Scienza e Pace

Science & Peace

ISSN 2039-1749 VOL. XI, N. 2 (2020)

Fundamental rights of migrants in the light of the Brazilian legal system and the trend to the security paradigm in the European Union and the United States

Jose Luis Bolzan de Morais
Gustavo Sipolatti

Rivista online del Centro Interdisciplinare
"Scienze per la Pace" – Università di Pisa

Paper* soggetto a *double-blind peer review

Ricevuto il 1 luglio 2020
Accettato il 17 novembre 2020

Per citare il *paper*:

De Morais, J. L. B. e Sipolatti G. (2020) "Fundamental rights of migrants in the light of the Brazilian legal system and the trend to the security paradigm in the European Union and the United States", *Scienza e Pace*, XI (2), pp. 59-76.

Fundamental rights of migrants in the light of the Brazilian legal system and the trend to the security paradigm in the European Union and the United States

Jose Luis Bolzan de Morais [*]

Gustavo Sipolatti [**]

Abstract

Contemporary migratory flows take place within a conjuncture of fear and fight against human mobility seen as "external threat": this view generally guides public debates and policies on individual rights and freedom of migrants. This paper addresses the legal treatment of migrants in Brazil in historical perspective, showing a reduction in the population concentration and an imbalance between newcomers and Brazilians living abroad. The national regulation of migration flows, inspired by the main international sources of migrants' rights, has recently gone through a paradigm shift from security to solidarity. In a historic and unanimous vote, the new Migration Law has been approved, which instead of stressing exclusively the importance of border controls began to focus on welcoming foreigners. The executive branch's defensive reaction was automatic, with the issue of a decree regulating the law. The effects of this tension have invested the Judiciary, including some cases considered by the Supreme Federal Court. At the end, a brief comparison is made with the two main Western legal systems on immigration, in the United States and the European Union: the Brazilian trajectory shows some significant transformations experienced by the Constitutional State.

Key words: migration, solidarity, security, fundamental rights, constitutional state.

Abstract

Il saggio affronta il rapporto tra flussi migratori e l'attuale convergenza di paura e lotta contro la "minaccia esterna" delle migrazioni, analizzandone le conseguenze sul dibattito pubblico e sulle politiche in materia di diritti e libertà degli stranieri. Viene analizzato il trattamento riservato ai migranti in Brasile nel corso della storia, in parallelo con la riduzione della concentrazione

[*] Jose Luis Bolzan de Morais is Professor of State and Constitution Theory at the Law Faculty in Vitória (Brazil) and Procurador do Estado do Rio Grande do Sul nos Tribunais Superiores. E-mail: bolzan@hotmail.com

[**] Gustavo Sipolatti is PhD student in Fundamental rights and guarantees at the Law Faculty in Vitória (Brazile), Procurador do Estado do Espírito Santo, and Conselheiro Estadual da OAB-ES. E-mail: sipolatti@hotmail.com

demografica e con l'asimmetria tra i flussi migratori in ingresso e i brasiliani che vivono all'estero. La regolazione interna si è sviluppata parallelamente alle principali fonti internazionali di legislazione sui migranti, finché il modello non è cambiato passando dalla sicurezza alla solidarietà. Con un voto storico e unanime, è stata approvata la nuova legge in materia di immigrazione, la quale, invece di essere finalizzata al controllo si concentra sull'accoglienza e l'inclusione sociale degli stranieri. Il governo ha assunto una posizione più difensiva in sede di adozione di un decreto per l'implementazione della norma. Gli effetti di questo contrasto sono arrivati fino agli organi giudiziari, tra cui alcuni casi trattenuti dalla Corte Suprema Federale. Un breve confronto finale con i due maggiori sistemi legali occidentali, quello statunitense e quello dell'Unione Europea, mostra alcuni significativi cambiamenti avvenuti in Brasile all'interno dello stato democratico di diritto.

Parole chiave: migrazione, solidarietà, sicurezza, diritti fondamentali, stato costituzionale.

1. Introduction

This article addresses the Brazilian State's treatment of the migratory issue and makes a parallel between European and American approach. In a postmodern and comprehensive approach the phenomenological method is adopted to unveil migratory flows, concerned with the life plan, extracting its concepts from the entity and without forcing them (Cunha 2014). The study, concerned with the phenomenon, tries to overcome a limitation noted by the rhetorical makeup of the owners of power.

The emotional aspect of terror and the limitation of analytical methods, which commonly address formal issues, regardless of sensitivity and reality in law, printing concepts to it. The dissociated narrative of the facts ends up justifying the adoption of security policies, instead of giving adequate treatment to migratory flows, composed mostly of vulnerable people.

