

# UNDERSTANDING THE RELATIONSHIP BETWEEN PRECARIOUS WORK AND SLAVE LABOR IN BRAZIL

## ENTENDENDO A RELAÇÃO ENTRE TRABALHO PRECÁRIO E TRABALHO ESCRAVO NO BRASIL

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### ABSTRACT

The main goal of the article is to comprehend the definitions of precarious work and degrading work conditions as a type of slave labor. We intend to ascertain the phenomenon of the “precarization” of work and of the subject of the worker, treated as disposable merchandise by the capital holders who, becoming consistently stronger, determines the localization of his factories according to the fragility of the State, of the Labor Law and of the social movements. He settles in regions where work is so precarious that at times it seems to confuse itself with the concept of degrading conditions for purposes of characterizing as slave labor. In this regard, the article intends to identify and conceptualize the phenomena of “precarization” and of slavery, differentiating them and delimitating them, demonstrating that the discourse of those who approximate them is part of a rhetoric built by the neoliberal capitalist ideology present in the current Toyotist production system.

**KEYWORDS:** Slave labor. Degrading conditions. Precarious work. Neoliberalism.

### RESUMO

*O objetivo principal do artigo é compreender as definições de trabalho precário e condições de trabalho degradantes como um tipo de trabalho escravo. Pretendemos verificar o fenômeno da “precarização” do trabalho e do sujeito do trabalhador, tratado como mercadoria descartável pelos detentores de capital que, tornando-se consistentemente mais fortes, determinam a localização de suas fábricas de acordo com a fragilidade do Estado, do Direito do Trabalho e dos movimentos sociais. Assim, instalam-se em regiões onde o trabalho é tão precário que, às vezes, parece confundir-se com o conceito de condições degradantes para fins de caracterização do trabalho escravo. A este respeito, o artigo pretende identificar e conceituar os fenômenos da “precarização” e da escravidão, diferenciando-os e delimitando-os, demonstrando que o discurso daqueles que os aproximam faz parte de uma retórica construída pela ideologia capitalista neoliberal presente no atual sistema de produção de Toyotista.*

**PALAVRAS-CHAVE:** Trabalho escravo. Condições degradantes. Trabalho precário. Neoliberalismo.

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**SUMMARY:** 1. Introduction. 2. Understanding precarious work. 3. Understanding slave labor. 4. Conclusion. References.

## **1 INTRODUCTION**

One of the most controversial things about slave labor in Brazil these days is its definition. Even though the article 149 of the Brazilian Criminal Code states that slave labor happens in four situations (forced labor, debt bondage, degrading conditions of work and debilitating work hours), the doctrine and jurisprudence haven't yet come to a unanimous consensus.

The biggest problem is the definition of degrading conditions and debilitating work hours. Some say these criminal types are too broad and because of that they can't be defined precisely which would result in unfair trials. On the other hand, a more accurate analysis of the judicial decisions and concrete cases help to understand how the concepts are being treated. One could say on the contrary that the judicial decisions have been too cautious about declaring slave labor under degrading work conditions or debilitating work hours.

We'll analyze the misconception about what is slave labor and what is precarious work. We'll show that there's an extreme caution in declaring the existence of slave labor even in cases where the evidence is clear. In a lot of cases doctrine and jurisprudence would state that it's only a case of degrading work conditions, treating the concept as if it belong to the definition of precarious work rather than the definition of slave labor.

The main goal of the article is to analyze the definition of slave labor and precarious work by demonstrating the difference between them in order to help consolidate the concept of slave labor in Brazil.

## **2 UNDERSTANDING PRECARIOUS WORK**

To understand precarious work it is crucial to understand the contemporary context of labor law in Brazil. And with that end it is necessary to do a brief study of neoliberalism.

The Neoliberal State provokes a moment of paradigmatic rupture, providing the increase of unemployment, the dampening of Fordism and the appearance of more and more precarious job posts<sup>1</sup>.

In this sense, by evolving and disseminating its ideal of a law that's ancillary to the economic model, the "neoliberal" politics generates and "social deficit" and even an economic deficit when one considers the work relations under the aspect of political-economical productivity. According to Castelo: "[...] *there is no interest or concern over the socio-ethical basis in which the contractual obligations and the human relations are settled*"<sup>2</sup>.

The "rupture" with the old "paradigms" serves as a backdrop for substantiating the "flexibilization" of the rights, especially labor rights. Jobs are flexibilized as are the means of hiring and firing, of time and function to meet the market's needs<sup>3</sup>.

As Süssekind disserts:

[...] the primordial objective of flexibilization in the work relations was that of providing the implementation of new technology or new work methods and, as well, that of avoiding the extinguishment of companies, with evident reflexes in the unemployment rates and the aggravation of socioeconomic conditions. However, simultaneously, the thesis became universal to honor the social groups as sources of law (juridical pluralism). With flexibilization, the legal systems foresee either optional or flexible formulas of stipulating work conditions, whether by the instruments of collective negotiation, whether by the individual work contracts, or by the businessmen themselves<sup>4</sup>.

However, the illusion caused by "Toyotism" and by the "flexibilization of the work relations" generates only more misery and social inequality. We are living a time of "work devaluation" and, consequently, of the worker.

New ways of hiring arise, such as contracting and hiring for a predetermined amount of time; the hypotheses of temporary contracts are widening; the number of people working informally grows; and there's a reduction of the concept of subordination,

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1 NASSIF, 2001.

2 CASTELO, 2003.

3 CASTELO, 2003.

4 SÜSSEKIND, 2005 p. 213.

expelling people who were considered to be employed from the protective sphere of Labor Law.

