait there was a lot of academic research and commitment of the specialists in human mobility around the debate for the construction of a new law based on human rights, to recognize that migrating is in fact a human right fundamental.

For Deisy Ventura researcher and specialist in the subject, the decree is dislodged in relation to the broad debate that occurred at least 10 years ago, and that aimed at a new legal framework for migration, in accordance with the Federal Constitution of 1988 (VENTURA, 2017 a). In addition to the public consultation was carried out in a short time, the fact that the aforementioned use the clandestine migratory expression in his article 172, according to Deisy Ventura (2017), demonstrates the lack of knowledge of the subject by whom he created it. This unworthy term, possibly inherited from the military regime and the Foreign Statute, should not be included in the decree for the regulation of the new law.

The Public Defender of the Union and social institutions linked to the issue of mobility have taken legal action to annul devices of the decree that would be against the law itself that it regulates. Still in this understanding, the example of the Argentine regulation that lasted almost five years to be approved and confirms the country as a model to be followed in the theme of

migration (VENTURA, 2017 b).

Despite the faulty decree and this resistance to change in certain points, the fact is that the text of the law itself had great popular participation, according to the conception of André de Carvalho Ramos: "There are 125 articles, approved from the original project of Senator Aloysio Nunes Ferreira (PSDB-SP), in a proceeding with extensive participation of academia, civil society, and parties of the situation and opposition, depicting a multi-party consensus around the project" (RAMOS, 2017).

In this way, we perceive the difference in the elaboration of a protective law in relation to migrants, given the creation of the norms in the time of Brazil colony in which the objective was the bleaching of the population, revealed by the incentive of white migrants and countries to populate the Brazilian territory. Still, in the construction of a statute in a context of military regime, which criminalized the act of migrating.

In addition to racism and xenophobia, and to overcome these incredibly instilled prejudices in the consciousness of beings, is in progress and educational development, in the specialized academic researches accumulated over the years when recognizing the migrant as a subject of rights and consequently acknowledge that the act of migrating is a fundamental human right. The understanding that human dignity is inherent to it, wherever it lives or desires to live, whether it is the color of its skin, it is a breakthrough that is not able to be revised except to broaden the rights of the most vulnerable.

The history of Brazil exposes that the denial of rights, their violation and the non-understanding of the value of human dignity as the supreme value that guides the legal order of the country was the source of social inequalities which we must diminish and eradicate, as Declared in the Major Law. Therefore, the devices criticized by the decree regulating the Migration Law are shown to be a resistance of the conservative forces that spread racism and xenophobia in the country, but in a democratic space and committed to respect for the rights the advancement of the text of the innovative law prevails.

According to Deisy Ventura (2017 B), Brazil is a country that is irrelevant from a migratory point of view, as it has a low pressure on the number of migrants moving here, that is, it is not a destination preference. It is estimated that the number of migrants and refugees is 1.5 million, in a country that has 200 million inhabitants, is not a question that requires fear but an efficient and committed law in preserving the dignity of the person in mobility.

The protection of human beings who migrate, is of fundamental importance because of the support they deserve and that has been recently normalized in the humanitarian sense of migratory legislation, in opposition to the law that for so long criminalized this practice and that the prevailing Democratic Constitution was in disagreement. Contrary to protection is the restrictive rule of law in relation to migrants, as described in the repealed Statute of the foreigner, which was the non-recognition of the human right to migrate and the non-realization of the respective

constitutional guarantees to migrants. Although this does not impede the displacement of migrants, they end up encouraging international trafficking in people, which violates the national legal system, international treaties ratified by Brazil, and international human rights law, Promoting the suffering of people who put their lives at risk to try to reach the intended place in a dangerous and uncertain way[6], in addition to crossing the progress of all mankind. According to Deisy Ventura (2014), the legal impediments of restrictive laws to the rights of migrants and physical contentions by the guarded walls and borders, are promoters of the well-known 'coyotes', whereby the "dowsers" of beings are called organized the illegal crossing of the frontier" (VENTURA, 2014).