Relevant source for the unveiling of humanitarian tragedies and flows is the latest report from the United Nations - UN, which pointed out that between 2000 and 2019 the migrant population grew 55%, from 2.8% to 3.5% of the population worldwide, reaching 272 million people, far exceeding projections that in 2050 would be 230 million. Of this total, 47.9% are women and 13.9% children. The survey indicates that 41.3 million are displaced due to conflict and 16.1 million due to climate disasters. In Latin America alone, in the last few years, more than 12 million people have been mobile, 4.6 million fleeing the serious Venezuelan crisis and thousands others from the Haitian crisis, which crossed the borders, having neighboring countries as their destiny.

Aware of the plan of fatality and migratory flows, the article aims to: identify the historical treatment given by Brazil, the latest legislative innovations, the conduct exercised by the Executive and the analysis of cases by the Judiciary; describe the policy adopted by Europe and the

United States; analyze whether these three models are linked to human rights; reflect on the injustices committed; reinforce the need for a dignified welcome to foreigners.

The investigation aims to unveil the being and avoid technical manipulation, covering: a) the legal treatment given by Brazil to migrants; b) the 1988 Constitution, the sources of international law, ordinary legislation and its regulation; c) traces the tension between legislative and judicial powers, and the role played by the Brazilian constitutional jurisdiction in the protection of fundamental rights; and, d) analyzes the European and American models.

2. Migratory flows: an overview

The conjunctural analysis (Skinner 2002) aims to reduce the risk of the narrative dissociated from reality, to enable a critical understanding of migratory flows, in a perspective of materializing fundamental rights.

Development takes place on the plane of life, extracting its concepts from the entity itself and without forcing them, allowing them to happen to enable its own knowledge (Cunha 2014).

The unveiling of reality is important, especially when there is a common and potentiated emotional reaction of fear in the discourses about migratory flows, surrounded by the mantra of terrorism, the unknown and the possibilities of economic, political and social crises, with the State adopting the paradigm of security - connected to the assumption of sovereignty, in its classic bias, and to the limits of borders based on the territoriality of modern stability - in a defensive reaction to the external threat.

The restorative landmark in the fight against terror was September 11, 2001. The novelty was the subversion of the principles (national state, people, territory and sovereingnty) that guide the Modern State, despite generating operations against terrorist organizations, it also spurred a wave of xenophobia and triggered an increase in central power[1] and, correlatively, a process of revitalizing the old formula of the State of Exception (Morais 2018).

Currently, the rhetoric of fear has been intensified by combating COVID-19. Italy and Spain, among the European countries hardest hit by the pandemic, felt abandoned and discriminated against by their wealthier neighbors, who closed themselves off because of the fear of the disease, questioning the reason for the European Union's existence.

[1] The Patriotic Act is recalled, which consisted of a legislative package approved by the American Congress after the attacks of September 11, 2001, without any consultation to the population. The expression “Patriotic” (Provide Appropriate Tools Required to Intercept and Obstruct Terrorism) consists of a series of control tools necessary to intercept and obstruct acts of terrorism. The same has been happening in several countries in this pandemic crisis, due to control proposals through the monitoring of cell phones, although there is no scientific study that proves the benefits of this relativization of rights.

The progress towards fundamental rights is facilitated by the apathy of citizens, dismayed by the avalanche of information received and by the promise of security, they begin to admit greater control, prostrating themselves passively and in agreement with the relativization of their privacy, their freedom and of your free conscience (Morais 2018).

The terrorist act had already helped to create an environment of fear (Morais 2014) and to use *new surveillance*, in addition to a new subjectivity, such as that defined by Hardt and Negri, that of the *securitized*, the one that *justifies and accepts a state of exception that is built by about "our voluntary servitude*" (Hardt, Negri 2014, 33)

The use of fear serves to carry out hidden interests, in a plan for dominance (Gessen 2012, 45). Werneck Vianna warns of the possibility of manipulation, for whom what matters is not the fact, but the version that is conveyed of it, signaling that the interpretation is optional, integrated by a subjective element, in which the understanding of the circumstances is relevant, such as organically organized and structured periods differ from the versions, pure and free fantasy of an actor about himself and his situation, *"The ability ... to falsify the fact, to" lie "about it and even to deny the evidence of what results from it, means... how much power he has..."* and concludes *"I firmly believe that, regardless of the "versions", the facts and the interpretation of the facts speak for themselves..."* (Vianna 1983).