Job posts are “precarious” and there are more and more workers laboring in sub-jobs, that don’t offer any juridical protection. According to VIANA, workers from neoliberal companies can be classified under three groups:

1. A more and more qualified and reduced nucleus, with good salaries, career perspectives and certain stability. From a worker of this group, functional and geographical mobility is demanded, as well as a disposition for working overtime and – above all – identification with the company, as if it was something that belonged to him.
2. The exercisers of mean-activities, such as secretaries and messengers, as well as less qualified workers, working full time. Turnover is high, salaries are low and the career perspectives are almost inexistent. It’s above all the fear of unemployment what makes them subject themselves to any condition.
3. A group of eventual workers, either by term or part-time. Almost always unqualified, they move between unemployment and precarious work, and that is why they are the most exploited ones by the system. And here we find the largest contingent of women, youngsters and (in the case of advanced countries) immigrants. This group, such as the previous one, tends to be discarded for the partners<sup>5</sup>.

The third group represents the base of the modern capitalist structure and it’s the one that grows the most in absolute numbers. It’s in this group where most workers found in conditions analogous to slavery are situated in. In this sense, it’s noticeable that almost 90% of the workers rescued in the year of 2014 were outsourced workers that provided services to great economic conglomerates.

Perhaps here resides the difficulty in distinguishing between precarious work and slave labor, as most times slaved workers also occupy posts of precarious work. Notwithstanding, it is crucial that we are able to define and differentiate them in order to guarantee the effective legal protection to these people.

In this sense, ALVES explains that:

The complex of productive restructuring propelled the relative decrease of the industrial working class, installed in the central nucleus of the production complex of merchandise. As it decreased, it incorporated

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5 VIANA, 1999, p. 886.

new qualifications, integrating more, under the logic of Toyotism, to the organization of the capitalist production (which contrasts with its precarious propagation through the edges of the production complex of merchandise). On one hand, we observe the interpenetration, which is increasing, between “productive” functions and functions said to be “unproductive”. A reconstitution of the “collective worker” occurs inside the production of capital, with the decrease (and the metamorphosis) of the industrial labor happening as a consequence (Lojkine, 1995). On the other hand, in relative terms, develops the economy of live work, through the growing development of the productivity (and the intensification) of work, which tends to “dry up”, more and more, the participation of industrial workers in the nucleus of the production complex of merchandise. In this way, a new industrial proletariat arises, complex and heterogeneous, whose numeric reduction in its productive core tends to hide its peripheral expansion, interpenetrated by units of industrial subcontracting and of “services” (it’s worth saying, a new “post-modern” neoproletariat with precarious social statutes)<sup>6</sup>.

Starting from the 1990s in Brazil, the production process becomes more and more decentralized, broadening the Toyotist model of verticalization and the leaning of the factories. The new hiring modalities intensify and more and more workers become outsourced, autonomous, contracted by term, part-time and informal. The aim is to decrease costs with work, severing the employment ties, but without stopping to exert control over the production in a more and more intense manner, however under the cloak of a “rarefied” subordination in the eyes of the classic legal system.

The truth however is that, though apparently more rarefied in the face of the advent of new technologies and contractual modalities, subordination intensifies, in a way that the capitalist is able to – at the same time that he unfocuses his production and disconnects his workers (in the sense of no longer aggregating them in a physical space in which their recognition as equals is possible) – subject and subdue the workforce in a way that is even more incisive and intense.

In this regard, adduces ALVES that “*the polyvalent worker appears more and more as the server of a system of machines*”<sup>7</sup>.

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6 ALVES, 1999. P. 139.

7 ALVES, 1999. P. 150.

ANTUNES understands that “interactive involvement” between the machine and the human work emphasizes the process of estrangement and alienation, capturing the subjectivity of workers and expanding the modern forms of reification of man. The capitalism of our days, while it can increase human potentiality, it can make the “social phenomenon of strangeness emerges, and so far the development of this capacity does not necessarily produce the development of a meaningful individuality, but, on the contrary, can undervalue the human personality”<sup>8</sup>.

In Brazil, the strong impact of the neoliberal ideology and of the Toyotist system starts to be felt from 1993 when the increase in productivity became possible even with the decrease of job posts in automakers. The process of flexibilization of the labor laws meant, and still does, that the consolidation of the precarization of work, at the same time that it inaugurates a new structure of organization of industrial labor<sup>9</sup>.

The work with no guarantees and safety, according to STANDING, creates a new working class: the “precariat”. The author explains that such workers are devoid of guarantee of a job market, of guarantee of employment ties, of job security, of safety at their workplace, of guarantee to the right to professional training, security of income and guarantee of representation<sup>10</sup>.

Although BRAGA criticizes the notion of precariat as a social class exterior to the salary relationship, he identifies these workers under three categories: fluctuating workers, the latent population and stagnant workers<sup>11</sup>.

It is noticeable that the expression “precarious work” refers to all this process of dismount and deconstruction of Labor Law and of the employment relationships implemented in Brazil especially as of the 1990s. In this way, a job post is said to be precarious every time it represents some form of contraction that stops guaranteeing to the worker all the labor rights inherent to the employment relationship in a merely juridical maneuver, as the maintenance (and

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8 ANTUNES, 2010, p. 122; p. 93.

9 ALVES, 1999.

10 STANDING, 2013, p. 24-25.

11 BRAGA, 2012, p.54.

at times the intensification) of the juridical subordination (and of the other elements characterizing of the employment relationship, namely: work by an individual with personhood, non-eventuality and onerosity).

In this way, one can't mistake precarious work for work in degrading conditions able to characterize as work analogous to slavery. Although one can presume that every time contemporary slave labor is verified one is standing before a situation of precarious work, the contrary cannot be considered to be true, therefore not every precarious work can be considered to be labor in degrading conditions.

The difference between the figures is clear and evident when analyzing some concrete cases as the ones brought in the following section of this article. In this standard, it is possible to asseverate that precarious work refers to all those situations in which the worker is subjected to conditions that hinder the recognition and the full access to their labor rights, whilst the penal type (degrading conditions for purposes of configuration of slave labor" subjects the worker to conditions that attempt against his dignity and puts him in situations that debase his own condition as a human being.

As one will see from the examples presented in the following section, degrading work conditions are held in extreme cases where the workers have been exposed to a condition that is offensive to their own dignity. They're unable to reach their basic and fundamental human rights.

