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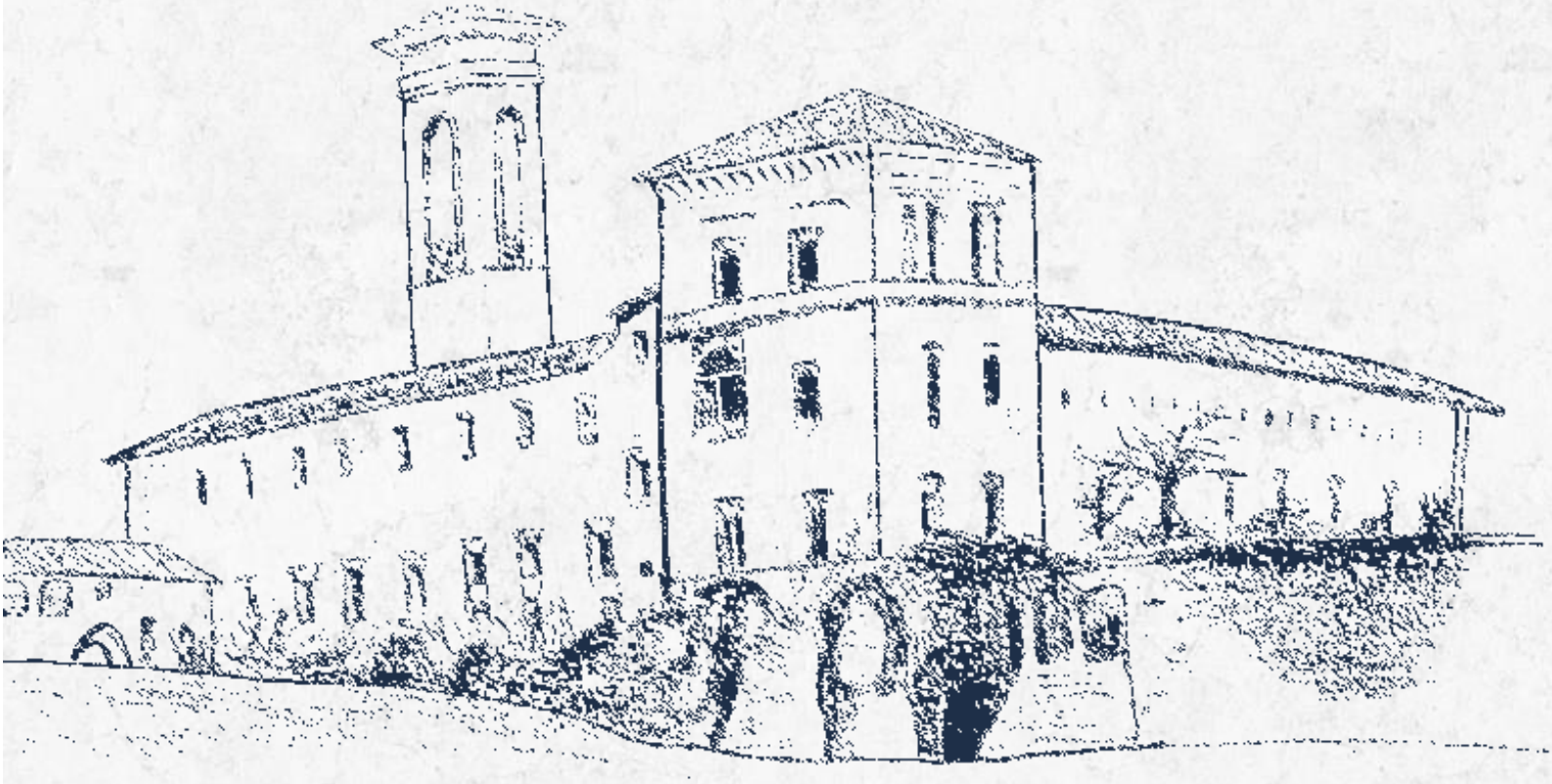

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Brazil's Labour Reform: Flexibility at What Cost?

