

The racial deficit of Labour Law in Brazil

O déficit racial do direito do trabalho no Brasil

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Abstract

This article seeks to analyze the racial deficit in Labor Law in Brazil, based on the understanding, by the critical field of the labor sector, of the place in which black workers are inserted in the emergence of Labor Law and in the very constitution of the working class. Thus, we seek to show how this field deprives itself of an analysis that identifies black workers as relevant agents in the historicity of labor relations in Brazil.

Keywords: Racial deficit; Labor Law; Critical field.

Resumo

O presente artigo busca analisar o *déficit* racial do Direito do Trabalho no Brasil, a partir da compreensão, pelo campo crítico do ramo juslaboral, do lugar no qual são inseridos os trabalhadores negros no surgimento do Direito do Trabalho e na própria constituição da classe trabalhadora. Assim, busca-se evidenciar como esse campo priva-se de uma análise que identifique os trabalhadores negros como agentes relevantes na historicidade das relações de trabalho no Brasil.

Palavras-chave: *Déficit* racial; Direito do Trabalho; Campo crítico.



Introduction

Initially, it should be noted that this paper has a very specific purpose, which is also a very problematic one: to discuss racial relations in the critical field of Labor Law in Brazil. It is true that the racial debate has now resumed a relative protagonism, be it by the persistence of social inequalities caused by the racialized structure and the proposed paths for its overcoming or accommodation, whether due to the theoretical-discursive expansion in different areas of knowledge. In that sense, the racial debate began to instigate questions about certain commonplaces that were sacralized in certain areas, which, due to dominant conceptions and readings on specific historical facts, became naturalized as truths, to the point of delimiting the very criticism of those who rebel against them.

In this sense, the emergence and consolidation of Labor Law as a historical experience in the country is a fertile field for these common places, residing there an environment in which the exercise of (self)criticism must be the horizon that will guide the debate from which a new social historiography of labor will support a more judicious look on the founding bases of Labor Law. And this is exactly where your critical eye must direct your attention, either by virtue of certain narratives of the past still gravitate in your imagination, conditioning your readings and behaviors, either because facing such issues is an imperative necessity, compatible with the constant exercise of criticism.

Thus, in order to apprehend a given topic as a relevant problem to be debated and faced in a public debate, a critique must be able to arouse in the interlocutors a certain discomfort regarding the crystallized certainties that hover over its *state of the art*, in a way that allows pointing to the inconsistencies and limitations of its arguments. In this sense, criticism arises to deconstitute the common places that fossilize historical readings that, in the face of new milestones and perspectives of a certain field, become incapable of answering the new questions asked, while are resistant to change, as they are introjected as dominant conceptions over the historical subjects of a specific area of knowledge.

As well raised by Marcos Nobre,¹ the fundamental sense of criticism is to be able to point out and analyze the obstacles to be overcome so that the potential better gifts in the existent can be realized. In his opinion, this is how is possible to see, in the present reality,

¹ NOBRE, Marcos. A Teoria Crítica. 3 ed. Rio de Janeiro: Jorge Zahar Editor: 2011



elements that prevent the full realization of its full potential, presenting the existing from the point of view of opportunities for emancipation from the prevailing domination. This way, a perspective that proposes criticism must overcome the imaginaries and logics of built or produced identifications, whose function is to conceal the conflict between social classes, to conceal domination and to hide the presence of singularity, giving it the appearance of universal. Guerreiro Ramos² already pointed that critical consciousness arises when the human being or a social group reflects on the historical determinants and walks towards them as an individual, resulting therefrom not only in an awakened and vigilant human conduct, but also an attitude of mastery of oneself and of the outside.

In spite of new readings of the Social History of Labor in Brazil about the constitution of the working class and the place of the black in the historicity of the relations of work in the country, which made significant contributions to understanding the transition from colonial slavery to class society and its subsequent effects on citizenship, Labor Law was oblivious to this debate. Strongly marked by a dogmatic perspective, the narrative about the emergence of this legal field does not consider the black worker, making him invisible as a labor force in the post-1888 class society spring, while praising the role of the European immigrant for the formation of the Brazilian working class and for the constitution of a social protection system, especially the CLT (Brazilian Labor Law). On the other hand, the critical field of Labor Law, despite the formulation of a relevant analysis on the fundamentals of the Labor Law field in Brazilian dependent capitalism, has shown little capillarity to face this issue. In other words, it has been unable to break with certain commonplaces that border the contribution of the black worker for the constitution of the social regulation of labor in the country.