Thus, the new legal diploma is finally in conformity with the Magna Carta and its maximum principle, that of the dignity of the human person. In this sense, the research group, teaching and extension of human rights and international human mobility of the Federal University of Santa Maria, highlights that "for its begin logical content of human rights and not criminalization of migrants, the law 13.447/ 2017 represents a breakthrough in the struggle for the human right to migrate" (MIGRAIDH, 2017), therefore, the great legal innovation is perceived by revoking a statute that does not match the Federal Constitution of 1988. Furthermore, the new law complies with the Universal Declaration of Human Rights (acronym in Portuguese: DUDH) and international human rights treaties.

The main advance of the new law is undoubtedly the change of the securitary paradigm to a humanitarian approach of people in mobility and this is ensured in articles 3 and 4 of the law. Respectively, they report the principles and guarantees to migrants based on human rights and their protection. The article 3 also focuses on the guidelines of Brazilian public policies in dealing with the topic of migration, focusing on the non-criminalization of migration, humanitarian acceptance, equal treatment and opportunity for migrants and their relatives, promoting and disseminating the rights, freedoms, guarantees and obligations of the migrant, among others, equally committed to the promotion of rights. The articles cited atone to the innovative spirit of the new migratory legal framework, committed to respecting the dignity of the person migrating, in accordance with the Brazilian Major Law, according to the international treaties on human rights, Axis of the Migration Law.

The innovation of the Migration Law is an achievement for the addressees of the law, as a consequence of the numerous studies carried out on migration, joint efforts of the protection sectors for migrants, stakeholders and civil society committed to the human rights guidelines.

However, the resistances to it were shown in the decree and also in the presidential vetoes for its sanction, clearly originated from conservative sectors of the *status quo*, that is, the state of things, thus being contrary to a humanistic perspective, therefore not committed to the

[6] See, for example, the matter that highlights the nightmare of crossing the border in Mexico-USA: Available in: https://gazetanews.com/fronteira-mexico-eua-e-o-pesadelo-da-travessia/. Access in: Oct. 15, 2018.

fundamental principles and objectives listed in the Magna Carta. This demonstrates an affront to the Democratic State of Law.

5 BRIEF ANALYSIS OF THE PRESIDENTIAL VETOES TO THE MIGRATION ACT: RESISTANCE AND BACKLASH OF BRAZILIAN CONSERVATIVE AND XENOPHOBIC SECTORS

As discussed, the advance of the current Migration Law is undeniable, especially in comparison to the repealed statute, however the vetoes made by the then President Michel Temer (MDB) are seen with concern by the experts in law and public policies aimed at Issue of migrants.

The first veto that deserves to be analyzed relates to Section I of § 1 of the first article of that law, which determines that the migrant is the person who moves from country or geographic region to the territory of another country or geographic region, including the immigrant , the emigrant, the frontier resident and the stateless. In the reasons of the veto, the argument is that it has been established too broad a concept of migrant, which covers even the foreigner with residence in a frontier country, according to the veto: "what extends to any and all foreigners, whatever their condition immigration, equality with nationals, violating the Constitution in article 5, which establishes that equality is limited and has as its criterion for its effectiveness the residence of the foreigner in the national territory (BRASIL, 2017).

This restrictive view of the concept of migrants is not in accordance with the principle of human dignity, the broad concept was interpreted favorably by the STF from article 5, that is, any person is a frontier resident, immigrant or foreigner resident is a migrant (ASSIS, 2017). Thus, the equality between national and non-national, described in the Caput of the aforementioned article is conditional on the fact that the foreigner resides in Brazil, a hypothesis in which it can be revised its constitutionality, to be according to the dignity of the human person, that cannot be linked to your residence. This, because the dignity of the human person is inherent to the person who holds rights, and that assumption is not bound to any circumstance, according to Sarlet's lesson (2015, p. 79).

Furthermore, it violates the principles and directives of public policy aimed at migrants in the same law, based on universality, indivisibility and interdependence of human rights, which can disfigure the new legal framework. Thus, the reason for the veto demonstrates a retrograde resistance by restricting the concept of migrants, and the objective of the law is the protection and promotion of the human rights of the migrant. In addition, it performs a literal and restricted interpretation of the *caput* of article 5, regarding the interpretation that only foreigners residing in Brazil are holders of fundamental rights, not recognizing the broad interpretation and already consolidated in both the jurisprudence and the best doctrine on inclusion as recipients of protection also non-resident foreigners. Therefore, it uses a literal interpretation of the

constitutional text, not welcomed by the doctrine and jurisprudence, to veto a device that recognized the foreigner as a recipient of rights.