Diogo Silva [*]

Abstract Purpose. The study presented here consists of an analysis of the latest labour law reform in Brazil as a response to the crisis that affects this country.
Design/methodology/approach. The analysis considers some key alterations across in order to highlight the principal scope of the labour law reform, in individual, collective and procedural labour law.
Findings. Although the main purpose of the reform was to incentivize the labour market, it is questionable that these particular reforms will be able to fulfill such a scope. Without prejudice, it can be recognizable as an important modernization of the labour law regulations, considering the former law dated from 1943 (notwithstanding the minor alterations along the years).
Research limitations/implications. The research is part of a debate adding a perspective from a Southern-American country.
Originality/value. The paper consists of further material for an ongoing discussion on the impact of a crisis in the labour market and the adequacy of reforms as a response to them.
Paper type. Issues paper.

Keywords: Brazil, Labour law, Flexibility, Reform, Constitutionality.

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1. Introduction

The Law nº 13.467 of July 13th 2017[1] deeply affects the structure of labour force regulation in Brazil that dates back, albeit with amendments and changes adopted over time, from the fundamental law of 1943 ("*Consolidação das Leis do Trabalho*"). The intervention of reform can be explained, at least in the intentions of the Government, with the need to counter a situation of deep economic crisis, characterized by high levels of unemployment (from 5.2% in February 2012 to 8.2% in February 2016, according to the IBGE data on employment level). The stated objective of the labour reform, which we will describe briefly in the following paragraphs, therefore, is to stimulate economic recovery through a process of liberalization of the rules governing the matching of the demand and supply of labour[2-3].
In order to render an analysis of the labour rules in a transversal way, the present contribution has been divided into three major sections (individual, collective and procedural labour law), with the aim of analysing the way, with respect to each of them, that the flexibilisation goal can be extracted from the legislative act.

2. Flexibilisation of the Rules on Individual Employment Relationships

It must firstly be said that, out of the numerous changes made by this law in employment relations, only those deemed most relevant will be analysed, namely those which clearly show the greater flexibility that the reform introduced with respect to certain legal rules and provisions related to institutions and specific work contracts.

[1] Published on Diário Oficial da União in 14th July 2017, having a *vacatio legis* of 120 days.
[2] It is undeniable the impact of economic crisis on labour markets, check T. CHRISTINA NAHAS, *A reforma trabalhista brasileira no marco da economia globalizada*, Revista Jurídica Luso-Brasileira, 2017, a.3, n.4, 1385.
[3] This flexibilisation restructure was already being developed since the beginning of the early 2000's. But since the macroeconomic scenario was highly positive, regulation also expanded social rights, more specifically, on matters of minimum wage and social security, etc. Check A. GAMBIER CAMPOS, *Breve historia de los cambios en la regulación del trabajo en Brasil*, Revista de Trabajo, 2014, a.10, n.12, 64-65.

2.1. Pregnant Women

A first aspect where this trend towards flexibility can be found – and probably the most controversial of all[4] – is related to the protection of pregnant women who work in places that may carry risks for the health of women and babies. With the new article 394-A of the CLT, women can take advantage of a special leave provided for in these cases, if the unhealthy environment is of the greatest degree of risk with respect to the classification set out in special legislation. If the risk of impact is medium or minimum, the workers can take advantage of the leave only upon presentation of a medical certificate that does not recommend the continuation of the work.

In the case of breastfeeding workers, the condition of access to such leave through medical certificate applies regardless of the degree of risk in the production context[5].

2.2. Working Time

With regards to working time, the flexibility of the rules takes many forms. Among the primary goals was the possibility by employers to increase working hours. Thus, for example, if in the previous law the working time in part-time contracts was limited to 25 hours per week, with the new writing of the CLT emerge two possibilities: on the one hand, to raise the limit to 30 hours a week without the possibility of overtime or secondly, to fix the limit at 26 hours per week, but with the possibility of adding 6 hours of extra work, paid for with an increase of 50%.

It also introduced, by means of individual agreement between the company and worker, a 12x36 working day, making reference to the hypothesis of uninterrupted work for 12 consecutive hours per day, which, however, must be followed by 36 hours of uninterrupted rest, which can be met or compensated. Case law had already welcomed this

[4] R. SIMÃO DE MELO, *Reforma erra ao permitir atuação de grávida e lactante em local insalubre*. Reforma Trabalhista, 2017, 181.