The rhetoric based on fear is revealed as an instrument of control, especially in the migratory issue, with deleterious consequences for the fundamental rights of migrants under the false promise of national security (Morais, Lobo 2019).

The analysis of the migratory phenomenon is concerned with removing the emotional aspect and the manipulation of versions about the facts, in order to achieve other interests, and to overcome the limitation of analytical methods, which meet purely formal criteria, when their operators should turn to things themselves, to get to know them.

The investigation aims to unveil the being itself and to avoid its technical and emotional manipulation, developing from the migratory phenomenon.

Recent surveys conducted by the United Nations - UN point out that between 2000 and 2019 the migrant population grew 55%, from 2.8% to 3.5% of the world population, reaching 272 million people, exceeding by far projections that in 2050 would be 230 million. Of this total, 47.9% are women and 13.9% children. The report indicates that 41.3 million are displaced due to conflict and 16.1 million due to climate disasters.

In recent years, mobility in Latin America has exceeded 12 million people, 4.6 million fleeing the serious Venezuelan crisis and thousands of the serious crisis in Haiti.

The article builds on this experience[2] unveiled by the importance of migratory flows. The understanding of the phenomenon goes through the treatment given to migrants in Brazil, to then analyze the international models, having in mind the noted and historical limitations of the Democratic Rule of Law in ensuring universally (to whom and what) the materialization of fundamental rights (Morais 2018).

3. Treatment of migrants in Brazil

Brazil since its origin in 1500 was constituted by migrants, from the colonizers to the slaves, nobody had origin in this land and the only ones who lived here were the Indians.

The first count of Brazilians computing slaves and foreigners occurred due to the innovative policies of D. Pedro II. The total population in 1872 was 9,930,478 inhabitants. Being 15.24% slaves (they were still forced migrants), 58% were brown or black and 38% said they were white. Foreigners accounted for 3.8% of Portuguese, Germans, free Africans and French. Indigenous people made up 4% of the total inhabitants.

The end of slavery generated the obligation to replace labor and the need to fill in these posts with new workers. On the external front, some countries were experiencing economic and social difficulties, Italy and Germany were engaged in a long struggle for national unification, leading the rural population to chronic difficulties, which resulted in the risky adventure of ocean crossing.

At the end of the 19th century, Brazil had implemented a policy to encourage migration, millions of migrants were attracted and transported by Italian and French shipping companies, 1.6 million Portuguese, 1.5 million Italians, 700.000 Spaniards, 200.000 Germans, 50.000 Turks and around 250.000 Japanese.

In 1920, 1 in every 20 people who lived in Brazil was originally from a foreign country, which meant 5% of the total population.

The rhetoric of the Brazilian migration policy was stimulated by promises that did not correspond to reality, and due to the terrible conditions of work, health, housing and education on the farms, the General Commission of Emigration in Italy published in 1920 the Prinetti Decree, which prohibited the subsidized emigration.

Over the years the number of immigrants has been decreasing. The reduction was accompanied by a resurgence of legislation and migration policies (Vianna 1983), showing a State with a centralizing and controlling profile.

With the 1934 Constitution, the condition of the foreigner came to be dealt with for the first time by the Brazilian constituent legislator, establishing a distinctive treatment of nationals, a quota system was

[2] A complete experience would require a sample and personal analysis of migrants, including interviews and personal and subjective analysis, as well as verification of electoral systems, economic aspects and impact on budgets, etc.

instituted and the concentration of immigrants in any point of the national territory was prohibited, already under the justification for avoiding the foreign threat.

The 1937 Constitution limited the entry into the country of certain races or origins, favoring European immigration (art. 2 of Decree-Law nº 406/1938).

After the end of the Second War, Decree-Law nº 7967/45 started to allow foreigners to enter, although it favored Europeans.

During the military period, the Foreigner Statute was issued in 1980, concerned with national sovereignty and aimed at controlling migrants, explicitly devoted to controlling the external threat. This risk never materialized in a single event in national history.

The discriminatory policy focused on security has generated in the last century a steady reduction in the concentration of foreigners in Brazil, reaching 447.000 in 2000, which corresponded to 0.3% of the population.

Since 2010, the migratory curve has changed in a timid and upward way, a small increase in income, triggered by the tragedies that have plagued Latin America.

According to the Ministry of Justice, from 2012 to 2018, Brazil received 774.200 immigrants (39% Venezuelans, 14.7% Haitians, 7.7% Colombians, 6.8% Bolivians and 6.7% Uruguayans) by the Ministry of Justice (Violante 2014).