Analyzing this first veto, it could be said that unconstitutional is the part of the Constitution that states that they are recipients of the protection of fundamental rights only foreigners residing by contradicted other norms and principles of the constitution and not how the veto was reasoned. In this sense, there is a thesis defended by the German jurist Otto Bachof (1994), the theory of the unconstitutionality of constitutional norms, that is, the possibility of recognizing a constitutional norm to be contrary to the Constitution itself.

Another veto is what is laid down in § 2 of article 1, this device adducts that the rights originating in indigenous peoples and traditional populations are fully guaranteed, in particular the right to free movement in traditionally occupied lands. In the reasons set out to justify such veto, is the concern with the defense of the national territory for the full exercise of its sovereignty, among others (BRASIL, 2017b). According to Glautia's Assis (2017), a professor of constitutional law, this veto restricts the free movement of indigenous peoples in border regions, culturally they have always circulated through these areas, and compel an Indian to ask permission to around in these stretches is something inconceivable. In this way, once again, the affront to the dignity of the human person is noticeable, even more in the case of a part of the population that has its rights neglected by the State power, such as the originating peoples.

The veto to § 2 of article 4 relates to wana for foreigners to exercise position, employment and public informartic function, except those restricted to Brazilian born, according to the note of the MIGRAIDH, this veto: "[...] contrary to the principle of equality ensured in the Constitution, especially with regard to equality in opportunities. It Is not possible to understand another motivation for this veto than to consider the foreigner as a potential threat" (MIGRAIDH, 2017). Once again, a remnant of the retracted Foreign Statute elaborated in an undemocratic time, an affront to the democratic state of law. Here, article 3 is violated in its section IX of the Migration Law, which declares equal treatment and opportunity for the migrant and his family.

The veto to § 3 of the aforementioned article, is in relation to not requiring a document that hinders or prevents the exercise of their rights, which demonstrates a rejection of the situation experienced by the migrant, which for countless reasons may not have certain documents in hand. It is worth noting that these last two mentioned the General Advocacy of the Union, the Institutional Security Office of the Presidency of the Republic and the Civil House of the Presidency of the Republic appointed vetoes.

In this sense, the presence of an organ dedicated to national security is enabled to make suggestions for vetoes to the law, allows the understanding that the migrant inspires fear, because in the absence of any document can allow itself the contrariness to the device which confers equal and free access of the migrant to services, programs and social benefits, public goods, education, legal assistance, among others, as amended by article 3, XI, of the Migration Law.

The veto to § 10 of article 14 points out that a regulation could have a more chance of granting temporary visas, and the restrictive plea of veto is obsolete, as it is a restriction on new forms of temporary visa, and is disrespected Welcoming and humanitarian spirit, as demonstrated by article 3 in its VI paragraph (BRASIL, 2017b).

Article 3 of the Migration Law is what deals with the Principles and Guarantees of the legal norm, therefore it must be carefully observed with the aim of not having in its devices any contrariness, because it can cause a conservative and uncommitted interpretation of human rights.

The single paragraph of article 37 on the granting of a visa or residence permit for family meeting purposes may be extended, by means of a reasoned act, to other hypotheses of kinship, affective dependence and sociability factors. The veto to the single paragraph was based on the concern with the international kidnapping of children and adolescents, but in the understanding of the MIGRAIDH this "counterclaims human rights by preventing the recognition of cultural diversity for the purposes of family characterization and access to the human right to family reunion" (MIGRAIDH, 2017). As previously seen, the alleged threat of the migrant always appears in one way or another and extends throughout the family.

Article 44 of the Migration Law shows that the visa holder or the recipient of a diplomatic treaty or communication that carries a visa waiver may enter the national territory, except for the impeditive hypotheses. The plea of veto was to ensure the Power of Brazilian Police by migratory institutions, or permission of the free choice of agents to decide on the danger of an immigrant in the defense of national sovereignty (BRASIL, 2017b). Now, here is a violation of human rights, restricting the access of migrants in the name of national sovereignty, which supposedly can be put in jeopardy by a migrant in search of a more dignified life. This view of the migrant does not represent the values of promotion and protection of the right to migrate. This conservative and prejudiced plea objectively offsets the principle of the non-criminalization of the migrant, provided for in article 3, item III, and for this reason could not be maintained, because it represents a retracted perspective adopted in the Statute of Foreign.

