

A CONSTITUCIONALIZAÇÃO SIMBÓLICA DA EMENDA CONSTITUCIONAL Nº 81/2014 E A VIDA NUA DO TRABALHADOR ESCRAVO NO BRASIL

THE SYMBOLIC CONSTITUTIONALISATION OF THE CONSTITUTIONAL AMENDMENT # 81/2014 AND THE BARE LIFE OF THE SLAVE LABORER IN BRAZIL

José Lucas Santos Carvalho

Universidade Federal de Sergipe – UFS – (São Cristóvão, SE, Brasil)

Flávia de Ávila

Universidade Federal de Sergipe – UFS – (São Cristóvão, SE, Brasil)

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RESUMO

A Emenda Constitucional nº 81/2014 determinou a expropriação de bens oriundos da exploração do trabalho escravo. No entanto, tal alteração é compreendida como uma norma de eficácia contida, que depende de regulação infraconstitucional. Houve, assim, transferência da solução para outro momento, caracterizando-se um ato de constitucionalização simbólica como fórmula de compromisso dilatório. Paralelamente, no mesmo momento histórico em que se discute no parlamento brasileiro fórmulas para redução do alcance do conceito de escravidão, o Brasil é instado internacionalmente a aprimorar os seus mecanismos de combate à escravidão. Este artigo, utilizando-se do aporte teórico da biopolítica do filósofo Giorgio Agamben, defende que a constitucionalização simbólica é uma ferramenta do poder soberano, no exercício de suas táticas de controle e manutenção de poder sobre a vida. Desse modo, seria mantida a estrutura da sociedade brasileira baseada em um controle biopolítico de exclusão-inclusão do sujeito vivente – no caso, o trabalhador escravo –, consolidando, assim, a *vida nua* na sociedade contemporânea.

PALAVRAS-CHAVE

Constitucionalização simbólica. Trabalho escravo. Vida nua.

ABSTRACT

The Brazilian constitutional amendment # 81/2014 predicted the expropriation of goods derived from the exploitation of slave labor. Nevertheless, such alteration is understood as a norm of contained efficacy that depends on infraconstitutional regulation. Therefore, there was a transfer of the solution to another moment to characterize a symbolic constitutionalisation as a formula of dilatory commitment. At the same time, the Brazilian parliament seeks to reduce the scope of the concept of slavery and Brazil is urged internationally to improve its mechanisms to combat slavery. This article,

using the theoretical contribution of the philosopher Giorgio Agamben, argues that a symbolic constitutionalisation is a tool of sovereign power, in the exercise of its tactics of control and maintenance of power over a life, to maintain the structure of Brazilian society based on a biopolitical control of exclusion-inclusion of the living subject, in this case, the slave laborer thus consolidating *bare life* in contemporary society.

KEYWORDS

Symbolic constitutionalisation. Slave labor. Bare life.

INTRODUCTION

Although Contemporary Slave Labor (CSL)¹ is legally prohibited, it is subject to international norms and is considered an imperative norm of international law (*jus cogens*) that implies obligations *erga omnes* for the States, the intensive and violent exploitation of human labor is a phenomenon which, according to the Global Slavery Index 2016, reaches about 45,800,000 people, almost 0.5% of the world population (WALK FREE FOUNDATION, 2016). In Brazil, according to data from the Ministry of Labor and Employment (MLE), in 2016, during surveillance operations to eradicate slave labor, 885 workers were rescued “under conditions analogous to slavery” (BRAZIL, 2016).

Nowadays, to determine a situation as slavery, it is necessary to analyze a set of characteristics that are not limited to the exercise of the attributes of the property right that is attached to the traditional concept of slavery or *chattel* (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2016, p. 71), there being a diversity of terms to characterize the situation and a variation of meanings, which constitutes a political-ideological field of construction of the concept in the international and internal scope². To understand the meaning of CSL, two fundamental elements are required: the state or condition of an individual and the exercise of one of the attributes of the property right, i.e., that the enslaving has power over the enslaved person to the point of controlling their individual autonomy, placing the person in complete vulnerability. For Bales (2012, p. 280), the slave is a person – man, woman or child – maintained in this condition through violence or threat of violence, for the purposes of economic exploitation. The forms of exploitation

1 In this paper, we have chosen to use the term Contemporary Slave Labor (CSL), as this term effectively spans the problem by explaining that today the various forms of exploitation constitute slave labor, clarifying the political debate around the subject that both weakens the confrontation of slavery itself.

2 Other denominations of the term “contemporary slave labor” coexist in the national and international literature: “clandestine work”, “conditions analogous to slavery”, “forced labor”, “new slavery”, “precarious work”, “illegal labor” and “sub-work”. On this matter, Sousa (2015, p. 86) points out that there is still no consensus on the use of the terminology, and that within the International Labor Organization itself there are still considerable differences in the meaning attributed to them.

are varied and involve forced prostitution, pornography, the sale of organs, servitude, debt bondage or the use of human beings in armed conflicts.