[5] However, some authors have contested the adequacy of this medical certificate to the effect pretended by the law, as the medical professional might not have the specific knowledge to determine the risk of the workplace environment that the female worker is inserted in. Check R. SIMÃO DE MELO, *Reforma erra ao permitir atuação de grávida e lactante em local insalubre*. Reforma Trabalhista, 2017, 180.

possibility in the previous law, provided that there was a prior agreement between the union and employer in this sense.
A greater flexibility is also recognized with reference to the enjoyment of holidays, admitting - provided that there is the workers' accordance - that their duration is divided into three periods, one of which must be at least 14 uninterrupted days[6] and the others are of at least 5 consecutive days. Enhancing the scope of this flexibility on holiday leave, the legislator also abolished the prohibition of vacation leave fractioning for teenagers and people over 50, although maintaining the right for family members and teenagers to schedule their vacations in the same period of time.
The reform also affects the classification of time *in itenere* as working time. As a result of this new paradigm, the time taken for travel to the workplace is now being removed from the calculation of working hours and is therefore unpaid. This is in contrast to the prior regime, in which the worker's travel was considered working time if transport was provided by the employer in the event of a workplace with difficult reachability and not served by public transport (article 58 of the CLT).
In addition, and in order to increase flexibility in the negotiations, the banking hours' regime and compensatory arrangement of rest days can now be determined by agreement between the employer and the employee, without prejudice to the already existing possibility of collective agreements to this end.

2.3. Termination of the Employment Relationship

With regard to termination of the employment relationship, the main changes are aimed at reducing to a minimum the bureaucracy, in order to achieve a simpler procedure. While in the past, the termination of an employee with more than a one-year service contract with the same employer had to be ratified by the unions or ministerial authority, as a result of the reform the employers' communication of the renunciation to the competent bodies is now sufficient, followed by the compensation payment to the worker within ten days of the termination.
With the same aim of simplification, collective redundancy, up to now, was prohibited without authorization and/or negotiation with trade

[6] This 14-day minimum limit is to maintain accordance with the ILO's Convention 132, ratified by Brazil in 1999 by the Decree 3.197 of 5 of October. See H. B. MATEUS DA SILVA, *Comentários à Reforma Trabalhista: Análise da Lei n. 13.467/2017*. São Paulo: Editora Revista dos Tribunais, 2017, 57.

unions, and is now treated as an individual waiver which, therefore, does not require a prior authorization by the respective trade union.
Finally, the reasons that may give rise to termination of the employment relationship with just cause were extended, which now also encapsulates the scenario in which a worker loses their status or legal requirement for the exercise of a certain function, such as the case of the driver who loses their driving license.

2.4. Types of Employment Contract

Another important new feature of the reform respects the regulation, for the first time, of teleworking[7], so far only taken into account by the jurisprudence. In the CLT, there is now regulation of various aspects of telework (article 75-A and following of the CLT), including the ability to modify the labour contract into telecommuting as a result of the agreement between the parties, or the return to physical presence with a notice of 15 days. It is also predicted that the parties will establish in the employment contract the respective responsibility in terms of acquisition, maintenance and/or provision of equipment and tools needed for the teleworking performance.
Next to teleworking, the intermittent employment contract – which must be stipulated in written form and is defined by law as work characterized by the discontinuation and alternation of periods of work and idle (the latter not paid), the duration of which can change in hours, days or months – is also predicted. The regulation also predicts several aspects of this type of relationship, for example, the establishment of the maximum time in which the worker is not assigned any work or the prohibition of an exclusivity requirement in the contract[8].