Today, Brazil has 0.4% of the population made up of foreigners, a proportion still 12.5 times lower than 100 years ago and below the world average: Saudi Arabia has 37% of the immigrant population, Germany 15%, USA 15%, Russia 8.1%, Argentina 4.9%, Chile 2.7% and Paraguay 2.4%.

There is an imbalance in the Brazilian migratory balance: 3 million people live abroad, exceeding four times the number of immigrants.

The disproportion in Brazil's migratory balance is second only to China, which has 0.1% (978,046 people) of emigrants in relation to its total population and 0.69% (9,546,065 people) of immigrants living abroad, among the countries of larger population and extension.

The Foreigner Statute, centered on security, was maintained until 2017, despite the 1988 Constitution having been edited 29 years before, being revoked by the new Law on Migration, a diploma connected to the international law and fundamental rights.

4. Sources of law and the new Migration Law

Despite the tonic of internal control and national legislation based on security, Brazil has ratified several international treaties in its order. The norms incorporated into the Brazilian internal system are listed: a)

Universal Declaration of Human Rights of 1948; b) American Declaration of the Rights and Duties of Man of 1948; c) 1951 Refugee Status Convention; d) 1966 Refugee Status Protocol; e) 1966 International Covenant on Civil and Political Rights; f) 1966 International Covenant on Economic, Social and Cultural Rights; g) 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; h) 1989 Convention on the Rights of the Child; and, i) 1969 San José Pact of Costa Rica, ratified by Brazil in 1992, which regulates an international protection system (provision for the right to asylum, arbitrary non-expulsion, collective non-expulsion, freedom of movement, residence. ..).

Due to the universal nature of human rights, as they are historical and social achievements, due to their irradiating effect on all States (Piovesan 2009), international decisions and instruments, even if not ratified domestically, should also be considered in the achievement of the local law (Mazzuoli 2008), serving as a hermeneutic criteria in the application of legislation by the Judiciary, in the elaboration of public policies by the Executive and inspiration for the elaboration of ordinary legislation by the Legislative.

The following sources stand out: a) Consultative Opinion 18 of the Inter-American Court of Human Rights, which establishes the guarantee of labor rights, with correspondence in the internal system, which must necessarily be in tune with the other international agreements; b) International Convention for the Protection of the Rights of all Migrant Workers and their families approved by the UN, which deals with the social rights of workers as a subject of international law; and, c) United Nations General Assembly Resolution 40-144, which recognized protection for non-nationals of the country where they live: right to life; right to personal security; deprivation of liberty according to legal procedures; protection against arbitrary interference with life and family; free interpreter assistance in criminal cases; freedom of marriage, thought, religion, demonstration and peaceful assembly; right to property; right to preserve their own culture; the right to transfer your assets abroad; the right to leave the country and be with your family; the right not to be treated cruelly; prohibition of discriminatory expulsion and only motivated by judicial decision; safe work and good hygienic conditions; equal pay for equal work; right to join unions and other organizations; health protection; social security; social services; rest; recreation; expropriation of assets only by legal procedure; and freedom to communicate with the consulate.

The Brazilian Constitution converges with international guidelines, outlines a plan of values, providing among its fundamental objectives, art. 3rd, the construction of a free, just and solidary society, which guarantees development, eradicates poverty, reduces inequalities and promotes the good of all without prejudice of any form or discrimination[3].

[3] Art. 3º Constitute fundamental objectives of the Federative Republic of Brazil: I – to build a free, fair and solidary society; II – to guarantee the National development; III – to eradicate poverty and marginalization and to reduce social and regional

The Constitution listed a series of principles and guarantees: dignity of the human person, equality, solidarity, protection for the family, the worker, the family and the child, access to health, security..., which must be understood in their structuring form, normative and which constitute the reason for the legal norms (Canotilho 1995).

Of particular relevance is the observance of the principle of solidarity, which must permeate the relationship between nations, observing the condition of vulnerability, imposing on States the duty of mutual cooperation, with the inclusion of the other, with their participation in the democratic plan, influencing citizenship and the very foundation of sovereignty (Habermas 2004).

The concept of fraternity was rescued, breaking with self-centeredness, taking into account the collective and provoking the vision of others as brothers.

Solidarity must be understood in its ternary character, not only referring to the relationship between the State - individual, but also between State - state, and individual - individual (Sarmento 2006).

The feature of the fundamental duty (Abikair Filho, Fabriz 2014) of solidarity between individuals must have a strong and propelling character, especially in democratic regimes, in which the civic and republican conception within society makes possible its conditions of concretization (Nabuco 2003), since policies designed by public authorities to incorporate solidarity to society are worthless if nationals do not see immigrants as equals.