This situation can't be mistaken for precarious work, even though they can be, sometimes, similar. To understand the difference we'll analyze some concrete cases that can illustrate how the concepts can't be confused.

An alert has to be made though. Most of the time the mistaking of the definitions is intentional in order to deflate the concept of slave labor and tries to convince society that it is so broad that it can generate unfair trials and judgments. One can conclude it's a rhetorical speech destined to confuse people by spreading the unreasonable fear that almost every employer could be consider as an enslaver. This is not true as we'll see.

### 3 UNDERSTANDING SLAVE LABOUR<sup>12</sup>

The “Manual Against Slave Labor”, edited by the Labor Inspection Secretary states that:

Diverse are the denomination given to the phenomenon of illicit and precarious exploitation of work, at times called forced labor, slave labor, labor exploitation, semi slavery, degrading labor, among others, which are used indistinctively to treat the same legal reality. Despite the diverse denominations, any work that doesn't gather the minimum condition necessary to guarantee the worker's rights, which is to say, scrimps his freedom, debases his dignity, subjects him to degrading conditions, including in relation to the work environment, will be considered labor in analogous condition to that of a slave<sup>13</sup>.

Considering this concept, we can understand that the juridical asset to be tutelated by the Penal Law is the dignity of the human person, and not just the individual's freedom. Therefore, the express insertion of labor in degrading conditions in the penal type, adduced by law dated from 2003, cannot be dismissed<sup>14</sup>.

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12 Some of the references in this part were originally developed in MIRAGLIA, Livia Mendes Moreira. **Contemporary slave labor**: conceptualization in light of the principal of human dignity. 2<sup>a</sup> ed. São Paulo: LTr, 2014.

13 Ministry of Labor and Employment, 2011, p. 12.

14 Article 149 of the Penal Code became effective with the following writing:

Article 149. Reduce someone to the condition analogous to that of a slave, whether subjecting him to forced labors or to exhaustive working hours, whether subjecting him to degrading work conditions, whether restricting, by any means, his movement due to debt contracted with the employer or prepost: (Writing given by Law number 10.803, from 12.11.2003).

Penalty – reclusion, from two to eight years, and fine, as well as penalty corresponding to the violence. (Writing given by Law number 10.803, from 12.11.2003).

§ 1o In the same penalties incurs someone who: (Included by Law number 10.803, from 12.11.2003).

I – restrains the use of any mean of transportation by the worker, aiming to retain him in the workplace; (Included by Law number 10.803, from 12.11.2003).

II – keeps ostensive surveillance in the workplace, or takes over documents or personal objects from the worker, aiming to retain him in the workplace. (Included by Law number 10.803, from 12.11.2003).

§ 2o The penalty is increasing by half, if the crime is committed: (Included by Law number 10.803, from 12.11.2003).

I – against a child or teenager; (Included by Law number 10.803, from 12.11.2003),

II – for reason of prejudice of race, color, ethnicity, religion or origin. (Included by Law number 10.803, from 12.11.2003).



The recognition of the four hypotheses of work analogous to that of a slave foreseen in article 149 of the Penal Code (forced labor, exhaustive working hours, degrading conditions and restriction of movement due to debt) is today considered by the International Labor Organization as an international mark to be followed by other countries, putting Brazil ahead in the combat against modern slavery.

The alteration of the legal norm, summed to the definition of the competence of the Federal Justice to the appreciation and the judgement of the crime, imprinted effectiveness to the penal type<sup>15</sup>.

It was from this concept of contemporary slave labor that the Ministry of Labor and Employment realized more than 1300 rescue operations since 2003, resulting in more than 80 million reais in compensations and more than 40 thousand workers rescued<sup>16</sup>.

In the same sense follows the jurisprudence of the Supreme Federal Court, which, as coined by Minister Rosa Weber, understood that:

For the configuration of crime of the article 149 of the Penal Code, it is **not necessary to prove the physical coercion of the freedom of coming and going or even the retrenchment of the freedom of moving, with the**

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15 ABRIDGEMENT: PENAL LAW AND PENAL PROCESSUAL. ART 149 OF THE PENAL CODE. REDUCTION TO THE ANALAGOUS CONDITION OF THAT OF A SLAVE. SLAVE LABOR. DIGNITY OF THE HUMAN PERSON. FUNDAMENTAL RIGHTS. CRIME AGAINST THE COLLECTIVENESS OF WORKERS. ARTICLE 109 VI OF THE FEDERAL CONSTITUTION. COMPETENCE. FEDERAL JUSTICE. EXTRAORDINARY APPEAL PROVIDED. The 1988 Constitution presents a robust normative set that aims the protection and effectiveness of the fundamental rights of the human being. The existence of workers that labor under escort, some chained, in situation of complete violation of freedom and of each one's self-determination, configures as a crime against the organization of labor. Any conduct that can be held as violating not only of the system of organizations and institutions with attributions to protect the rights and duties of the workers, but also of the workers themselves, reaching them in spheres that are most valuable to them, in which the Constitution grants them maximum protection, are frameable in the category of crimes against the organization of labor, if practiced in the context of work relations. In such cases, the practice of crime foreseen in article 149 of the Penal Code (Reduction to the condition analogous to that of a slave) characterizes as a crime against the organization of labor, so as to attract the competence of the Federal Justice (article 109, VI of the Constitution) to process and judge him. Extraordinary appeal known and provided. (BRASILIA. Supreme Federal Court. **RE number 398.041**. Reclaimer: Federal Public Ministry. Reclaimed: Silvio Caetano de Almeida. Rel. Min. Joaquim Barbosa. Published in the DJE in 12/19/2008).

16 MTE, 1995 a 2013.

subjection of the victim to “forced labor or exhaustive working hours” or “to degrading labor conditions” being enough, alternative conducts foreseen in the penal type”<sup>17</sup>.

It must be pointed out that more than 80% of the fines were due to the verification of the subjection of the worker to degrading labor conditions and/or to an exhaustive working hours<sup>18</sup>.