With regard to section IV of article 66, which teaches to be a natural state-party or state associated with the Southern Common Market - MERCOSUL[7], the veto was based on the possibility of naturalization to residents in Brazil and born in these places, because this could weaken the national electoral process, because we would have voters coming from outside who could vote and be voted, which would generate, according to the intelligence of the veto "unpredictable effects on the country's democracy". (BRASIL, 2017b).

The aforementioned veto violates the principle of repudiation and prevention of xenophobia, because if the migrant cannot vote or be voted on, he will not be able to exercise his

[7] The Southern Common Market - MERCOSUL is a process of regional integration signed by the Treaty of Asunción by the governments of Argentina, Brazil, Paraguay and Uruguay. Available in: http://www.mercosul.gov.br/. Access in: Oct. 15, 2018.

citizenship in a full way. This puts the non-resident migrant in a situation of disadvantage to the Nationals and a perspective of lower citizenship, but the political rights listed in the Federal Constitution of 1988, in § 2 of article 14, are norms that possess these characteristics exclusive. These norms can be revised in their constitutionality, because the denial of political rights to migrants is the non-recognition of their citizenship, a fact that makes them a mere spectator of the political life of the State to which it contributes as much as a national.

The article 118 of the Migration Law deals with the situation of residence permits to immigrants who entered Brazil until July 06, 2016, this article was vetoed because of the granting of amnesty to any immigrant, regardless of the situation regular migratory. Certainly, a veto that caused frustration in relation to the principle of non-discrimination on the grounds of the criteria or procedures by which the person was admitted in national territory. According to the understanding in the MIGRAIDH note, this veto is one of the biggest attacks on the objective of the Migration Law:

> This veto, which is contrary to the practices reiterated in the last decades of periodically guaranteeing documentation/amnesty to the immigrant population who lives here and constitutes his life, severely compromises universal access to rights ensured in Federal Constitution of 1988 (MIGRAIDH, 2017).

The innovation of the Migration Law cannot hold a veto so disproportionate to the objectives and guarantees proposed in the said Law. The discretion of the State for the reception of foreigners is not a reason for protection above human rights, but these are elected as the basis of the legal diploma. This veto signals the ignorance of the act of migrating as a fundamental right and puts the migrant in a flagrant situation of danger, by submitting it to the disprotection of the State as the wording of the revoked Foreign Statute, which macula the obligation assumed Brazil regarding the fulfillment of international treaties on human rights.

Thus, the resistance of conservative groups increasingly present in the national context is perceived, as in the case of vetoes imposed on the law that enact a restrictive interpretation or, even on the part of the judiciary[8], even with a law founded on the protection of the dignity of the human person.

On the international stage, with the ascension of the far right, according to the understanding of Paul Krugman (2018), economist and professor, winner of the Nobel Prize in 2008, currently from the victory in political elections, the far right has excelled in some European countries, due to the financial crisis and the fear of the population in relation to refugees.

This political ideology is contrary to the recognition of the human right to migrate and, therefore, to recognize migrants as subjects of rights, as described in sections 1 and 2 of this

[8] Federal Judge determines the prohibition of the entry of Venezuelans by the border with Roraima. Available in: https://www.conjur.com.br/2018-ago-06/juiz-proibe-entrada-venezuelanos-fronteira-roraima. Access in: Oct. 26, 2018.

article. These ideals of exclusion and restriction of rights have already been overcome and therefore demonstrate the backlash of their racist and xenophobic foundations based on prejudice and ignorance of the migratory phenomenon.

Moreover, despite the little time of democracy jointly experienced by the Democratic State of Law, after years of military dictatorship, efforts must be totally opposed to any remnants of these authoritarian times. The change in the securitary paradigm in the theme of migrations to a human rights promotion is a recent achievement and cannot be retreating. In this way, it is perceived that although the vetoes are retracted, they are grounded in the Constitution as they are coherent to the literality of the constitutional limitations imposed on non-nationals who do not reside in the country.