From this understanding, it is essential to point out that the critical field of Labor Law in Brazil, aligned with a perspective of class protection worker in the legal regulation of the capital - labor conflict, needs a self-criticism when it applies its views to the Brazilian reality. In your almost totality, such looks do not dialogue with the racialized structure of our society. In this sense, a more critical perspective presupposes recognizing the limitations or the absence of criticism itself about certain aspects of this structure.

² RAMOS, Alberto Guerreiro. *A redução sociológica*. 3 ed. Rio de Janeiro: Editora UFRJ, 1996.



Thus, it is pertinent to signal a racial deficit in critical Labor Law readings in the country, which is expressed both by the historical silencing of the racialized structure as well as superficial or punctual analyzes of the role of black worker in the history of this labor market. Hence, as a critical exercise and self-criticism, how to overcome such limitations? How to proceed to understand certain common places in the historical analysis of Labor Law critical field, regarding this topic? The first step, in our view, is to recognize, as a critical field, the existence of this problem and propose a deconstruction of certain understandings and analyses, based on public debate. For this, it is also to seek what is understood by history, so that we can situate what must be overcome.

Accordingly, for the purposes of this text, it is necessary, initially, to delimit what is understood as critical theory, to then outline the called racial deficit and the critical field of Labor Law to which we refer, approach the new contributions and perspectives of the Social History of Labor about the role of the black worker for the formation of this legal field. Finally, from the reading of three authors from the critical field - Maurício Godinho Delgado, Jorge Luiz Souto Maior and Wilson Ramos Filho -, we try to understand how they treat the transition from colonial slavery to class society in the country, in terms of emergence of Labor Law and the constitution of the working class. So, we seek to show, in an exemplary way, how Labor Law critical field deprives itself of an analysis that identifies the black worker as a relevant agent in the historicity of labor relations in Brazil.

1 Delimiting the debate

To Karl Marx,³ in the social production of their own existence, men enter into determined, necessary, independent of his will. For the author, these relationships of production correspond to a certain degree of development of its material productive forces. Thus, in his view, the totality of these production relations constitutes society's economic structure, the real basis on which a legal and political superstructure is built and which is a correspondence of specific social forms of conscience. In this sense, the mode of production of material life is what determines the process of social, political and intellectual life, it is

³ MARX, Karl. *Contribuição à Crítica da Economia Política*. 2 ed. São Paulo: Expressão Popular, 2008.



not the conscience of men that determines its being, but it is the social being that determines its consciousness.

The Marxian thinking, by inverting the logic of Hegel and focusing on the material conditions of human existence, in which work assumes an ontological status in the formation of the human being, either individually or as a social being, establishes a severe criticism of capitalist sociability. In this sense, by capturing the capitalist social formation as a historical social formation, conditioned by relations of specific productions, traced the structure and dynamics of bourgeois society, pointing its foundations, conditionings and limitations, with a view of promoting the overcoming of this sociability mode. Present in Marxian thinking, the exercise of criticism, aimed at radical transformation and human emancipation from the societal form of capital, allowed him to develop dialectical historical materialism.

In this sense, Florestan Fernandes⁴ notes that Marx's greatest contribution was the historical materialism, which allowed, for example, new possibilities of scientific development in social sciences. For the author, the method introduced by Marx contributed to the following understandings: a) the social laws and economic conditions are valid only for certain social forms and for a determined period of its development; b) the existence of regularity in the social phenomena, yet the human will intervenes in historical events, in certain determined conditions; c) social facts are articulated among themselves by intimate connections, in an idea of totality; d) the existence of determining factors (the production in modern capitalist societies) acting over the other factors.

Thus, articulating the concept that bourgeois society is a totality concrete, contradictory and mediated by multiple determinations, Marxian thinking establishes its fundamental theoretical-critical perspective. It allows, therefore, to articulate the inseparability of a theoretical dimension with a revolutionary praxis, transforming social reality.