[7] The Brazilian legislator predicted teleworking as a new form of employment contract as stated by H. B. MATEUS DA SILVA, *Comentários à Reforma Trabalhista: Análise da Lei n. 13.467/2017*. São Paulo: Editora Revista dos Tribunais, 2017, 56. For the prediction of teleworking, two major systems can be identified: a) teleworking is predicted as an employment contract, like the case of Brazil; b) teleworking as a modality of the employment contract execution. This last system is identifiable not only in Latin America (for example, in Peru – check E. T. LÓPEZ, *Ley de Teletrabajo en el Perú*, Revista de Direito do trabalho, 2016, v. 42, n.168, 273 – and Argentina – G. M. ZAMORA, *Teletrabajo: opinión y somero análisis del tema en Argentina*, Juris: Revista da Faculdade de Direito, v. 22, 2014, 185), but also in Europe (for instance, Italy – check G. SANTORO-PASSARELLI, *Lavoro eterorganizzato, coordinato, agile e il telelavoro: un puzzle non facile da comporre in un'impresa in via di trasformazione*, in Diritto della Relazione Industriali, n. 3/2017, 771-790).
[8] Even if referring to the Law Proposal n.º 4.787/2017, the Brazilian doctrine already pointed the significance of the establishment of such parameters, arguing that a lack of

3. Incentives to Collective Bargaining

As mentioned above, another area which the reform deeply affects is industrial relations. In this context, collective agreements are becoming increasingly important, as the continuing effect of widening the scope of collective bargaining and the stronger presence of unions among workers and within companies.

This reduction of the prescriptive value of the law, accompanied by an increase in the regulatory space in favour of the social partners, inevitably leads to questions about the fate of the principle of *favor laboratoris* inside the renovated Brazilian legal system, even if considering that the legislature still banned collective bargaining on some matters, for reasons of public interest, such as health and safety or social security (called peremptory norms or even public order standards)[9].

It should be highlighted that the reduction of legal regulation in favour of individual and collective agreements tendency is not restricted to the Brazilian paradigm[10], as even across Europe there are examples of this movement[11].

In a general perspective, the justification of this development has been predominately attributed to three key factors: an increase in workplace democracy (on one hand, it limits the employers discretionary power on some aspects and to a certain extent by a private agreement, and on the other hand, it gives voice to workers, involving them in the governing of

such regulation would translate into an assimilation to autonomous workers, transferring to them the risks of the employment contract. Such is the case of V. BOMFIM CASSAR, *Limites da liberdade individual na relação de trabalho e na reforma trabalhista*. Revista do Tribunal Superior do Trabalho, 2017, vol. 83, n. 2, 290-292.

[9] R. SIMÃO DE MELO, *Os limites da negociação colectiva para o sistema jurídico brasileiro*, Reforma Trabalhista, 50.

[10] Check J. ZENHA MARTINS, *As transformações do direito do trabalho e a redefinição das relações entre fontes*. Revista de Direito do Trabalho, 2017, n.º 175, 165-168.

[11] Such is the case of Germany, Spain, France, Italy, Portugal and Greece, check A. T. RIBEIRO, *Recent Trends of Collective Bargaining in Europe*, in: K. STONE ET AL. [eds.] – *Labour in the 21st Century: Insights into a changing world of work*, Cambridge Scholars Publishing, Newcastle, 2017, 190-208. On the French system, it has long been acknowledged: JEAN-EMMANUEL RAY, *Du tout-État au tout contrat? De l'entreprise citoyenne à l'entreprise législateur?*, Droit Social, 2000, n.º 6, 578-579, already alluding at that time to the trend, going as far as claiming as predicting that at a certain point "*tout le Code du travail (ou presque: hygiène/sécurité) serait dérogable, voire supplétif de la volonté (pour l'instant) collective des partenaires sociaux*".

the workplace); progressive redistribution of power to workers; and economic efficiency[12].

3.1. Collective Bargaining Agreements

a) Derogation by Collective Bargaining

More specifically in Brazil's case, the increased importance of collective agreements is clearly seen in the extension of the application of collective agreements, which can now intervene in a pejorative sense of what the law determines, being able to overcome limits that until now were impassable.
As a result, collective agreements are now enabled to overlap the law in regards to a number of aspects, such as augmenting working time (for a working day of eight hours can be added up to 2 hours a day and up to 44 per week) having in consideration the constitutional limitations, reducing the length of the pause (up to a minimum of 30 minutes if the working day is 6 hours or more), or changing aspects of the methods used to record presence in the workplace, teleworking, the performance bonuses, etc. (check article 611-A CLT).
Without prejudice of this increased possibility of *in pejus* derogation, the Brazilian legislator made some matters available only to *in melus* derogation, for matters of public interest like health (for example, the reduction or suppression of the number of days of vacation of the employee is prohibited) and safety (prohibiting regulation on the grounds of hygiene regulated by law or regulatory standards emitted by the Labour Ministry) – check article 611-B CLT.