According to the Inter-American Court of Human Rights, in the judgment of the case “Workers of Fazenda Brasil Verde against the Federative Republic of Brazil”³, to determine a situation as contemporary slavery is necessary to fill in some attributes. The criteria include the restriction or control of individual autonomy; the loss or restriction of freedom of movement; the perpetrator obtains any kind of benefit; the absence of consent or free will of the victim, or its impossibility or irrelevance due to the threat of use of violence or other forms of coercion, fear of violence, fraud or false promises; the use of physical or psychological violence; the position of vulnerability; detention or captivity; and exploration.

In Brazil, after 15 years of processing the Proposed Amendment to Constitution No. 57A/1999, Constitutional Amendment No. 81, from June 5th, 2014, rewrote article 243 of the Federal Constitution. This amendment added the possibility of confiscation of any good of economic value that uses the exploitation of slave labor⁴; however, this modification is understood as a contained norm of effectiveness, when establishing that the procedure will take place “according to the law”.

Marcelo Neves (1994) considers that the symbolic constitutionalization is a phenomenon of normative text production, revealing that the political sense prevails hypertrophied in relation to the apparent legal-juridical sense. Thus, the declarations of rights, despite their prediction in legal provision, are in disagreement with the social reality and with the constitutional system itself. According to the author, this phenomenon can be: a) to confirm social values; b) to demonstrate the State’s capacity for action; or c) to postpone the resolution of social conflicts through delaying commitments. Thus, among the possibilities for the State to legislate symbolically, it is the one in which the State aims to create the image of which responds normatively to the

³ The case “Workers of the Fazenda Brasil Verde against the Federative Republic of Brazil”, tried in 2016, is the first case of contemporary slavery and trafficking in persons judged by the Inter-American Court and the fifth conviction of the Brazilian State in the Court. The CSL concept established by the Court was based on the analysis of international case law and international treaties, the definition being in line with the greater protection of the individual (principle *pro person*).

⁴ “Article 243. Rural and urban properties of any region of the country where illegal crops of psychotropic plants are located or the exploitation of slave labor in the form of the law will be expropriated and destined to agrarian reform and popular housing programs without any indemnification to the owner and without prejudice to other sanctions provided for by law, observing, where applicable, the provisions of article 5.

Single paragraph. Any property of economic value seized as a result of illicit trafficking in narcotics and related to drugs and the exploitation of slave labor shall be confiscated and revert to special fund with specific destination, as provided by law.”

difficulties of society, although the respective social relations are not really turned into norms in a way to modify reality, leaving to future and uncertain time the solution of the social problem.

It was from the perspective of “legislation as a formula of delaying commitment”, in the sense presented by Neves (1994), that Constitutional Amendment No. 81/2014 came into force, because its content only transfers the solution of the conflict to another moment. In addition, in parallel to the approval of the Amendment, a movement began in the Legislative to modify the concept of “slavery”, reducing the conceptual scope of the crime foreseen in article 149 of the Criminal Code that is in line with international instruments for the protection of human rights.

Because of this situation of exclusion of human dignity, fundamental value of the Constitution, the question is: why are the norms of fundamental rights not fulfilled and become symbolic? Why does not the Brazilian State improve its mechanisms to combat slavery, as in the case of Constitutional Amendment No. 81/2014, which could have a more effective protection (full effectiveness), instead of conditioning its application to infra-constitutional regulation?

In the present article, using the theoretical contribution of the philosopher Giorgio Agamben in the project *Homo Sacer*, we will try to demonstrate this is not an unconscious choice of the Brazilian State, but according to a bio-political practice in which the sovereign power, in the exercise of its tactics of control and maintenance of power over life, maintains the structure of Brazilian society based on a bio-political control of exclusion-inclusion of the living subject - in the specific case of this study, the individual victim of slave labor.

With the assumption of bio-politics in the contemporary world, Agamben (2010) explains that the paradigm of modern power consists in the “management of things and people” with the goal of producing governable subjects from the capture of their subjectivity. The victim of slave labor has its subjectivity captured. He is stripped of any legal guardianship, which reduces him to a “any” body, to the bearer of a naked life, that is, a political life (*bíos*) reduced to *zoé*, animal life, biological, the potentiality of what it would be, within all its impotence. The slave worker is, so to speak, a *homo sacer*, this figure of archaic Roman law that represents the sacred character of human life. An individual whom people have judged for some offense, and it is not lawful to sacrifice him, but if someone kills him, he will not be convicted of murder (AGAMBEN, 2010, p. 79).