Rúrion Melo⁵ is precise in pointing out the transforming impetus of revolutionary *praxis*, based on Marxian thinking, needed to be grounded in a successful relationbetween

⁴ FERNANDES, Florestan. Prefácio. In MARX, Karl. Contribuição à Crítica da Economia Política. 2 ed. São Paulo: Expressão Popular, 2008

⁵ MELO, Rúrion. Teoria Crítica e os sentidos da emancipação. CADERNO CRH, Salvador, v. 24, n. 62, p. 249-262, May/Aug. 2011



theory and practice. As a result, for the author, an adequate understanding of the capitalist system was fundamental as to a clear orientation towards a revolutionary action. In his view, Marx draws from the very existing capitalists conditions the real movement of their transformation, being the most important theoretical task to produce a diagnosis of the time capable of highlighting the conditions and obstacles to practical guidance. In this sense, there is, within Marxian thinking, an immanent criticism of capitalist society, which, according to Rúrion Melo, is a diagnosis of the time based on: a) the historical and categorical investigation of the functioning logic and reproduction of capitalism; b) the contradictory determinations of the system (intrinsically creating forms of social pathology); and c) the withdrawing of the development assumptions of the system itself towards the social conditions of its overcoming, that is, of social emancipation.

In this way, a critical theory based on Marx should be able to produce a diagnosis of the complexity of the functioning and contradictions of the capitalist sociability, pointing ways for transformation and overcoming of its societal form. In this sense, it later supported the field of what was conventionally called Critical Theory, guided by an interdisciplinary materialism.⁶

For its delimitation, Marx Horkheimer⁷ already observed that, insofar as the concept of theory is independent, as if coming out of the inner essence of gnosis, or having an non historical foundation, it becomes a category objectified and therefore ideological. For the author, what the traditional theory admits as existing, without engaging in any way, are questioned by critical thinking, because of its positive role in a bourgeois society, the relation of media and untrue forms with the satisfaction of general needs and its influence in the renovation process in the life of the majority, requirements which science itself is not used to worry. As a result, in his view, criticism is associated with the social structure in its entirety and the non-alignment with the current social order, being necessary, therefore, to

⁶ To give an idea of the scope of this project, it is enough to mention some of the names involved: in economics, in addition to Friedrich Pollock, Henryk Grossmann (1881-1950) and Arkadij Gurland (1904-1979); in political science and law, Franz Neumann (1900-1954) and Otto Kirchheimer (1905-1965); in the critique of culture, Theodor W. Adorno (1903-1969) — who would later become the great partner of Horkheimer in the production in philosophy —, Leo Löwenthal (1900-1993) and, some years later Walter Benjamin (1892-1940); in philosophy, in addition to Horkheimer, also Herbert Marcuse (1898-1978); and in psychology and psychoanalysis, Erich Fromm (1900-1980) (NOBRE, Op. cit., 2011)

⁷ HORKHEIMER, Max. Teoria Tradicional e Teoria Crítica. In BENJAMIN, Walter; HORKHEIMER, Max; ADORNO, Theodor W, HABERMAS, Jürgen. Textos Escolhidos. São Paulo: Abril Cultural, 1975.



expose the social contradictions and constitute itself as a factor that stimulates and transforms. In this way, critical behavior is based on an orientation towards emancipation of society. In this sense, Marcos Nobre⁸ observes that the orientation for emancipation requires that theory be an expression of critical behavior in relation to knowledge produced under capitalist social conditions and to the very social reality that this knowledge intends to capture. In his view, the theory is so important for the critical field that its meaning is completely altered, because it is not limited to saying how things work, but analyzing how things work in light of an emancipation project that is at the same time concretely possible and blocked by the prevailing social relations. Hence, for the author, one of Critical Theory's most important tasks is the production of a certain *diagnosis* of the present time, based on structural tendencies of the current social organization model, as well as in concrete historical situations, in which show both the opportunities and potential for emancipation and the real obstacles to it. This way, Critical Theory cannot be confirmed except if transforming practice of existing social relations.

The formulation of Critical Theory in Max Horkheimer moved away from initial conceptions, notably due to the publication of *Dialectic of Enlightenment*,⁹ in which, on one hand, the emancipatory orientation would be blocked by instrumental reason. Nathalie de Almeida Bressiani,¹⁰ in this context, observes that Adorno and Horkheimer argued that social integration would have been reduced to its systemic forms, and that the identification between reason and domination, a consequence of a progressive process of enlightenment, would have eroded the very possibility of freedom in society, which would be inseparable from enlightening thinking, which, paradoxically, destroys it. Thus, in his view, the possibility of a emancipated society can only be conceived from the abandonment of rationality,

⁸ NOBRE, Marcos. Op. cit.

⁹ The authors build a theory of domination from the instrumental control of nature, in which all forms of domination derive from the logic of identity of instrumental reason, which is why they explain the origin of the dynamics of civilization regression. Therefore, Marcos Nobre (2011) states that, in managed capitalism, reason is reduced to an ability to adapt to previously given purposes of calculating the best means to achieve ends that are alien to him. In his view, this rationality is dominant in society not only by shaping the economy, the political system, or the state bureaucracy, it also makes part of socialization, the learning process and formation of personality.