b) Conflict between Agreements of Different Levels

The logic of this reform, which, as mentioned, has as the objective to increase flexibility at every level, is also visible in the prediction that the collective agreements at company level efficacy prevails over sectorial collective agreements, even where the latter are more favourable to the employee.
This means that the Brazilian legislator adopted the criteria of specificity as criteria to solve a conflict between different levels of bargaining[13].

[12] As argued by G. DAVIDOV, *A purposive approach to labour law*, Oxford: Oxford University Press, 2016, 85-97.
[13] Some Brazilian doctrine points out the advantages of this criteria, as is the case of H. B. MATEUS DA SILVA, *Comentários à Reforma Trabalhista: Análise da Lei n. 13.467/2017*. São

Previously, the determination of the prevailing instrument would not be between one or the other in terms of hierarchy, but what would be better for the worker (principle of *favor laboratoris*)[14].

3.2. Trade Unions Contribution

The improved role of work councils in the enterprise means that the model of exclusive representation by trade unions has been abolished[15].
In order to maintain the membership levels in trade unions, the mandatory nature of the payment of trade union fees, both for employees and for companies, was abolished. In the case that the worker still wishes to pay his fees, he must state whether he wishes to have this contribution deducted from his pay check.

3.3. Workers' Representatives in the Company[16]

With reference to the representatives of workers in the company, the incentives of this co-managerial method have been vindicated as a necessity to maintain employers' compliance to the rule of law[17]. The continuous decrease of levels of trade union membership has led to an investment in the importance of the so-called work councils[18].
It should be stated that Article 11 of the Brazilian Constitution of 1988 already established that companies with more than 200 employees must

Paulo: Editora Revista dos Tribunais, 2017, 126-127. The Author highlights that company level agreements allow for a bigger adequacy towards the company's framework, for example, allowing enterprises with poor financial conditions to negotiate some clauses that may no longer be suitable.

[14] Which was always in the centre of the debate as it was deemed confusing and created problems separating the single benefit from the global benefit. Check H. B. MATEUS DA SILVA, *Comentários à Reforma Trabalhista: Análise da Lei n. 13.467/2017*. São Paulo: Editora Revista dos Tribunais, 2017, 126.

[15] Paraphasing G. DAVIDOV, *A purposive approach to labour law*, Oxford: Oxford University Press, 2016, 221-222, "*in legal systems that created a model of exclusive representation by unions, a duty to pay agency fees is common*".

[16] For a general study on the forms of employee representational participation in the workplace or at enterprise level, check M. BIAGI, M. TIRABOSCHI, *Forms of Employee Representational Participation*, in: R. BLANPAIN [org.], *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 10th ed., Netherlands, 2010, 523-576.

[17] G. DAVIDOV, *A purposive approach to labour law*, Oxford: Oxford University Press, 2016, 241, highlights this message of improving compliance to the diverse sources of labour law, being that "*the idea is to allow employers some degree of self-regulation, on the condition that representatives of the employees will be given power to monitor compliance with it*".

[18] L. MENEZES LEITÃO, *Direito do Trabalho*. 3rd ed. Coimbra: Almedina, 2012, 497-498.

elect an employee representative, who will be in charge of direct negotiations with the employer on a strict number of points (in conjunction with Article 7, Paragraph XI of the Brazilian Constitution). However, up until now there was no regulation on the organization or competences of the elected representatives[19].
As such, it was determined that in companies with more than 200 employees, they can elect a council whose composition, in terms of numbers, varies depending on the company size. The CLT, then, establishes the criteria for the election of workers' representatives and their security measures.

4. Changes on the Procedural Rules

Finally, the law in analysis has changed some aspects related to the Labour court procedures, not so much, in this case, as a function of greater flexibility, but in order to clarify some procedural rules[20].