The first part of this work will have the scope to present the bio-politics and the concepts proposed by Agamben to understand the *homo sacer* phenomenon in modernity. The purpose is to understand how sovereign power acts in the democratic state of law, through symbolic normative production, to have control over life. Next, the concept of CSL will be worked out

and the panorama of slave labor in Brazil as well as that of legislation on the subject will be worked out so that the bio-political use of fundamental rights can be perceived.

The last section of this paper will try to elucidate how this practice of control over life occurs, based on the hypothesis developed throughout the text, that symbolic constitutionalisation is a tool of sovereign power to exert control of exclusion-inclusion of the subject, consolidating, thus, bare life in contemporary society.

So, in order to answer the questions, the juridical-theoretical line will be used, within the scope of the theoretical-methodological aspect of the applied social sciences, to approach the philosophy of law, constitutional law and legal hermeneutics when studying concepts, interpretation and application of standards. Consequently, the legal-exploratory methodological method will be adopted, since various aspects will be analyzed on the subject. The technique of content analysis of doctrinal texts, academic texts and legal norms will also be used.

1 BIO-POLITICS IN THE DEMOCRATIC STATE OF LAW AND THE SYMBOLIC CONSTITUTIONALIZATION

Giorgio Agamben (2010, p. 12) states that the politicization of naked life is the decisive event of modernity. Life as a political issue gives rise to bio-politics at a time when the State starts to administer and establish rules about the human life, guarding it. According to Agamben (2010), it was in the Modern Age that there was the radicalization of bio-politics, with the entrance of human life and the biological processes inherent to the human being as part of the calculation of power, because of the State's need to strengthen its productive force. With the argument of protecting the population's life, sovereign power began to preserve the lives of some and to determine the death of others, consisting in the right of life and death, the right *to live* or *let die*.

Giorgio Agamben (2010), in the series *Homo Sacer*, structures his analysis on the distinction between *zoé* and *bíos*, described by Aristotle, which in very brief terms can be considered biological life and political life, respectively. Based on these two classifications, Agamben introduces a third, adapted from Walter Benjamin's essay *For a Critique of Violence* – naked life, which is constituted in the new bio-political body of modernity, in terms influenced by Foucault.

Bare life is concealed in the juridical-institutional model in which the exercise of sovereign power is consolidated, invariably appearing when *zoé* and *bíos* are separated, by the neglect of *bíos* or by the mere preservation of *zoé*. The exclusive-inclusive relationship provided

by language in the context of intersubjective relations capable of maintaining reflection on living gives way to a space of mere life, which removes any possibility of existence of singularities in the midst of a simulacrum of the sacredness of life.

Consequently, in the vocabulary attributed to human rights, bare life, used as a strategy of power, is weakly preserved by regulations that lack effectiveness because they translate concepts devoid of material content, because they are linked not to rights but to exceptionalities. Unfortunate examples of when exceptionality becomes rule are contemporary slave laborers.

In this sense, Agamben suggests that there is the notion of a side that in itself means the existence of a paradox: it is at the same time the act of sovereign power includes within the scope of the legislation someone who will be excluded from his community, such as the slave worker. Applying the law, which does not guarantee rights, but exceptionalities, individuals are excluded who are depersonalized before their community, which makes them included-excluded.

Foucault (1975) explains that, with the constitution of the Modern State and the emergence of relations of capitalist society, there was a need for a technology of power to manage and control human lives. However, the exercise of power does not only belong to the State, although traditionally its monopoly is attributed to it. In his investigations, Foucault (1975) verified power as a network of micro-powers articulated to the State and permeating the entire social structure, understanding how these microstructures are related to state power. In this Foucaultian perspective, power relations go beyond the state dimension and are found throughout society. Power, then, penetrates institutions and embodies techniques that control the lives of individuals.

The study of this microphysics assumes that the power exercised in it is not conceived as property, but as a strategy, that its effects of domination are not attributed to “appropriation”, but to dispositions, maneuvers, tactics, techniques, to workings; which is revealed in him before a network of relations always tense, always in activity, than a privilege that could be stopped; that the perpetual battle be given as a model rather than a contract that makes an assignment or an achievement that seizes a domain. In short, we must admit that this power is exercised more than we have, that it is not the “privilege” acquired or preserved by the ruling class, but rather the effect of all its strategic positions – an effect manifested and sometimes which are dominated. (FOUCAULT, 1975, p. 29).

In modern democratic States of law, a bio-political power technique is the declarations of rights. Agamben explains that they are the site of the transition from the classical form of sovereignty of divine origin to the new figure of the sovereignty of the States of law. In them, the individual is transformed from vassal to citizen.