Solidarity radiates effects between States, nationals and in relation to all men, and should be understood in its greatest extent in the duty that binds the will of political people and those most in need, regardless of the nationality bond.

The tutelage of the collective and the rescue of the fraternity brings a new look to the principle of solidarity, before with a charitable character, to be seen with an equality, brotherhood and family bias, due to the human condition, regardless of what its origin is.

The constitutional text imposes positive State intervention for the creation of a just, egalitarian and solidarity-based society, denoting that the interpretation and application of regulatory rules regarding migration must be interpreted in order to dignify the immigrant, avoiding any form of discrimination and fully integrating him into society, offering the same access to health, education, security, work, family as to nationals.

Despite being in force for over 30 years, the Migration Law was recently issued, focusing on international sources, social achievements and the values enshrined in the 1988 Constitution, for the protection and promotion of the human rights of foreigners, representing a new

inequalities; IV – to promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.

paradigm, with an emphasis on their protection and the human condition of all.

Only now was revoked the previous statute. It was promulgated during the military dictatorship, which was concerned with sovereignty and national security, clearly out of step with international sources and with the Constitution itself.

Even though late, Brazil started to have a new ordinary legislative framework, surpassing the State's control paradigm, to recognize and implement fundamental rights as a way to guarantee the dignity of migrants. The following provisions stand out: a) the classification among the various types of mobility, conceptualizing the condition of immigrant, emigrant, visitor and stateless person (the original text of the law brought the concept of migrant, which was vetoed, but which continues its mention in several articles); b) the establishment of guiding principles for the action of the Brazilian State (the universality, indivisibility and interdependence of human rights); c) combating xenophobia, racism and any form of discrimination; d) non-criminalization of migration; e) promotion of regular entry and document regularization; f) humanitarian reception; g) guarantee of the right to family reunion; h) equal treatment and opportunity for migrants and their families; i) social, labor and productive inclusion of migrants through public policies; j) equal and free access by migrants to services, programs and social benefits, public goods, education, comprehensive public legal assistance, work, housing, banking and social security; k) the promotion and diffusion of migrants' rights, freedoms, guarantees and obligations; l) international cooperation with States of origin, transit and destination of migratory movements, in order to guarantee effective protection of the human rights of migrants; m) full protection and attention to the best interests of migrant children and adolescents; n) protection for Brazilians abroad; o) the promotion of academic recognition and professional practice in Brazil, under the terms of the law; p) repudiation of practices of collective expulsion or deportation; q) ensures civil, social, cultural and economic rights and freedoms; right to freedom of movement in national territory; r) right to the migrant's family reunion with his spouse or partner and his children, family and dependents; s) measures to protect victims and witnesses of crimes and violations of rights; t) the right to transfer funds from your income and personal savings to another country, subject to applicable law; u) right of assembly for peaceful purposes; v) right of association, including union, for lawful purposes; x) access to public health and social assistance services and social security, under the terms of the law, without discrimination on grounds of nationality and migratory status; y) the right to public education, without discrimination on grounds of nationality and migratory status; z) guarantee of compliance with legal and contractual labor obligations and the application of worker protection rules, without discrimination based on nationality and migratory status; a1) the right to leave, to remain and to re-enter national territory, even while a pending application for a residence permit, extension of stay or transformation of a visa into a residence permit is pending; and b1) the

immigrant's right to be informed about the guarantees that are guaranteed for the purpose of migratory regularization.

There was a commendable advance in the treatment of migrants, with the realization of fundamental rights at the ordinary domestic level, with a clear influence from sources of international law and noted inspiration in the list of rights contained in Resolution 40-144 of the United Nations General Assembly.

However, the advance was short-lived. Shortly after the publication of the law, it was regulated by Decree No. 9,199 of November 20, 2017, by the then President of the Republic Michel Temer, which proved in several passages to be incompatible with the text of the original law, showing the attempt to contain its advances and to go back to the security paradigm.

5. Decree 9.199 of November 20, 2017

As noted, despite the legislative advance, marked by unanimous approval by the Brazilian legislature, its regulation proved to be distorted from the democratic will. The Decree evidenced the attempt to distort the spirit of the law, limiting achievements and historical progress. An undue overlapping of competences is noted to ensure greater control of borders and migrants by the federal State apparatus (Morais 2018).