Furthermore, it is important to highlight that the Commission of Experts in the Application of Conventions and Recommendations of the ILO (CEACR) pointed out that other member countries, such as France, Venezuela and Spain have been producing internal legislations similar to the Brazilian, with the goal of punishing the “*exploitation of the vulnerability of workers, as well as conditions of labor that violate the dignity of the human person*”<sup>19</sup>.

Notwithstanding, even though the writing of the article 149 of the Penal Code is clear, there is still jurisprudential and doctrinary difference in regards to the definition of each of the hypotheses of the penal type. Especially concerning the conceptualization of work in degrading conditions in a way that there are still those who approximate it to the concept of precarious work with the clear intention of decharacterizing the subjection to degrading labor conditions as a hypothesis of crime of labor in conditions analogous to that of a slave.

The divergence in regards to the concept of degrading labor is great. Notwithstanding, it’s possible to asseverate that there is agreement in the affirmation that is differentiates itself from forced labor for not characterizing, necessarily, an offense to the right to freedom of the worker.

In the magisterium of VIANA, one can focus degrading labor under five hypotheses:

1. The first category of degrading conditions relates to slave labor itself “*stricto sensu*”. It presupposes, therefore, the explicit lack of freedom. Even in this case, however,

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17 STF. Inquiry number 3.412. Author: Federal Public Ministry. Inquired: João José Pereira de Lyra and another. Published in the DJE in 11/12/2012.

18 MTE, 1995 a 2013.

19 ILO, 2015.

the idea of constriction must be relativized. It isn't necessary for there to be an armed supervisor or another violence threat. [...] the sheer existence of a growing and unpayable debt can be enough to stunt freedom. The subjection of the worker to the logic of the supervisor doesn't make him less supervised.

2. The second category relates to work. In this context there are not just the *exhaustive working hours* themselves which the Penal Code mentions – whether extensive or intensive – as well as the exacerbated directive power, the moral abuse and analogous situations. Note that, even though the factory worker may suffer the same violations, the circumstances that surround slave labor – such as the lack of options, the oppressive climate and the degree of ignorance of the workers – make them even more serious.
3. The third category relates to salary. If this isn't at least the minimum wage, or if it suffers discounts not foreseen in the law, the insertion in the dirty list is already justified.
4. The fourth category related to the health of the worker that lives in the company's camp ground – whether inside or outside the farm. As examples of *degrading conditions* we would have unsanitary water, a plastic tent, the lack of mattresses or sheets, spoiled or insufficient food.
5. But even when the worker is moved to a random outskirts location, and from there is transported every day to his workplace, it seems to us that the solution should not be different. It's sufficient that the company repeats the paths of slavery, uprooting the worker and not giving him another option than to live that way. This would be the fifth category of *degrading conditions*<sup>20</sup>.

To BRITO FILHO, degrading work is that which is performed without:

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20 VIANA, 2007, p. 44.

[...] the minimum guarantees of health and safety, as well as the absence of minimum conditions of work, of housing, hygiene, respect and food”, with all this having to be assured jointly, considering that the lack of one of these elements imposes the recognition of work under degrading conditions<sup>21</sup>.

That is the case, for instance, of the labor performed in some coal-pits. In such places, activities are performed outdoors, not counting on any shelter against the elements. Workers, in general, labor with no individual protection equipment and don't receive the additional of insalubrity and of nocturnal work<sup>22</sup>.

Most times, workers don't enjoy the payment for overtime done, not even the additional 50% (fifty per cent). They also don't possess a dignified consideration and are subjected to extenuating working hours and without the proper resting time. Besides, the remuneration is earned by production, which obligates workers to subject themselves to grueling working hours and lowermost salaries<sup>23</sup>.

It is seen that, such as in the cases of forced labor, the enticement is usually done in regions that are distant from that of where the service will be provided. Testimonies allow us to infer that the housing and food supplied are extremely precarious, with the food not being enough for the type of work, the dormitories are precarious, there is no potable water or any other hygiene condition<sup>24</sup>.

In this sense, HADDAD says:

[...] “at the farm there were three houses and one shed; that the sheds in Pará are made with wooden forks covered by a black tarp and babassu leaves; that there were workers living in the sheds and others in the house [...] that all workers (whether from the houses or from the sheds) bathed and washed their clothes in a river; that they did their physiological needs in the same river or in the woods; [...] that in the second house the food was placed in the house's floor, subjected to the action of rats and other animals; that there was no stove; that they improvised a can with wood or branches to burn and make the food [...]

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21 BRITO FILHO, 2004, p. 80.

22 Diário de Pernambuco, 2007.

23 Diário de Pernambuco, 2007.

24 REIS; TRINDADE, 2006.

that there was no potable water; that all the workers and women drank the turbid water from the river; [...] that there were many mosquitoes in unbearable amounts. The degrading work conditions are confirmed by the tax auditor Luis Fernando Duque de Souza, according to whom “he found wooden and tarp sheds in the interior of the farm; that the wooden shed was old, quite precarious, with cracks and a dirt floor; that there weren’t good hygiene conditions for the workers; [...] that the water was extracted from a creek and there weren’t any sanitary installations; [...] The photographs [...] show the precariousness of the housing occupied by the workers”<sup>25</sup>.

According to the report of the Social Observatory, most workers can’t read or write, they have forgotten their own birthday dates, they have difficulty expressing themselves, they are afraid and almost never have an identity card or a voter registration. “They are like ghosts, with an uncertain future”<sup>26</sup>.

Still in consonance with the study done “it fits into the condition of degrading work that in which the worker isn’t formally registered, doesn’t have protection gear, sleeps in a corral without walls, doesn’t have access to potable water or to medical assistance, to vacation time, to a thirteenth salary. In almost 100% of cases they don’t count on a bathroom at their workplace”<sup>27</sup>.