4.1. Deadline Computations

In order to be in congruence to the Civil Procedural Code of 2015, the CLT reform act had to intervene on the counting mode of deadlines, transforming it from the type of continuous counting to one that takes into account only working days.

4.2. Out-of-court Settlement Procedure

This law also introduced a new procedure for the conclusion of a court settlement, the request for which has to be filled by both parties, who must be assisted each by a different lawyer, considering the express prohibition that the lawyer is the same for both (check article 855-B of the CLT).
This new procedure provides an alternative to judicial litigation, having as a main purpose the reduction of judicial litigation, being that these

[19] For an overview of trade unions and work councils' framework across the world, check BAKER & MCKENZIE – *Worldwide Guide to Trade Unions and Works Councils*, Cornell University ILR School, 2009, available at: http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/09/global_tradeunions_guide_2009.pdf.
[20] As noted by T. CHRISTINA NAHAS, *A reforma trabalhista brasileira no marco da economia globalizada*, Revista Jurídica Luso-Brasileira, 2017, a.3, n.4, 1393, the legislator gave clear indications of adopting the theory of economic analysis to the procedure.

agreements attribute juridical security to the parties and can be used for judicial enforcement later on without the need of filing a normal judicial action.

4.3. Procedural Costs

The CLT has finally intervened on procedural costs. For example, the upper limit for the court fees is now equal to four times the maximum limit for the fee of the general social security system that was established (R$22.125,24), in accordance to article 789 CLT. Previously, according to this law there was only a minimum fee of R$10,24.
The lawyer's fees, as determined by the law, are now established between 5% to 15% of the sum attributed to the winner or, in the event that this is not measurable, calculated with respect to the estimated value of the cause[21].

a) Constitutional Conformity of the Law

The topic of balance between procedural law, judicial costs and the restriction of the constitutional guaranty of access to justice is not restricted to the Brazilian framework[22].
In Brazil, this reform proves to be a new weight on the balance between these three measures. Having this as a background, the General Attorney of the Republic filed a request to the President of the Federal Supreme

[21] J. A. DALLEGRAVE NETO, *(In)aplicabilidade imediata dos honorários de sucumbência recíproca no processo trabalhista*, Reforma Trabalhista, 2017, 44-45, claims that these costs will only apply to actions judged after the enforcement of the law as they impact on complex procedural acts with deferred effects, notwithstanding standard processual rules have an immediate appliance to current actions, like the case of deadline computes rules.

[22] In fact, one should also consider the very recent UK case of abolishment of employment tribunal fees, that were introduced in July of 2013 and declared unlawful by the Supreme Court in July of 2017, claiming, in short, that "*fees must therefore be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable*", thus posing an unlawful restriction to the constitutional guaranty of access to the courts. The decision is available here.

Court[23] for a constitutional conformity revision proposing a freezing of effects before they are proposed to come to fruition.[24]
Claiming that the balances are no longer on the same level, the General Attorney of the Republic asserts that citizens without financial resources shall not be forced to comply with the payment of the procedural costs (mentioned in the point 4.3.) and expert fees if they have obtained, even if in a diverse process, the possibility to bear the expense. Citizens shall also not be forced in to the payment of judicial costs if they have requested the termination of the action due to lack of attendance to the hearing, and not by conditioning the filing of a new action to the payment of such previous action fees. The General Attorney thus evokes the constitutional guaranty of a free justice for those without financial resources, present in article 1, 3, 5, 7 to 9 of the Brazilian Constitution, to argue that there is an impairment of the right of access of workers to the judiciary system, through an unequal and disproportionate treatment of the poorest.

5. Conclusions

Firstly, it must be highlighted the importance of the scrutinized legislative reform on the Brazilian scenario, as it constitutes an update to previous law from 1943, which dictated the regulations in labour and that was out of touch with the new realities of the market.
The analysis of any labour market reform must surpass four key indicators: 1) regulation of standard and non-standard employment; 2) unemployment benefits; 3) wage and collective bargaining regulation; 4) active labour market programs (also known as ALMP's)[25].
On the first point, the introduction of new types of employment contracts might be able to reduce the number of informal employment positions, which not only has an implication on the unemployment rate, but also

[23] According to article 102 of the Brazilian Constitution, the Federal Supreme Court has the competence to ensure the Constitution enforcement and judge the (un)constitutionality of laws or normative acts.
[24] The initial request can be consulted here (Action n.º ADI 5766).
[25] D. CARDOSO, R. BRANCO, *Labour market reforms and the crisis in Portugal: no change, U-Turn or new departure?,* Instituto Português de Relações Internacionais Working Paper n.º 56/2017, available here: http://www.ipri.pt/images/publicacoes/working_paper/2017_WP/WP_IPRI_56-2017.pdf.

serves as an indicator of a decent work[26], considering that only certain forms of work were considered by the jurisprudence[27].