¹⁰BRESSIANI, Nathalie de Almeida. Economia, Cultura e Normatividade: o debate de Nancy Fraser e Axel Honneth sobre redistribuição e reconhecimento. 2010. Thesis (Master in Philosophy). Universidade de São Paulo, São Paulo.



without which domination inherent to the relations between subject and object cannot be overcome.

On the other hand, the multiplicity of later theoretical strands, encompassed under its mantle, imposed on Critical Theory the need to be able to renew its diagnoses and understand the configuration of contemporary social struggles, sometimes to face its normative deficit and move towards communicative rationality (Habermas), or to outline the idea of a critical theory of society, in which the processes of social change must be explained with reference to normative claims structurally inscribed in the recognition of reciprocal relationship (Honneth).

In this sense, it is important to note that, according to Rúrion Melo,¹¹ the history of Critical Theory is marked by a competition between the diagnoses of the time, more or less suited to society criticism, in an attempt to overcome the classical opposition that was historically established between revolutionary Marxism and reformists, which did not imply giving up on a Critical Theory oriented towards emancipation. It can be said, therefore, that this vast field gave rise to theories that, despite having different conceptions about the possibilities or senses of emancipation, seek to respond to the role of a critical theory as to face the problems of its historical time.

Thus, for the purposes of this article, it is in this sense that it was previously delimited that one can argue for the existence of critical field in Labor Law, in which I include Maurício Godinho Delgado, Jorge Luiz Souto Maior and Wilson Ramos Filho. In other words, it is not that such a field and its authors belong to Critical Theory - which would be a historical reverie and an epistemic impropriety - but rather that the criticism embedded in their work approaches a certain legacy of criticism inherited from the Frankfurt School. And this can be seen in the tensions of the labor class political fight and the limits of legal claims under capitalism, held in the discussions on the preservation of the protective core of Labor Law, in the face of the neoliberal rationality.

However, to do so, it is necessary to explain both its particularity, notably the bases on which the exercise of criticism in the Labor Law field is established, as the choice of the

¹¹ MELO, Rúrion. Sentidos da emancipação: para além da antinomia revolução versus reforma. 2009. Thesis (PhD in Philosophy). Faculdade de Filosofia e Ciências Humanas da Universidade de São Paulo. São Paulo.



aforementioned authors and their respective works. Would such attribution be arbitrary or could we establish such a delimitation?

A critical field of Labor Law can be delimited under two guidelines. The first, of an explicitly Marxist orientation, in which there is a criticism towards capitalist sociability, to the content of the legal form and to the legal ideology, with a view to human emancipation and overcoming the social capital reproduction. It guides from a Marxian perspective of Law, adding the seminal contributions of Pachukanis, in which the genealogy of legal subjectivity is found in the commodity exchange relations, in which the legal form is equivalent to the merchandise form.

Thus, Labor Law is understood as the result of a conflictive correlation of forces between capitalists and workers, materialized in legal norms, serving the project of juridification of the conflict between wage earners and capital and its channeling or institutionalization by the State.¹² In this perspective, this Labor Law field is essentially a Capitalist Labor Law. Authors who support this guidelines are, amongst others, Jorge Luiz Souto Maior, Gustavo Seferian Machado, Sayonara Grillo, Marcus Orione, Wilson Ramos Filho.

The second guideline is centered on criticizing the dogma of Labor Law, guided by the defense of the legal-constitutional order of worker protection, guided by the social value of work, human dignity, citizenship and corporate social purpose. From this perspective, reading the fundamentals and principles of Labor Law fulfills the discursive function of establishing a minimum civilizational level for the working class, on which the onslaught of capital would not find legal support. Thus, Labor Law would accomplish the following functions: a) improvement of employment contracts' conditions within the socioeconomic order; b) modernizing and progressive development, from an economic and social point of view; c) conservative political function, through which political and cultural legitimacy is conferred on the relationship of basic production of contemporary society; d) civilization and democratic function, as it establishes the access of dispossessed segments to the material wealth accumulated by the economic society.¹³ Followers of this guideline

¹² RAMOS FILHO, Wilson. *Direito Capitalista do Trabalho: história, mitos e perspectivas no Brasil*. São Paulo: LTr, 2012.

¹³ DELGADO, Mauricio Godinho. *Curso de Direito do Trabalho*. 18 ed. São Paulo: LTr, 2019.



would be Maurício Godinho Delgado, Valdete Souto Severo, Magda Barros Biavaschi, Gabriela Delgado and Rodrigo Carelli.