[the declarations of law] ensure the *exceptio* of life in the new state order that will succeed to the overthrow of the *ancien régime*. Through it, the “subject” becomes, as has been observed, “citizen”, means that birth – that is, natural naked life as such – becomes here for the first time (with a transformation whose bio-political consequences only today can we begin to measure) the immediate bearer of sovereignty. (AGAMBEN, 2010, p. 135).

The sociologist Eugène Enriquez (2006), proposing a tragic vision of life⁵, explains that the historical subject, the one who contributes to define the orientation of society, appeared at the dawn of the 5th century B.C. in Athens with the idea of the citizen. This notion was erased in feudal and monarchical periods, and reignited with the Charter of Rights of England and the French and American Revolutions. To be historical, the individual would then need to have rights, be someone who enjoys the rights and who is under the protection of a law in a state of isonomy, but not all citizens have received the attributes of citizenship.

It can be said, then, that sovereign power divides society between those who are able to exercise their citizenship and those who are incapable of such rights, although theoretically they are subject to those same rights. Agamben (2010) affirms that in “modern sovereign bio-politics is one that decides on the value or on the devaluation of life as such” (AGAMBEN, 2010, p. 149). It is in the bio-political control of the right to life and death that there is the figure of *homo sacer*.

The *homo sacer*, from the ancient Roman law, is a non-sacrificial and at the same time killable individual – the sacred man, because he is completely deprived of the human condition protected by law. A legal-political figure by which a person, when proclaimed *sacer*, was legally excluded from law. This condition prevented him from being legally dead (sacrificed), but anyone could kill him, because the law did not punish such act. Beek (2012) teaches that, in archaic Roman law, the phrase *sacer esto* was used in religious and secular sources, indicating a penalty for a committed error.

Agamben (2010) uses this historical figure to affirm that *homo sacer* is life abandoned by law, naked life. In this context, the body is the primordial element of the sovereign’s political strategy, since in taking it without legal identity, it clearly shows that *bíos*, like political life, has been reduced to *zoé*, here as animal, biological life.

What *homo sacer* reveals is the existence of the sovereign as an essential figure of Western law and its political order. The sovereign exists because he has the power to decree the exception of law, that is, to suspend the right to decree the existence of naked life. Only a sovereign power, which is out of order and above the law, has the power to decree the suspension

⁵ In the words of the author: “I therefore propose a tragic vision of life, not to allow ourselves to be invaded by fatality, but to lucidly examine whether another way is possible, if we can make civilization prevail, despite ambiguities, over barbarism” (ENRIQUEZ, 2006, p. 2).

of the right for others. (RUIZ, 2011).

In a democratic state of law, *homo sacer* refers to the abandoned life, the subject living on the margins of society. The precariousness of living conditions, the marginalization of some and the murder of others, the overthrow of all the rights provided for in the Constitution, and international human rights documents are continuous productions of naked lives exposed to violence and misery. This is the crude face of the State that prioritizes the legal discourse of rights, assuming a symbolic character, to the detriment of its implementation. In Brazilian society, naked life is represented by this person deprived of rights, whose reality is not achieved by symbolic normalization, so that fundamental rights and guarantees are only “on paper”.

Giacoa Junior (2008) states that, for Agamben, declarations of rights can and should be understood both as a mechanism for ensuring individual rights and public freedoms, and as an instrument of re-signification and legal-political investment of life in the institutional framework of the State-nation. In carrying out a radical critique of human rights, Giacoia Junior (2008) asserts that it is the sacredness common to *homo sacer* and the sacred character of human rights that institutes an insidious complicity between bare life and the bio-political power of law.

Marcelo Neves (2005, p. 421) indicates that the symbolic force of the rights expresses an ambivalence, in the sense that texts (declarations, treaties, constitutions, for example) serve to maintain the *status quo* of lack of rights, as well as to the overcoming concrete situations of denial of rights. In this perspective, constitutionalizing rights serves not only as a mechanism for cooling social mobilizations, but also as a fuel for change for those who still manage to fight against oppression, in a system that seeks to reduce them to bare life.

Gontijo and Arcelo (2009) analyze the discourse of rights under the Foucaultian view and consider as a mechanism of bio-political governmentality the norms of fundamental rights. According to the authors, these norms become symbolic because they occupy the political space of declarers of rights, but, in praxis, they are imperative norms, “capable of dissimulating and cooling the social movements that demand them” (GONTIJO; ARCELO; 2009, p. 5,889). It is in this sense that the symbolic force of the declarations of rights lies.

So, the analysis of the discourse of rights through bio-political governmentality points to an interpretation that seeks to problematize the overcoming of the symbolic force of rights as strategies of domination and exclusion of the cognitively ambivalent, that means,

the economically disengaged, considered as useless, then enemies that need to be removed or even suffer the killable life of the abnormal. (GONTIJO; ARCELO, 2009, p. 5,898).