In an article produced by the members of the Committee of Experts constituted by the Ministry of Justice, which had the purpose of preparing a proposal for the Draft Law on Migration and Promotion of the Rights of Migrants in Brazil, Doctors André de Carvalho Ramos, Aurelio Rios, Clèmerson Clève , Deisy Ventura, João Guilherme Granja, José Luis Bolzan de Morais, Paulo Abrão Pires Jr., Pedro B. de Abreu Dallari, Rossana Rocha Reis, Tarciso Dal Maso Jardim and Vanessa Berner, concluded that the various provisions of the Decree were illegal and unconstitutional. Being this conclusion the result of severe criticism of the Decree by the academic community, not only for its technology in the use of vulgar expressions such as “*clandestine*”, but for providing for the possibility not established in the deportate's prison law.

Advances such as the temporary visa for work, allowing regular reception and that would serve to combat the degrading conditions that are commonly established to illegal migrants, ended up being emptied by the requirement of formalized contract, making it difficult to obtain a visa.

The setback was characterized by submitting the granting of visas for research, teaching, investment or activity with economic, social, scientific, technological or cultural relevance, artistic and sporting activities to the prior residence permit - to be granted by the Ministry of Labor.

The commands focused on security and detached from the law, show an illegality and unconstitutionality of the regulatory norm, not taking into account the paradigm shift and the legitimate legislative process(Costa 2019). The Executive's conduct is detached from the plan of life. The real

and historical conditions of the migrants, due to their negligible number in the national territory, the unbalanced balance of a greater number of Brazilians abroad than foreigners living here, as well as the humanitarian tragedy noted in Venezuela and Haiti, weaken the hypothetical thesis of the need for control or privilege to security at the expense of solidarity that would apparently justify the executive's attitude.

6. Jurisprudence of the Supreme Federal Court

Decree 9.199 is partially incompatible with the recently enacted migration law, signaling the executive's attempt to maintain control over the migrant, creating a clear tension between the powers (Morais 2011), paralyzing[4] the effective implementation of fundamental rights duly stated until a final decision to resolve this conflict.

The fragmentation of the limits between executive and legislative implies a weakening of institutions, with the phenomenon of the judicialization of politics occurring and serving the Judiciary as the main instance (Ferrajoli 2007) for the application, implementation and guarantee of fundamental rights.

A judicial solution that is sensitive to reality and the law is fundamental, privileging not only the traditional criteria for resolving antinomies, the formal hierarchy of the law (Bobbio 1999) and constitutional limitation to the regulatory power of decrees, but mainly an interpretation focused on principles, constitutional values and sources of international law, in tune with the risks of draining executive and parliamentary activity, the so-called *constituzione infinita* (Violante 2014).

The migratory paradigm has been modified, and the principle of solidarity must be observed in the relationship between the State and the migrant. The migration law undoubtedly means an important advance in the realization of fundamental rights.

In this context, the Brazilian Constitutional Court has highlighted the dignity of the human person, solidarity and the rights made concrete by the new law, modifying the previous jurisprudential understanding based on the national security paradigm[5].

For a good understanding of the role that has been played by the STF in the migration issue, the following cases stand out. Theme “Frontier”: ACO de nº 3121 moved by the Union against the state of Roraima. The State issued a Decree that ordered the closure of the border with Venezuela.

[4] Time in matters of mobility is crucial and sensitive, both for those who want to go, as well as for those who want to come, the violation of human rights is intensified every second. Policies must be humane, adequate and safe, avoiding and preventing the need for judicialization of situations that must be dealt with in a routine and immediate manner by the administration, under penalty of judicial intervention having to take a strong form, including in order to correct omissions.

[5] At some point, the executive should adapt the regulation to the law, to avoid a flood of violations of fundamental rights.

In analyzing the case, Minister Rosa Weber understood that the normative act produced by the local Executive violated the competence of the President of the Republic, international treaties, the 1967 UN protocol, the Declaration of Brazil, the agreement formalized in 1982 with Venezuela and the new Migration Law that provides for humanitarian reception, economic, political, social and cultural integration of the peoples of Latin America, through the establishment of spaces for citizenship and free movement of people, in order to guarantee the protection of the human rights of migrants .

After an injunction suspending the effects of the Decree, an agreement was signed between the State of Roraima and the Federal Union to guarantee the reopening of the border.

- Precedent 421 STF: the fact that the extradited person is married to a Brazilian or has a Brazilian child does not prevent extradition" (1964).
- After 1988, the Supreme Court considered the precedent 421 compatible with the current Constitution, justified in international cooperation against crime. The existence of family ties with Brazilians did not prevent extradition. Extradition Process 1.343 Minister Celso de Mello - 10/21/2014.
- Theme "Family and Childhood": Habeas Corpus 114.901 – Federal District. The Supreme Court changed its position after the enactment of the migration law in 2017.