Notwithstanding this, and on the side of the regulation of standard employment, the reduction of bureaucratic procedures without any effect on working conditions, are to be encouraged – such are the cases of the termination of the employment contract or extrajudicial agreement – as this will allow the rationalization of the intervention of the judicial system and allow resources to be better utilized.

However, many questions rise from the constitutionality of the procedural standards altered by the CLT reform. Nonetheless, it should not come as a surprise if this reform is declared unconstitutional, as the Ministry of Labour had already published four technical notes accusing the draft law of containing some norms that lacked constitutional conformity[28]. Some of the controversial points were revised for the final draft, but some were maintained despite all the recommendations[29].

On the third key indicator, the reform has a mission of encouraging a shift to a more decentralized collective bargaining on the Brazilian paradigm, one that will increase flexibility in standard determination of employment terms and conditions. This is a clear sign of liberalization of the labour market: the predominance of enterprise level agreements over sectorial agreements and the mandatory constitution of work councils on enterprises with over 200 employees will provide businesses with more adaptability towards the elasticity of market demands and simultaneously increase the democracy in the workplace.

The last key indicators which are discussed above include unemployment benefits and active labour market programs. Even though the first falls off the scope of the legislative reform (as unemployment benefits are regulated by diplomas other than the CLT), a criticism can be made on the second key indicator, as the reform seemed to have despised the latter's, considering that these policies are especially lenient at reducing

[26] D. KUCERA, L. RONCOLATO, *Informal employment: two contested policy issues*. International Labour Review, 2008, vol. 147, n.º 4, 325.

[27] However, T. CHRISTINA NAHAS, *A reforma trabalhista brasileira no marco da economia globalizada*, Revista Jurídica Luso-Brasileira, 2017, a.3, n.4, 1387, claims that the parcial regulation of some institutes like the intermittent contract and part-time working contract might generate more doubts that the ones it intended to solve.

[28] Click here to check the Note 1, Note 2, Note 3, Note 4.

[29] Check here to check the request to veto the reform proposal.

imbalances and fighting inflexibilities present in the labour market and its accessibility[30].

Finally, one has to question whether the measures abovementioned even have the appetence to fulfil their initial goal: incentivise employment and increase enterprise competition levels on the international market in order to attenuate the effects of the economic crisis that Brazil has plunged into[31]. Even though flexible labour market regulation can constitute an incentive to job creation, especially in times of recession[32], this is a fallacious argument, since an increase in the levels of employment will only succeed if there is an improvement of the country's economy and greater investment in public policy fostering workers' insertion in the labour market[33].

[30] V. ESCUDERO, *Are active labour market policies effective in activating and integrating low-skilled individuals? An international comparison*, Research Department Working Paper No. 3, available here: https://mpra.ub.uni-muenchen.de/55319/1/MPRA_paper_55319.pdf.

[31] M. B. BIAVASCHI, *A reforma trabalhista no Brasil de Rosa: Propostas que não criam emprego e reduzem direitos*. Revista do Tribunal Superior do Trabalho, Vol. 83, n.º 2, 2017, 195-203, highly disagrees with the argument that this legislative reform is going to serve as an incentive to employment levels, among many other authors.

[32] O. VAN VILET, H. NIJBOER, *Flexicurity in the European Union: Flexibility for Outsiders, Security for Insiders*, MPRA Paper n. 37012, 2012, 2.

[33] T. CHRISTINA NAHAS, *A reforma trabalhista brasileira no marco da economia globalizada*, Revista Jurídica Luso-Brasileira, 2017, a.3, n.4, 1387-1388.

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