In this sense, the selection of work pieces written by Maurício Godinho Delgado, Jorge Luiz Souto Maior and Wilson Ramos Filho¹⁴ is justified, on one hand, because they are books in which their respective authors develop their arguments more broadly and judiciously on Labor Law, allowing the reader to understand the nuances of their criticism perspectives. On the other hand, as they are commonly used in Law schools, their perceptions about the emergence of Labor Law crystallize commonplaces about the *locus* of black people in labor relations in Brazil. Thus, given the breadth of its scope, contribute to the maintenance of a racial deficit in the current critical field.

Having made these delimitations, we will proceed to analyze the new readings of History that allowed the repositioning of the historical place of the black in the relations of work in the country, in order to subsidize the criticism of the narratives of the emergence of Labor Law and the formation of the Brazilian working class.

2. New readings of the social history of labor

It is undeniable that colonial slavery, due to its length in time and quantitative relevance, has a big historical mark in the construction of Brazilian sociability, delimiting the spaces of power, the structuring of the State, the qualitative restriction of a civil society, those included in the distribution of wealth, fundamentals production relations and the post-1888 class society transition. In that regard, It would not be an exaggeration to say that analyzing race relations constitutes an excellent interpretive path for understanding the dilemmas faced by the Brazilian society to deal with the challenges of transitioning from a slave-holding structure to a free and wage-earning typically capitalist society.

¹⁴ DELGADO, Mauricio Godinho. Curso de Direito do Trabalho. 18 ed. São Paulo: LTr, 2019; MAIOR, Jorge Luiz Souto. História do direito do trabalho no Brasil: curso de direito do trabalho, volume I: parte II. São Paulo: LTr, 2017; RAMOS FILHO, Wilson. Direito Capitalista do Trabalho: história, mitos e perspectivas no Brasil. São Paulo: LTr, 2012.



For Florestan Fernandes,¹⁵ the social and slave order did not open easily to the economic, social, cultural and juridical-political requirements of capitalism and the emergence and development of the competitive social order took place gradually, as the disintegration of the slave-owning social order and manor house provided really consistent starting points for the reorganization of the production and market relations on a genuinely capitalist basis. The author observed that “the social revolution linked to the desegregation of slave production and corresponding social order was not made for the entire Brazilian society”, which is why its “historical limits were closed, although its historical dynamisms were open and durable”.¹⁶

Put in other words, despite the country being inserted, since slavery colonial times, in socio-economic forms related to the development of the capitalism at a world level, how to develop, domestically, a sociability essentially capitalist if the Brazilian historicity is founded on an slavery *ethos* and in a rigid social structure? What to do to “civilize” a mass of enslaved, now free, and direct them to a rational, disciplined, and organized society of a wage-earning society?

The problem of how to build a typically capitalist sociability in Brazil would necessarily have to go through the challenge of reorienting the mass of enslaved, because the universalization of free and salaried work, based on juridical equality, was in theory not be compatible with the standards established by the slavery *ethos*. In this sense, the constitution of a free labor market was imperative, given that the elites' imaginary about the enslaved, as observes Celia Marinho Azevedo,¹⁷ treated them as subjects despoiled by slavery and unprepared for free work, unable, therefore, to adapt to the new contractual standards and for rationalizing and modernizing large-scale agricultural and industrial schemes. In the author's understanding, under this guideline, they would become marginal by force of the inevitable logic of capitalist progress.

In this sense, for the aforementioned author, the inevitable way out found by the nineteenth century elites for the constitution of a free labor market would be in a worker

¹⁵ FERNANDES, Florestan. *A revolução burguesa no Brasil: ensaio de interpretação sociológica*. 5 ed. São Paulo: Globo, 2006.

¹⁶ FERNANDES, Florestan. *Significado do Protesto Negro*. São Paulo: Cortez; Autores Associados, 1989, p.13- 14.