The same situation repeats itself in some industries that produce biofuel, especially in the chopping and growing of sugar cane. These fundamental rights are also withheld from the workers that work in sugar cane fields

In such cases we observe the lack of supply of individual protection equipment, of implementation of mechanisms to avoid labor accidents, of access to dignified housing and food, of fair remuneration, of limitation of the working hours and payment of the additionals corresponding to work done overtime. Besides, there is information of retention of their Work and Social Security Card<sup>28</sup>.

Under circumstances similar to degradation illegal immigrants are found, subjected to work in conditions analogous to that of a slave in urban centers. They live huddled in the same place

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25 HADDAD, 2014.

26 CASARA, 2007.

27 Slaves of steel, 2006.

28 LOBATO, 2007.

where they labor, they work without rest, they receive by production and when there is something left at the end of the month the amount is insufficient to guarantee a dignified existence to them<sup>29</sup>.

They are strongly dependent of their employer, who is responsible for paying for the expenses of their feeding and housing, which, discounted at the end of the month, generate an insignificant remuneration.

For being in an illegal situation, they don't have a Work and Social Security Card, which keep them from having access to working and social security guarantees. Besides, often times they can't enroll their children in public schools and there are testimonies of denial of medical assistance due to the lack of documentation<sup>30</sup>.

In this sense, it's important to present the following testimony, collected from a document made by the Ministry of Labor and Employment:

The Ministry of Labor and Employment has received since the 1990s in a growing manner complaints of violence in the workplace related to the irregular immigration flow of foreign workers. The complaints are usually in regards to servitude by debt, forced labor, mistreatment, precarious conditions of health and safety, moral and sexual harassment, beatings, working hours of more than 16 hours of work and other human rights violations. In the sewing workshops several migrant workers are found, mostly coming from countries such as Bolivia, Paraguay and Peru, who work for more than 14 hours a day to earn values close to minimum wage, or even below it and without even the most basic conditions of safety and health. Most times, to get to Brazil, these workers end up contracting debt that is discounted from their already low salaries, leading to situations of servitude and restriction of freedom of movement, by debt. This situation is aggravated due to the lack of knowledge of the national laws and the lack of Brazilian documentation, since most of this migration happens informally, without the control of the frontier authorities. It's not rare for there to be physical and moral aggression, threats and other "vulnerabilization" of human rights<sup>31</sup>.

In this wake collates the following jurisprudence of the Labor Justice:

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29 BARROS, 2006, p. 269-287.

30 BARROS, 2006, p. 269-287.

31 MTE, 2014.

ANNULATORY ACTION. WORKERS SUBJECTED TO DEGRADING WORK CONDITIONS. *Salve labor* was banished in Brazil in 05/13/1888. Unfortunately, after more than 120 years of the advent of the *Áurea Law*, we still see, here and there, the debasement of labor conditions, in which the employee is subjected to debasing and degrading labor situations. Not even the fact that article 149 of the Penal Code establishes that it constitutes a crime to “Reduce someone to the condition analogous to that of a slave, whether subjecting him to forced labor or to exhaustive working hours, whether subjecting him to degrading conditions of labor” hinders the practice of such a grave conduct. This conduct, besides violating international precepts, such as the Universal Declaration of Human Rights, which establishes, in article 23, that “Every person has a right to work, to the free choice of work, to equitable and satisfactory conditions of work”, offends fundamental principles of the Magna Carta consisting of the dignity of the human person, of the social value of work and of the prohibition of inhumane or degrading work (items III and IV of article 1<sup>st</sup> and item III of article 5<sup>th</sup>). We can’t, also, lose sight that one of the objectives of the Federative Republic of Brazil is the construction of a free society, fair and solidary. Therefore, the subjection of workers to degrading conditions such as the ones portrayed in the present records – in which workers are obligated to sleep in the open, under a plastic tarp, without disposing of sanitary installations, being forced to do their physiological necessities in the woods, preparing their meals on the dirt floor and eating outdoors, under the treetops – not only causes indignation, disgust, but dishonors us as citizens, in a country where the Supreme Law featured, at all times, the principles of equality, of dignity and of the well-being of the human person<sup>32</sup>.

LABOR IN CONDITION ANALOGOUS TO THAT OF A SLAVE. Any work that doesn’t gather the minimum necessary conditions to guarantee the rights of the worker has to be considered as labor in condition analogous to that of a slave. The counterpoint to modern slave labor is in the constitutional guarantees of the dignity of the human person (CF, article 1<sup>o</sup>, III), in the social values of work and of the free initiative (item IV), in the prohibition of inhumane or degrading treatment (article 5<sup>th</sup>, III), in the social function of property (XXIII), in the economic order founded in the value of free and humane labor (article 170), in the exploration of the rural property that favors the well-being of the owners and of the workers (article 186, IV). APPEAL KNOW AND PROVIDED<sup>33</sup>.

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32 REGIONAL LABOR COURT OF THE 2<sup>nd</sup> REGION. Second Class. **Process 0061000-08.2005.5.05.0019**. Rel. Dalila Andrade. Published in the Electronic Diary of Labor Justice in 21. Oct. 2008.

33 Regional Labor Court-10 - Rapporteur: Chief Judge Elke Doris Just, Date of Trial:

This is also the position of the Supreme Federal Court which in the records of the action previously mentioned, recognized that:

[...] “Modern slavery” is more subtle than that of the 19<sup>th</sup> Century and the

Curtailment of freedom can arise from several economic constraints and not necessarily physical. You deprive someone of their freedom and of their dignity by treating them as a thing and not as a human person, which can be done not only through coercion, but also through intense and persistence violation of their basic rights, including the right to dignified work. The violation of the right to dignified work impacts the victim’s capacity to make choices according to his own free determination. This also means “reducing someone to a condition analogous to that of a slave. It isn’t just any violation of the labor rights which configures as slave labor. If the violation of the labor rights is intense and persistent, if it reaches blatant levels and if the workers are subjected to forced labor, exhaustive working hours or to degrading labor conditions, it is possible, in thesis, to frame it in the crime of article 149 of the Penal Code, for the workers are receiving the treatment analogous to that of slaves, being deprived of their freedom and of their dignity<sup>34</sup>.