When analyzing the symbolic constitutionalization, Marcelo Neves approaches the social and political meaning of the constitutional texts, exactly in the inverse relation of its legal-normative concretion. In addressing the social effects of ineffective constitutionalisation, the author discusses the symbolic function of constitutional texts lacking normative-legal concreteness, especially in a society in which large sectors of the population depend on the most diverse benefits of the State but do not have access to them. The constitutional text symbolically inclusive contrasts with the constitutional reality excluding. The author explains that structuring ideas of constitutional language, such as fundamental rights, tripartition of powers, electoral process and the conception of isonomy, are misrepresented in the praxis of the concretizing process (NEVES, 1994, p. 91).

It is well known that, in modernity, the constitution is understood as a letter of freedom or power pact, the structural link between politics and law (NEVES, 1994). In presenting conceptions of constitution, Marcelo Neves explains that Lassale did not observe that the “material” factors of power and the “legal” constitutional order are found in permanent relations of reciprocal implication, in this relation between politics and law.

The discourse of rights, according to Marcelo Neves, emerges in the context of the structural dissent that comes from modern society. Thus, the appearance brought by constitutionalisation, as an illusory representation, is a method of immunizing the political system against alternatives of consonance of the constitutional text with reality. In this context, human and fundamental rights must promote coexistence in the real conditions of structural dissent. Thus, through the institutionalization of fundamental rights, “the Constitution recognizes the super complexity of society, the dissolution of socially globalizing criteria of expectations, the absence of a supreme social system” (NEVES, 1994, p. 70).

However, the dissonance between the text of the Constitution and the Brazilian social reality denounces a system of violence against the most vulnerable individuals. The power net, in the Foucaultian perspective, acts in the maintenance of the *status quo* and the exercise of sovereign power controls naked lives, rendering them useless and disposable. In a country that wants to be democratic, slave labor is a form of violence that removes from the individual all the rights guaranteed by human rights declarations and the Constitution.

Due to the international commitments assumed by the country and the constitutionally established obligation itself, the Brazilian State is compelled to adopt measures to combat slave labor. However, its performance is controlled by political and economic agents that

directly influence the decisions of the State. Because that, the exploitation of slave labor is maintained, discarding lives, and the subjects that make up the network of power continue to profit from the violent exploitation of human life.

2 THE SCENE OF SLAVERY WORK IN BRAZIL AND THE CONSTITUTIONAL AMENDMENT No. 81/2014 AS A CASE OF SYMBOLIC CONSTITUTIONALIZATION

The Brazilian State's commitment to confront forced labor is in the Federal Constitution, which, in article 5, item III, states that no one shall be subjected to inhuman or degrading treatment, as in contemporary forms of slavery, as well as in the social rights envisaged in Articles 6 and 7, which guarantee decent work, the antithesis of slave labor. In addition, Brazilian international commitment to tackling forced labor has existed since joining the International Labor Organization (ILO), which has, among the fundamental principles and general purposes defined in the 1944 Declaration of Philadelphia, the eradication of forced labor slave, and the country has subsequently ratified several international human rights treaties and international labor law, such as Conventions 29⁶ and 105⁷.

Slave labor, which is a global problem⁸, was officially recognized by the Brazilian State in 1995 before the ILO as a serious social problem and since then the country has reformulated its system to combat slavery. With this purpose, the National Plan to Combat Slave Labor, and the National Pact to Combat Slave Labor were created, the National Commission for the Eradication of Slave Labor (Conatrae) was installed along with its respective state commissions, Mobile Surveillance Groups was created and the so-called "dirty list" was implemented (INTERNATIONAL LABOR ORGANIZATION, 2010). This list, created in 2004 by Act No. 540 of the Ministry of Labor and Employment, is a register of offending employers caught by the fiscalization of exploiting slave labor (INTERNATIONAL LABOR ORGANIZATION, 2010)⁹.

⁶ Convention concerning Forced or Compulsory Labor, adopted by the Conference at its Fourteenth Session – Geneva, June 28, 1930 (as amended by the 1946 Final Articles Review Convention).

⁷ Convention No. 105 concerning the abolition of forced labor adopted by the Conference at its Fortieth Session – Geneva, 25 June 1957.

⁸ According to the UN (2016), the region with the highest prevalence of slave labor (defined as the number of victims per thousand inhabitants) is the Center and South-East of Europe (composed of countries that are not part of the European Union) and the Commonwealth of Independent States (4.2 per 1,000 inhabitants). Then there are Africa (4 per 1,000 inhabitants), Middle East (3.4 per 1,000 population), Pacific Asia (3.3 per 1,000 population), Latin America and the Caribbean (3.1 per 1,000 developed economies and the European Union (1.5 per 1,000 population).