Minister Celso de Mello granted the order on behalf of patient Mario Apensa, a native of Suriname and convicted of drug trafficking.

The decision was based on the supervening offspring and based on the new migration law, giving prestige to the protection of the social-affective family relationship, the integrity of the child residing in Brazil and the dignity of the human person.

Based on the new law, the moment of conception for the prohibition of extradition was considered irrelevant, which may occur before or after the commission of the crime, being in any event an impediment to the expulsive power of the State, allowing the foreigner to remain on national soil.

Until the advent of the law, the STF's understanding established the moment of conception as a condition for the extradition of the convict.

- Theme nº 988, Minister Luiz Fux, pending trial, deals with the exemption of foreigners with permanent residence in relation to fees for migratory regularization. The Federal Public Defender's Office maintains: (i) that the Constitution ensures that fees are free for those who are underprivileged in relation to the acts necessary for the exercise of citizenship; (ii) there is no distinction between nationals and foreigners for the exercise of fundamental rights; (iii) violation of the principle of contributory capacity; and (iv) prohibition against non-confiscation.

- Social Security – Extraordinary Recourse 587.970 - São Paulo.
- Theme 173: " Foreigners residing in the country are beneficiaries of the social assistance provided for in article 203, item V, of the Federal Constitution, once the constitutional and legal requirements are met".

The Federal Union's extreme appeal was aimed at reviewing a decision handed down by an appeal group, which ensured minimum social security benefits for an elderly Italian immigrant, Felícia Mazzitello Albanese.

Minister Marco Aurélio extended the payment to the defendant due to the major principles of solidarity and the eradication of poverty, provided for in Article 3, I and III of the Constitution.

The Court considered assistance to the destitute as a fundamental right, as provided for in Article 6, with provision being made in Article 203, V, prohibiting ordinary legislation from restricting the right to nationals.

The STF ensured the effectiveness of fundamental rights, acting attentively to the values enshrined in the Constitution, by sources of international law and enshrined in the ordinary plan by Federal Law nº. 13.445 of 2017, reinforcing its role that modern doctrine has long signaled, as guarantor of fundamental rights.

7. Parallel of migration treatment in the United States and European Union

Despite the peculiarities and specific characteristics, in general terms, along the same lines as the Brazilian State, it has been a characteristic feature of the conduct of government officials the inclination towards control in dealing with the migratory phenomenon, in spite of the current international norms.

In the European Union - EU, the principle of solidarity has a superior reference, being a cornerstone in its legal and social construction.

The very origin of the EU dates back to the year 1950, emerging with the post-war period, in which common priority interests are highlighted in relation to those of the country itself.

The embryonic idea was to create an integration based on the common economic interest. The combination of purposes and economic dependence have strengthened the notion of solidarity among its members. Solidarity came to be built by a succession of facts that generated the economic development of the European market and later formed the European federation.

The reference to the principle of solidarity is noted in the treaties and in the charter of fundamental rights, with a view to protecting the family, art. 33, access to services of economic interest, article 36, protection of the environment and solidarity between human generations, article 37, in

addition to the express mention in the articles. 80, 121 and 194. Solidarity is also mentioned in the migratory matter, art. 232.

The normative framework has not (Aguiar, Wermuth 2017) permeated the actions established by the European Union and its member states effectively, which began to prioritize the protection of borders before immigrants.

As an example, we can refer to the Italian Interior Minister Matteo Salvini's decree, which imposed fines of up to one million euros on those who saved immigrant lives adrift in the Mediterranean.

The measures adopted by the United Nations vis-à-vis France and the degrading conditions to which immigrants are subjected are constant.

Noteworthy is the lawsuit brought by a team of lawyers specializing in international law that accuse the European Union of committing crimes against humanity and being responsible for thousands of deaths on sea crossings, due to migration policies.

The policy adopted by the EU heads of State is geared towards the issue of border security and economic aspects, always under the umbrella of the deleterious risks of foreign invasion, with humanitarian and diplomatic issues being distant in plans.

The migratory flow in recent years has been reduced by almost 97%, despite the notable wars and tragedies that have plagued African and Asian countries.

The peak of migration occurred in 2015, with the entry of just over 1,000,000 irregular migrants, this number being reduced in 2019 to just over 30,000.