According to the Orientation number 4 of the National Coordinating Body of Eradication of Slave Labor, from the Federal Public Ministry:

[...] degrading conditions of work are those that configure as despise to the *dignity* of the human person, by the noncompliance with the fundamental rights of the worker, especially those referring to hygiene, *health, safety, housing, rest, food* or others related to the *rights to personality*, which stem from the situation of subjection which, by any reason, makes the will of the worker irrelevant<sup>35</sup>.

It is important to point out that the work in overtime able to characterize the type must be that which performed in an extenuating way affects the health and the physical and mental hygiene of the worker.

It is what we verify, for instance, in the biofuel industry, especially in the chopping and growing of the sugar cane. The

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04/09/2014, 2<sup>nd</sup> Class.

34 Supreme Federal Court. **Inquiry number 3.412**. Author: Federal Public Ministry. Inquired: João José Pereira de Lyra and another. Published in the DJE in 11/12/2012.

35 Ministry of Labor and Employment, 2011. p. 12.



choppers of sugar can receive by production, and not for the hours effectively worked. The production is earned, at the end of the day, by the weighing of the sugar can chopped by the worker. The workers have no control over the weighing of what they produce and there is mistrust in regard to the adulteration of the final amount, done with the objective of lowering even more the already insufficient remuneration of the worker.

In this system, the worker is compelled to labor for about twelve hours per day, with no rest. He can get to chop fifteen tons per day, equating, according to a study done by UNESP, his useful life to that of slaves from the past, which didn't go beyond twelve years<sup>36</sup>.

ALVES reports yet the following elements characterizing of extenuating working hours:

From the 1990s there was a great increase in the productivity of work. For workers to keep their jobs in sugar cane they need to, nowadays, chop at least 10 tons of cane per day, to keep themselves employed; the chopped average has expanded to 12 tons of cane per day. Therefore the average productivity has grown 100%, going from 6 tons/man/day, in the 1980s, and reaching 12 tons per day, in the present decade. (...) A worker that chops today 12 tons of cane on average for a day of work performs the following activities during the day: walks 8,800 meters; expends 366.300 pruning knife strikes; carries 12 tons of cane in mounts of 15 Kg each on average, therefore he makes 800 trips carrying 15 Kg in his arms for a distance of 1.5 to 3 meters; performs approximately 36,630 flexions of his leg to hit the cane; loses, on average 8 liters of water per day by doing all of this activity under the strong sun of the interior of the São Paulo state, under the effect of dust, of soot expelled by the burnt cane, wearing a garment that protects him from the cane, but increases the bodily temperature. (...) What goes to the core of the matter which are the deaths of the cane chopping workers due to the excess of work is the payment by production. As long as the sugar-alcohol industry remains with this internal dichotomy: on one side, it utilizes what there is of the most modern in technological and organizational terms; technology that's typical of the 21<sup>st</sup> century (high-end tractors and agricultural machines, precision agriculture, controlled by geoprocessing via satellite etc.); but keeping, on the other side, labor relations, already fought and banished from the world since

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36 MOTTA, 2008.

the 18<sup>th</sup> century, workers will continue to die<sup>37</sup>.

In this standard, according to the Pastoral Commission of the Earth (CPT in Portuguese), it is already possible to count 21 workers' deaths in Brazilian cane fields caused, supposedly<sup>38</sup>, by the exhaustion and the labor in demeaning conditions<sup>39</sup>.

According to the “Manual of Combat of Labor in Conditions Analogous to that of a Slave”, edited by the Secretariat of Labor Inspection of the Ministry of Labor and Employment in 2011, extenuating working hours capable of characterizing the crime of labor in conditions analogous to that of a slave “doesn't refer exclusively to the duration of the working hours, but to the subjection of the worker to an excessive effort or to an overload of work – even if it is in a period of time consistent with legal working hours – which pushes him to the limit of his capacity”<sup>40</sup>.

In this sense, it is fitting to bring forth the following jurisprudence:

TRT-PR-01-18-2012 SLAUGHTER OF CHICKENS. HALAL METHOD. END-ACTIVITY. ILLICIT OUTSOURCING. The activity of slaughtering chickens, regardless of how it is done (cutting disk, Halal method, etc.) and by whom it is executed (worker directly hired by the company, “outsourced” workers, Muslims, Catholics, atheists, etc.), is inserted in the end-activity economically explored by the defendant. Therefore, it is imperious to recognize that the services provided to the defendant by the Muslim (or converted) workers, in regards to the slaughter of chickens in her facilities and with her tools, substantiate the core of the profit reached by SADIA. COLLECTIVE MORAL DAMAGE. CHARACTERIZATION. INDICATIONS OF SERVICES PROVIDED IN CONDITIONS ANALOGOUS TO THAT OF A SLAVE. RECORD TO THE PUBLIC MINISTRY.

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37 ALVES, 2011.

38 According to the president of FETAG-AL (Federation of Agricultural Workers in the State of Alagoas), there is no way to prove the death by exhaustion in the crops, because “the medical reports are always favorable to the owners of the plants, excluding any type of responsibility of the boss”. In: MOTTA, David. Slave labor and death in Brazilian cane fields. *Jornal Extra Alagoas On Line*. Available in: <<http://www.oitbrasil.org.br>>.