⁹ Act No. 540, dated October 15, 2004, of the Ministry of Labor and Employment. "Article 1. Create, within the scope of the Ministry of Labor and Employment – MLE, the Register of Employers who have kept workers in conditions analogous to that of slave labor. Article 2. The inclusion of the name of the offender in the Register will occur after a final administrative decision regarding the notice of infraction drawn up as a result of a tax action in which there has been the identification of workers submitted to conditions similar to that of slave" (BRASIL, 2004).

The companies included in this register were listed and disclosed to society as a transparency mechanism in order to allow other actions to be taken, such as the commitment to sell their products based on the evaluation of the company and the cancellation of contracts with suppliers. This register was internationally recognized as an effective mechanism for the supervision of slave labor.

However, in December 2014, during a judicial recess, an injunction of the President of the Federal Supreme Court, Ricardo Lewandowski, suspended its publication. The decision was granted under the Direct Unconstitutionality Action (ADIn) No. 5,209, filed by the Brazilian Association of Real Estate Developers (Abrainc), which upheld the unconstitutionality of the Interministerial Ordinance of the Ministry of Labor and the Department of Human Rights, MTE/SDH No. 2, dated May 12, 2011, and MTE Ordinance No. 540, dated October 19, 2004, replacing legislative competence of the National Congress, in addition to the inclusion procedure violates due process of law (BRASIL, 2016).

The resolution of the controversy took place only in May 2016 when the Minister Carmen Lúcia, ADIN rapporteur, judged the action and acknowledged the loss of its object because two subsequent interministerial decrees ended up repealing the contested rule and substantially altered the content of the rules that originated the action.

The creation of the “dirty list” has symbolic and effective effects. First, it has the effect that these rights exist and must be recognized. Second, it suggests that there are real consequences for their violation. However, the dynamics of the power network, which exists in the tension between politics and law, has in the economic power a strong agent of influence in the decisions of the State, creating still more violations of rights and preventing the advance of social guidelines that attend to those who are prevented from enjoying the rights, creating and maintaining the bare life.

Another advance that was recognized as cutting edge by the United Nations (UN) refers to the updating in 2003 of criminal legislation to introduce the modern concept of slave labor¹⁰, which is in line with international discussions on the subject, which involves not only restriction of liberty and servitude for debt, but other acts that violate the dignity of the individual. In the Criminal Code there is the clarification that reducing someone to the condition

¹⁰ According to article 149 of the Brazilian Criminal Code, the crime of *reduction in the condition analogous to that of a slave* is defined as “to reduce someone to the condition analogous to slavery, whether by subjecting him to forced labor or an exhaustive day, to degrading conditions of work, or by restricting, by any means, their locomotion due to debt contracted with the employer or agent.”

analogous to slavery is not only deprivation of liberty but also exposure to situations in which it is impossible to guarantee their dignity.

There are four types of “slave-like” offenses, namely: the subjection of a person to forced labor (as defined in ILO Convention No. 29); the imposition of exhaustive working hours; the subjection of someone to the performance of works in degrading conditions and the submission of an individual to a fraudulent debt directly related to the execution of the work. Regarding the insertion in the criminal type of the term “degrading working conditions”, Sousa (2015, p. 114) reflects:

The insertion of degrading “human dignity” into the concept is the result of a history of labor relations, with fully defined positions: dominant and dominated. These historically constructed positions surpass the human physical factor and enter into the cognitive factor by intuitively crystallizing a form of material and mental domination. This will help human beings, placed in degrading working conditions, to believe that their only use in the world is to exert their workforce on behalf of their employer.

The concept of slavery is extended to understand the degrading conditions of work, which means, when the violation of fundamental rights endangers the health and life of the worker, and the exhaustive journey, where the person is subjected to excessive effort or overload that implies damage to their health or risk of death.

However, there is an effort to revise the current legislation on slave labor, such as Draft Law 432/2013, currently being processed by the Federal Senate, by the Mixed Commission of the National Congress chaired by Senator Romero Jucá (Partido do Movimento (PMDB) and by Deputy Federal Candidate Vaccarezza (Workers’ Party – PT), which intends to restrict the concept of the TEC to focus only on the hypotheses of restricting the freedom of the worker. Thus, the legislative breakthrough achieved with the amendment to the Criminal Code in 2003¹¹ regarding the inclusion of degrading conditions or exhaustive days would be out of line.

Draft Law No. 432/2013.

Article 1 [...] Paragraph 1 For the purposes of this Law, slave labor is considered:

I – submission to forced labor, demanded under threat of punishment, coercion, or involuntarily concluded, or with restriction of personal liberty.