In addition to the brief analysis of the vetoes, a third hypothesis was identified, which may be the subject of future research, in which it is possible to investigate the possibility of constitutional norms being recognized unconstitutional, because they limit rights of migrants on the basis of defending the national territory, and this confirms that the migrant is first seen as a possible threat and not as a subject of rights. This conservative and retrograde view of the migratory phenomenon is no longer sustained, since it was overcome by advancing the recognition of the importance of human rights.

6 CONCLUSION

The main objective of this work was to analyze the presidential vetoes to the Migration Law and to point out compliance or not with the constitutional norms and international human rights treaties. In this way, it was observed that the vetoes are discordant with the innovative spirit of the sanctioned Migration Law, which was based on the protection and promotion of human rights, especially in the dignity of the human person who is based on the Brazilian Federal Constitution. Moreover, they disagree with human rights and international treaties referring to the human right to migrate.

It is concluded that it is up to the state to acknowledge the human right to migrate and to guardianize this right as Brazil has done in the sanctioning of the new legal diploma. The manifestation of the recognition of the human right to migrate as an integral part of fundamental rights, before society through public policies and laws, can combat the remaining outbreaks of xenophobia present in the most conservatives of the country, which resist the change in the securitary context of migration to a humanitarian vision of the migratory phenomenon. In such a way that the international treaties ratified by Brazil, the current migratory law, in the light of the constitutional precepts, serve to confirm the human right to migrate and legitimize its migratory policy.

The reversal of human rights proposed by the politicians on the right and far right of the ideological field, present in the vetoes, symbolizes the return to a restrictive view of the dignity of the human person. Historically, the restriction and denial of this foundation have been the cause of wars and destructions and therefore serves as an alert for a society committed to a better and more inclusive future, committed to the welfare of all, without any negative distinction. It occurs that in the context of a Democratic State of Law the reversal of human rights is not legitimate.

The theme of migration is a subject that can only be based on the discussion of the dignity of the human person, because the non-observance of this aspect can cause the violation of human rights, which is forbidden and should be rejected, and for that reason there is no room for uncompromising opinions of critical reflection, especially in the academy that proposes as a place of encouragement for qualified research, besides the legal community that has in the Major Law the reference for its work.

The finding that the law was used to select migrants to the detriment of others only to institutionalize prejudices, demonstrated in the history of origin of Brazilian migratory policies, should be a warning of how not to act. As well as xenophobia legitimated by a legal diploma idealized in the military dictatorship. These events that have led to human rights violations should be remembered not to be repeated, because their consequences are still seen today in the Brazilian context, given their significant contribution to social inequality observed and so accentuated, beyond the suffering that they obviously caused.

The protection of the human being, especially those who migrate should overlap the protection of the territory, because there is no way to protect a person's place, without being seen as a threat. The locals must be people and not an environment where they are feared. According to the aforementioned facts, the protection of the territory at the expense of the person is not in agreement with the principle of human dignity.

Therefore, the Migration Law is a breakthrough in relation to the previous legislation, however, the presidential vetoes are disregarded from the law itself and do not observe human rights precepts present in the constitutional text and international treaties. It is perceived that some vetoes are grounded in the literality of the Brazilian constitutional norms, regarding migrants, especially non-residents in Brazil.

For all the facts mentioned above, it is believed that laws restricting fundamental rights of migrants, whether resident or not, have no justification from the point of view of human rights. Therefore, they do not correspond to the aspirations of a Democratic State of Law, which prioritizes the promotion and protection of the dignity of the human person. Thus, it is necessary to extend the protection of the migrant, because it reveals the prevalence of human rights. Therefore, they can be reviewed with the objective that national sovereignty is not an obstacle to the realization of the act of migrating in its fullness, observing that the dignity of the human person is the guiding principle of the legal system, the laws that compose it , of the pacts ratified by the

country and that recognize the human right to migrate.

For all this, it is affirmed that the main conclusive consideration of this work is that, although the presidential vetoes were justified by the literality of the constitutional norms, they represent the symbol of the diffused reversal by parcel conservative Brazilian society. And this restrictive view of the human right to migrate is retracted, compared to the advancement in the recognition of human rights, especially the human right to migrate.

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