39 CPT, 2007.

40 CPT, 2007.

COMPENSATION DUE AND REVERTED TO THE EXECUTION FUNDS. RECORD TO THE C. TST. The hypothesis of the records evidenced the responsibility of the defendant for the collective moral damage inflicted to the collectivity: illicit outsourcing of the end-activity referring to the slaughter of chickens, bringing forth labor, economic and social losses. The outsourced workers were housed in inappropriate accommodations, with inexistent beds or mattresses in insufficient numbers for all to sleep. Besides, these workers didn't receive their salaries in due time and their respective pay stubs, with some of them having their Work and Social Security Card wrongfully withheld for as long as one year, with annotation of the employment contract only after the moment of return of the document. **It wasn't adopted for these employees a clock in system or any other mean for the annotation of the working hours, even though the surpassed the number of ten hours and they worked overtime, including with vilification of the weekly break of Sunday. The work was extenuating, demanding repetitive movements. It was necessary to expedite a record to the State Public Ministry in view of the strong indications services provided under condition analogous to that of a slave.** The value arbitrated by way of compensation for collective moral damages shall be deposited in a checking account at the disposal of the Judgement so as to integrate the Funds of Labor Execution, managed by the Higher Labor Court, determining the expedition of the record to the C. TST in regards to the destination of the funds<sup>41</sup>.

Upon the analysis of the facts and of the exposed situations, we infer that degrading work is that which is done in subhuman labor conditions, offensive to the minimum substrate of the Human Rights: the dignity of the human person. In this way, we consider to be the existing minimum for a dignified existence: fair remuneration; respect to the norms of health and safety at work; limitation of the working hours, assuring the right to payment of overtime eventually worked and to the necessary rest for replenishing energies and for social conviviality; and access to security guarantees.

It should be highlighted however that, even though this is the majority understanding of the Labor Justice in respect to the proposed actions aiming at the payment of labor dues and moral damages in view of labor analogous to that of a slave, there are some decisions which, when approximating the concepts of precarious

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41 TRT-9. 7052009749908 PR 705-2009-749-9-0-8, Rapporteur: ANA CAROLINA ZAINA, 2<sup>nd</sup> CLASS, Publication Date: 01/18/2012. Bolded emphasis added.

work and degrading conditions of work, empty the concept of slave labor, no longer recognizing the existence of a crime. And even though they defer the payment of moral damages, they do it in an inferior amount to what would be due in case there was the characterization of labor in conditions analogous to slavery. In this sense:

WORK CONTRACT. INCOMPLIANCE WITH SANITARY AND COMFORT CONDITIONS BY THE EMPLOYER. SUBJECTION OF THE EMPLOYEE TO PRECARIOUS WORK CONDITIONS. CONSEQUENCES. The Brazilian legislation foresees the compliance with the rules of sanitary and comfort conditions of the employee. The subjection of employees to work in places devoid of bathrooms and potable water, as well as the undue fractioning of the breaks within the working hours constitutes contractual incompliance that authorizes the indirect rescission of the work contract. Being this the hypothesis of the records there is no way to welcome the claim of the employer as to the termination modality. COMPENSATION DUE TO MORAL DAMAGE. QUANTIFICATION. The compensation for moral damage presupposes the culpable or willful action or omission and the causal link. The moral damage isn't proved, with the conduct that made it arise being enough. The precarious conditions of labor development in the concrete case constitute an authorizing fact of the deferred compensation, with nothing existing to be reformed about it. Appeal known and not provided<sup>42</sup>.

COMPENSATION FOR MORAL DAMAGES – PRECARIOUS AND INHOSPITABLE WORK CONDITIONS. It is the employer's duty to supply proper conditions for the labor of his employees. As it is patent in the records that the claimed acted with lack of care, not having assured to the worker several basic hygiene conditions, health and safety of labor, in detriment of his dignity as a human being, the compensation for moral damages proceeds. Unprovided appeal of the claimed<sup>43</sup>.

As for the criminal condemnations, the specialized Justice appears to be even shyer when interpretation article 149 of the Penal Code, demanding the degrading conditions to be following by the

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42 Regional Labor Court-10 - RO: 01422201200110006 DF 01422-2012-001-10-00-6 RO, Rapporteur: Chief Judge Cilene Ferreira Amaro Santos, Date of the trial: 03/26/2014, 3<sup>rd</sup> Class, Publication date: 04/04/2014 in the Electronic Diary of Labor Justice.

43 Regional Labor Court-24 00000444420145240031, Rapporteur: TOMÁS BAWDEN DE CASTRO SILVA, 1<sup>st</sup> CLASS, Publication Date: 07/14/2015

curtailment of the right to freedom for configuration as a crime. In this sense, the decisions are the following:

PENAL AND PENAL PROCESSUAL. ARTICLE 149, CAPTION, PARAGRAPH 2<sup>nd</sup>, ITEM I, AND ARTICLE 297, PARAGRAPH 4<sup>th</sup>, BOTH IN THE PENAL CODE. DEFENSE APPEAL, ATYPICALITY OF CONDUCTS, CRIME OF REDUCTION TO THE CONDITION ANALOGOUS TO THAT OF A SLAVE. DEGRADING WORK CONDITIONS VERIFIED. INSUFFICIENT FOR THE ADEQUATION OF THE CONDUCT TO THE TYPE. NEED OF DEMONSTRATING THAT THE FREEDOM OF MOVEMENT OF THE EMPLOYEES WAS IMPAIRED BY THE EMPLOYER. PRECEDENTS. OMISSION OF ANNOTATION OF WORK CONTRACT IN THE WORK AND SOCIAL SECURITY CARD. NEED OF DEMONSTRATION OF THE WILLINGNESS OF THE EMPLOYER IN CHEATING THE PUBLIC FAITH AND SOCIAL SECURITY. SPECIFIC WILLFULNESS NOT DEMONSTRATED. ACQUITTAL, IN THE TERMS OF ARTICLE 386, ITEM III, OF THE CODE OF PENAL PROCESS. APPEAL PROVIDED. 1. The appellant was condemned by the practice of the offenses foreseen in article 149, caption, paragraph 2<sup>nd</sup>, item I, and in article 297, paragraph 4<sup>th</sup>, all from the Penal Code. The main thesis brought up in his recourse of appeal is that of the atypicality of his conducts. 2. In regards to article 149 of the Penal Code, which incriminates the reduction to the condition analogous to that of a slave, it was verified that the employees of the now appellant were subjected to degrading work conditions. However, according to the jurisprudence of the Regional Federal Court of the 5<sup>th</sup> Region, this isn't enough for typical adequation, as it is necessary to demonstrate that the freedom of movement of the employees was impaired by the employer, which isn't verified in the concrete case. 3. In regards to article 297, paragraph 4<sup>th</sup>, of the Penal Code, we observe that the simple omission of annotation of the work contract in the Work and Social Security Card doesn't constitute a crime, with the demonstration of willfulness of the employer in cheating the public faith and the Social Security being needed. However, in casu, this specific willfulness didn't stay demonstrated. 4. Acquittal in the terms of article 386, III, of the Penal Process Code 5. Appeal provided<sup>44</sup>.