The migratory policy has been stiffened by the Italian complaints that occurred in 2018, for a balance of responsibility and solidarity, with the need to relax the Dublin rule. *"This European legislation establishes that the first European country in which a migrant steps is responsible for manage the application for international protection, something unsustainable for Mediterranean countries that require solidarity from partners".*

The number of irregular migrants in Europe is estimated to be between 3.9 to 4.8 million, the survey was made by the Pew Research Center, corresponding to less than 1% of the total population of that group of countries.

The number of regular migrants is 4 times higher, totaling around 18 million, corresponding to just over 3% of the entire European population, which is more than 500 million people, this for the year 2017, where there was already a decline in the concentration of foreigners.

These numbers are below European emigration currents. Between 1800 (world population 978 million people) and 1930 (world population 2 billion people) 40 million left for the Americas.

The Italian diaspora was the largest non-forced migratory movement in history, close to 11 million people left the country (5.6 million to the USA, 2.9 million to Argentina, and 1.5 million to Brazil).

The adopted policy violates the rules contained in its charter, in the declaration of human rights and in all legal rhetoric built on the principle of solidarity.

The United States has a migration policy based on national security, despite having 50 million immigrants living in its territory, which corresponds to 15% of the total population, drawing a parallel, proportionally corresponding to 5 times more than the amount received by the countries of the European Union and 37 times more than that received by Brazil.

The United States adopted a zero-tolerance policy, which began with the Obama administration in 2014, by criminalizing parents and determining detention for families until the immigration and asylum process is decided.

The Trump administration has continued these guidelines, with the increase in the number of incarcerations, the separation of thousands of children from their parents, and their custody in prison-like quarters.

The measures adopted have generated outrage and commotion, with the repudiation of the American Academy of Pediatrics, signaling childhood traumas, and the UN, which understands that families should not be considered criminals and do not need to have their private freedom while awaiting the judicial process.

Criticism prompted President Trump to issue new executive decree, ensuring joint family detention.

The attempt to reform the immigration law was frustrated, with the privilege for the most qualified immigrants and the reduction of legal immigration by 50% in a period of 10 years, which was not approved by the American Congress.

Therefore, even more sharply than Brazil, there are numerous episodes in the United States and the European Union that give immigrants an inappropriate treatment, with episodes of serious violation of human rights and treaties to which both are signatories.

8. Final Considerations And The New Opportunity

The concern with reality shows that the sources of international law, despite giving a rational and dignified treatment to the migratory issue, have served to cover up the reality posed, in which their own facts are evaded in detriment of the human rights of migrants.

The exploration of the theme reveals not only a phenomenology of power, but a critique of the role played in the pursuit and guarantee of fundamental rights by States, which is why the process necessarily involves a democratic and ethical bias, in which citizenship must stop to

be understood as an element of exclusion, starting to function as a means of recognizing the other.

Due to the social mutability and the fallibility of the result generated by the use of the technique in relation to reality, it is necessary the constant social investigation of the legitimacy of their employment, not only linked to the overcome formal paradigm of authority and national security in the migratory issue.

When the law is dominated by planning techniques and processes of idealization of the natural world, human freedom is constrained to a prefabricated, artificial, unique and oppressive formula of life itself.

The history of immigrants in the last 120 years in Brazil, with their concentration reduced to insignificant numbers and the deficit in the balance of income X outflows are evident causes of an inadequate political, legal and legislative practice, dissociated from facticity and disrespect for rights human rights enshrined in international law. Resulting in a greater exodus of Brazilians, all with the objective and greater control to avoid the risk of external threat.

The inquiry made in the life plan, as it has already overcome the formal field of application of law, by analyzing the contrast of the means already defined in relation to the elected ends, allows for a causality examination, which reveals the truth and sensitizes a traditionally limited approach to the ideal plan of the right to the reality posed.

The succession of normative diplomas in the course of the last century has shown that there has been no progression, on the contrary there is a social and humanitarian setback accompanied by executive and legislative policies that have disrespected human rights, due to the adoption of the national security paradigm.

The new migration law came to reinforce the need for a paradigm shift, with the imperative obedience to the 1988 Constitution and international pacts.

The analysis focused on being, for the phenomenon itself, in relation to what occurs in Brazil, Europe and the USA makes it possible to control and reduce the manipulations resulting from the study limited to normative language, serving as guidance and guideline in the control of performance political agents, notably the executive.

In a global conjuncture of tragedies and great exodus, the Brazilian State, the USA and Europe have the possibility to correct the serious injustices committed. In order to do so, it is enough to observe its objectives and ensure the effectiveness of the fundamental rights of migrants enshrined internationally, in order to reach a more just, solidary, participatory, inclusive and egalitarian society, fulfilling the goal of a human family enshrined in the 1948 Universal Declaration of Human Rights.

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