II – the restriction of the use of any means of transportation by the worker, in order to keep him in the workplace;

¹¹ The current wording of the crime of “reduction to the slave-like condition”, given by Law No. 10,803, of December 11, 2003, occurred in the range of actions adopted by the Brazilian State after the friendly settlement reached by the Country before the Inter-Human Rights in the “José Pereira Case” (Petition No. 11.289, Report No. 95/03 of the Inter-American Commission on Human Rights), in which the State, among its commitments, has undertaken to make legislative changes to improve national combat legislation to slave labor.

III – the maintenance of ostensive surveillance in the workplace or the appropriation of documents or personal objects of the worker, in order to keep him in the workplace; and
IV – the restriction, by any means, of the locomotion of the employee due to the debt contracted with employer or agent.

Paragraph 2. The mere non-compliance with labor legislation does not fall within the provisions of §1. (BRASIL, 2013).

These discussions that intend to weaken the fight against slave labor in the country are led by a group of parliamentarians who became known in political practice as a “ruralist group”. The researcher Sandra Costa (2012) explains that the “ruralist group” consists of a group of political entrepreneurs of industry or commerce, and landowners who defend interests such as the approval of public budget resources, works of infrastructure and rural credit for the production of commodities, being this one of the main resistances to the agrarian reform¹² in Brazil.

In her research, Sandra Costa (2012) affirms that the presence of the bench brings obstacles to the reduction of the concentration of land and the recognition of *quilombola* and indigenous rights. It was also observed the involvement of congressmen in cases of flagrant exploitation of slave labor on their properties¹³. Therefore, the non-effectiveness of the State’s action, as a manifestation of the self-interest of its subjects, exposes the individual victim of slave labor to any legal protection, thus generating an “unclassifiable” body, unprotected bare life by right.

Despite the existence of a formally created system of responsibility for exploiters, impunity is still a rule in the country. In this sense, in 2010, the UN Special Rapporteur on contemporary forms of slavery highlighted the impunity “with which landowners, local international organizations, as well as intermediaries, known as ‘cats’, are benefited” (UNITED NATIONS ORGANIZATION, 2016, p. 7). In addition, in 2012, the Human Rights Council, in the context of the Universal Periodic Review, urged Brazil to adopt effective legislative measures and mechanisms to combat slave labor effectively in Brazil. In the view of the United Nations, eradicating slave labor requires coordinated action by all countries, with effective measures that diminish the advantages of exploiters and mitigate the social vulnerability of victims.

¹² According to the Land Statute (Articles 1 and 2), agrarian reform is the set of measures to promote better distribution of land through changes in ownership and use, in order to comply with the principles of social justice, sustainable rural development and increased productivity. It also involves other fundamental and strategic issues, such as food sovereignty, food production and territorial control.

¹³ Among the parliamentarians studied, Sandra Costa (2012) found out that about 351 have a total of 863,646 hectares of land in their names, on behalf of their families or companies they own, quotaholders or shareholders, according to data obtained from the National Institute of Colonization and Agrarian Reform (Incra).

Symbolic norms are characterized by low normativity, and in this scenario of advances and setbacks, since 1999, the National Congress has been analyzing PEC 57A/1999, with the objective of allowing the expropriation of lands where workers are found subject to conditions analogous to slave conditions.

After a long process, in 2014, Constitutional Amendment No. 81 came into force, which provides for the expropriation of urban or rural properties in which slave labor practice has been established. In the meantime, a contained rule of efficacy has been issued, stating that the procedure will take place “in accordance with the law”. There is still no law regulating the device; some draft laws, such as the previously mentioned PL 432/2013, which, under the pretext of regulating article 243 of the Constitution, reduces the scope of the concept of slave labor¹⁴.

Marcelo Neves (1994) explains that the symbolic constitutionalization is a typical problem of the peripheral state. In peripheral modernity, the structural problem is the lack of operational autonomy of the legal and political systems, which are externally blocked by injunctions of other social systems, especially the economic ones. Neves (1994, pp. 149-150) uses Luhman’s theory of systems to explain the logic of inclusion-exclusion of individuals in the social system. In the author’s words, the problem of “marginality” or “exclusion” is a problem of “sub integration” in the functional systems of society, in which the individual depends on the system but has no access to its services. On the other hand, “over integration” is access to the benefits of the system without depending on its rules and criteria.

The “sub integration” of the individual, presented by Neves, is the bare life described by Giorgio Agamben. It is the individual excluded from the legal order – in the Brazilian case, it is the subject victim of slave labor, the sub-citizen, excluded from all the rights formally guaranteed by the democratic state of law.

As Neves points out (1994, p. 159), “political practice and the social context favor a restricted and exclusive concretion of constitutional devices”, with symbolic constitutionalization as a mechanism for controlling life in this contemporary bio-political state. When the State acts this way, it chooses who will live and who will just survive.