PENAL. REDUCTION TO THE CONDITION ANALOGOUS TO THAT OF A SLAVE. PENAL CODE, ARTICLE 149. UNDIGNIFIED WORK CONDITIONS. DEPRIVAL OF FREEDOM. INSUFFICIENT PROOF. APPEAL UNPROVIDED. 1. The circumstance of being proven

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44 REGIONAL FEDERAL COURT OF THE 5<sup>th</sup> REGION. Fourth Class. **Process number 00000743220134058307**. Rapporteur. Chief Federal Judge: Élio Wanderley de Siqueira Filho. Published in the Electronic Diary of Justice on 31 Mar. 2016.

the criminal materiality reveals the circumstances of labor exerted by the victims, but little it reveals in respect to the deprivation of their freedom. In this sense, it should be observed that the rural property is located in the city of MonteMor, which is about 43 km away from downtown Campinas, a city with a notorious populational density and with corresponding resources, being evident that any of them could have had access to the competent authorities to free them from physical or moral coercion. To say that the work regimen made the return to the origin State impossible isn't the same as saying that the accused kept the victims from leaving the property. In any event, we observe that Celestino came first and that his wife was only invited to after, which suggest a certain conformity to the relations that up until then were prevalent in the work relationship. The circumstance of having alienated their house in Arapiraca (Alagoas) wasn't caused by any initiative of the defendant, who strictly speaking didn't even invite the victims to work. It is intuitive that with the arrival of a significant number of family members, the income provided or the labor conditions themselves could have suffered changes. This doesn't mean the attitude of the defendant was correct, but we can't go to the extreme opposite that he deliberately perpetrated the offense against the freedom of coming and going assured to the victims. It isn't about, therefore, excessively values the accordance of these, especially in regards to the partnership contract, but only of appreciating whether they are satisfied or not with the requisites demanded by the penal code. 2. Unprovided appeal<sup>45</sup>.

In this way, it is inevitable to adduce that there can't be as some seek to disseminate, a real confusion between precarious work and slave labor configured by the existence of degrading conditions.

On the contrary.

In the labor and penal areas there are examples that even when the demeaning conditions to the dignity of the employer are evident, it doesn't characterize as labor in conditions analogous to that of a slave or by an erroneous hermeneutic interpretation of the concepts of precarious work and labor in degrading conditions or by the inexistence of the curtailing of the right to freedom. In such a way, we perceive that the penal condemnations are still shy, so as to, according to the global report of the ILO from 2009, there was only one criminal condemnation that had involved a prison sentence<sup>46</sup>.

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45 REGIONAL FEDERAL COURT OF THE 3<sup>rd</sup> REGION. Fifth class. ACR 34699-0008494 42.2003.4.03.6105. Rapporteur. Chief Federal Judge André Nekatschalow. Published in the Electronic Federal Justice Diary on 02 Jul. 2010.

46 SENADO, 2016.

And even the labor condemnations haven't been enough to eradicate the use of this practice in the country.

It is important to point out once more that the eventual infringement of the working rights doesn't characterize work in degrading conditions.

There must be a reiteration of the conduct, so as the violation of the minimum fundamental rights of the worker is a constant or permanent practice in that determined labor context. However, we can't discard the hypothesis that an excessively severe infraction can immediately characterize the degrading work situation.

Furthermore, it is indispensable the intention of the agent – in this case, the employer – of subjecting the worker to a humiliating situation, demeaning, which in fact characterizes the undignified work. It is necessary for there to be the goal of “objectifying” or “instrumentalizing” the working-man, transforming him in a simple mean for the achievement of the business end: to obtain more profit.

Notwithstanding, the intention of the agent must be inferred from the evidentiary set, considering it would be unfair to impose to the worker such burden of proof.

Therefore, it is inevitable to conclude that it is up for the judgement, facing each concrete case in consonance with the principles of proportionality and reasonability and other informing principles of the Brazilian legal order, ponder the evidence and evaluate the existence of work in degrading conditions, the species of slave labor type.

#### **4 CONCLUSION**

From the analysis made it's probably clear to the reader that the speech of slave labor such as a too broad concept is rhetorical of a predominant neoliberalism type of capitalism that tries to reduce labor rights in every front where possible. They don't even care if their speech can produce a dangerous result by excluding from the Law sphere of protection those who need it the most.

It is clear that degrading conditions are an extreme situation and that the Brazilian Judiciary, especially the Criminal Court, is still reluctant to apply the recent concept of the article 149 of the

Criminal Code. The Labor Justice has taken a step forward and is applying the definition almost every time it faces working conditions that are really debilitating and offensive to human dignity.

From the cases and decisions we've analyzed it is evident that there is no confusion between precarious and degrading conditions. Maybe we could state that there is, on the other hand, a recognition that degrading work conditions occur because of the increasing numbers of precarious work and its lack of attention and connivance of the government as a kind of natural result of the capitalism model and Toyota's productive system.

Having said that, one can conclude that the neoliberalism ideology is producing more and more misery and workers with no rights. To the point that slave labor is increasing even though it was (supposedly) extinguished a few centuries ago. And because of the rising of precarious work and all its forms of exploitation, for some, slave labor might seem as something more related to a worker's rights violation than a human rights atrocity. It is time we stop and reflect on these concepts and all the rhetorical speech that has been constructed around precarious work and slave labor.

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