¹⁴ “Article 1 Rural and urban properties, where slave labor exploitation is identified directly by the owner, will be expropriated and destined to agrarian reform and popular housing programs, without any indemnification to the owner who has been sentenced, in a final criminal sentence, by the practice of exploitation of slave labor, and without prejudice to other sanctions provided by law, according to article 243 of the Federal Constitution.” (BRASIL, 2013).

3 THE SYMBOLIC CONSTITUTIONALIZATION AS A BIO-POLITICAL PRACTICE OF LIFE CONTROL

Homo sacer is included by exclusion and excluded in an inclusive way. Being included in abandonment is exposed to the vulnerability of all forms of violence. This paradoxical figure, used by Giorgio Agamben, reveals the two individuals who are outside and above the order: the *homo sacer* and the sovereign.

Human life abandoned by law – the *homo sacer* – exists because there is a sovereign will that has the power to suspend order, decree the exception and the existence of bare life. This bare life was placed outside human jurisdiction, with Agamben's greatest example being life in the concentration camp.

The field is the bio-political space of total control of life, "it is only the place where the most absolute inhuman condition that has occurred on the earth was realized" (AGAMBEN, 2010, p. 162). If there is total control over life, we can see in the workplaces of slave labor as the contemporary field of *homo sacer* in Brazil, so the exploiter has control of his individual autonomy over the enslaved person, placing him in complete vulnerability, stopping his freedom.

And the maintenance of this control of life occurs daily by the sovereign power, either by the inefficiency of the policies implemented, or by the creation of legal norms that have little effectiveness on the constitutional reality, having symbolical effect. Neves (1994) argues that the symbolic constitutionalization has a wider scope in the social, temporal and material dimensions. Its use reduces the requirement of rights and does not change reality; on the contrary, it renders the fundamental rights of the rule of law more ineffective.

Gontijo and Arcelo (2009, p. 5,892) see this practice of governmentality linked to market defense. In developing countries, bio-politics is a policy of invisibility of citizens who live in sub-citizenship; thus, bio-power in capitalist societies of great social inequality still remains in the field between life and death, which are clearly determined by patrimonial interests. In this way, maintaining the *status quo* and making a profit is the fundamental objective of economic power.

Marcelo Neves himself affirms that the expansion of the economic system, with its binary code (to have or not to have), destroys the autonomy of the political and legal systems. In strategic games of domination, symbolic constitutionalisation forges the protective apparatus that most vulnerable subjects need. In the case of the exploitation of slave labor, a symbolic constitutional norm maintains the social problem, controlling the bare lives, with the daily construction of sub-citizens,

of individuals completely excluded from fundamental rights that should create the necessary conditions for a dignified life.

4 CONCLUSION

When we return to the questions proposed for this article – why fundamental rights norms are not fulfilled and become symbolic and why the Brazilian State does not improve its mechanisms to combat slavery, as in the case of Constitutional Amendment No. 81/2014, which could have a more effective tutelage, creating a rule of full effectiveness, rather than conditioning its application to infra constitutional regulation – we are faced with the need to rethink the possibilities of the democratic state of law.

The declarations of rights have a dual historical-political function: they are emancipatory, contributing to the struggle for life improvements of the population, and integrate the processes of subjecting bare life to sovereign power. The fundamental rights, used in this second function, are symbolic norms that arise not to modify social reality; on the contrary, it is intended to cool the struggles for dignity and to conform the subject in the life of exclusion. The inclusive constitutional text contrasts with reality, exclusive and without the adoption of measures to initiate a concrete process, making the constitution's commitments impossible to build a less unequal society.

The study of the situation of the slave laborers in Brazil reveals a life inserted in a network of systematic production of “killable lives”, bare lives, in which the symbolic expression of the fundamental rights does not belong to them, since they were excluded from the human jurisdiction. The production of symbolic norms then emerges as a mechanism of control over life in the biopolitical perspective, contributing to the maintenance of the status quo through the reproduction of social inequality.

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José Lucas Santos Carvalho

Master's degree (in progress) in Law at Universidade Federal de Sergipe (UFS). Specialist in Public Law by Estácio de Sergipe. Bachelor of Laws at Universidade Tiradentes. Analyst at the Public Prosecution Service of Sergipe. E-mail: lucascarvalho.br@gmail.com

Flávia de Ávila

Professor in the Department of International Relations and in the Graduate Program in Law at Universidade Federal de Sergipe (UFS). PhD in Law at Pontifícia Universidade Católica de Minas Gerais (PUC Minas). Master in Law and International Relations at Universidade Federal de Santa Catarina (UFSC). E-mail: flaviadeavila@gmail.com

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