¹⁷ AZEVEDO, Celia Maria Marinho. *Onda Negro, Medo Branco: o negro no imaginário das elites Século XIX*. Rio de Janeiro: Paz e Terra, 1987.



compatible with a corresponding industrial economic development, the European immigrant. Thus, on one hand, the historical inevitability of a new agent as the dominant labour power, and, on the other hand, the image of a mass inert, disaggregated, uncultured, of no great importance in that period - the black -. And is precisely this imaginary, in her view, that will rise as a historic rationality, founded on fear and insecurity aroused by real or simply potential conflicts between the elites and the mass of miserable people,¹⁸ who show themselves as a fundamental piece for the understanding of the concrete tensions that will form within the interactions of the Brazilian working class, notably for the configuration of a racial labor division and the invisibility of the black worker's role in post-1888 labor relations.¹⁹

Hence, this formation of the free labor market is marked by debates, on one hand, by an emancipationist perspective, guided by the internalization of capitalist social hierarchy and its limits, without direct physical coercion, and, on the other hand, from an immigrant perspective, focused on replacing the national workforce. And it is exactly the latter that, in a way, *a posteriori*, will contaminate the future interpretations of labor relations in Brazil and the constitution of the country's working class. Put it in a different way, this is the framework that will constitute, in the words of Sidney Chalhoub and Fernando Teixeira da Silva,²⁰ as "the historiographical Berlin wall" that engages in "the necessary dialogue between slavery historians and the political and cultural practices of poor urban workers and the factory worker movement scholars".

In this sense, Silvia Hunold Lara²¹ observes that labor's social history in Brazil starts to be identified with free and salaried work, in which the enslaved worker does not have space. For this reason there is an irreconcilable opposition between slavery and freedom. For the author, there was an abundant historiography on the transition from slavery -

¹⁸ AZEVEDO, Op. cit.

¹⁹ Lúcio Kowarick, in his work *Trabalho e Vadiagem: the origin of free work in Brazil*, observed that the construction of an idea of vagrancy of the national worker, enslaved, freed or about to be freed, associating him with the lack of love for disciplined and oriented work for the then nascent class society in the country, which, in his view, reinforced the slave order and relegated the national to a marginal position in the labor market, in more degraded and poorly paid activities.

²⁰ CHALHOUB, Sidney; SILVA, Fernando Teixeira da. *Sujeitos no imaginário acadêmico: escravos e trabalhadores na historiografia brasileira desde os anos 1980*. Cad. AEL, v. 14, n. 26, 2009, pp. 13-47, p. 15. 21 LARA, Silvia Hunold. *Escravidão, cidadania e história do trabalho no Brasil*. Proj. História, São Paulo, (16), fev. 1998.

²¹ LARA, Silvia Hunold. *Escravidão, cidadania e história do trabalho no Brasil*. Proj. História, São Paulo, (16), fev. 1998.



endowed with objectified beings, devoid of traditions by the traffic mechanism - to society of classes - universe of free and salaried people. Result: the enslaved black disappears from history and becomes disregarded from the universe of the Brazilian working class.

See that the Social History of Labor in Brazil, for a certain period, described the working class as exclusively white, industrial, of European descent, masculine and urban, leaving considerable gaps regarding enslaved workers, free or freed in the 19th century, who constituted the very worker class through which colonial slavery was sustained. Such agents would not appear as relevant to the configuration of the post-Abolition labor market, for the dynamization of urbanization and for the industrialization process that took place in the first decades of the twentieth century. Thus, for Raissa Alves,²² the narrative of this area as of the arrival of European immigrants and the silencing of the experience had by the black people, hides the different situations experienced by black workers on the fringes of what is understood as a working class, obscuring the continuities of this place marked by racial discrimination. In this context, he rightly states that working conditions extremely degrading are not problematized, but naturalized as inherent activities carried out by the black population.

Antonio Luigi Negro and Flávio Gomes²³ point out that several studies began to break with this paradigm, by approaching the experience of manufacturing work and industrial use of slaves, as well as the complexity of the enslaved work, urban and rural, with the technological and ideological transformations occurred in the 19th century in several slave societies. In this sense, for the authors, instead of a weak class and technological backwardness, it would be possible to nuance the historicity of the urbanization and industrialization process in Rio de Janeiro since the end of the first half of the 19th century.

On the other hand, Sidney Chalhoub and Fernando Teixeira da Silva²⁴ point towards a change from a *paradigm of absence*, which identified, in the experience of Brazilian historians, a history that is incomplete and out of step with other national models, into a

²²ALVES, Raissa Roussenq. Entre o silêncio e a negação: uma análise da CPI do trabalho escravo sob a ótica do trabalho "livre" da população negra. 2017. Thesis (Masters in Law). Universidade de Brasília. Brasília.

²³ NEGRO, Antonio Luigi; GOMES, Flávio. Além de senzalas e fábricas: uma história social do trabalho. Tempo Social - Revista de Sociologia da USP, v.18, n.1, junho/2006, pp. 217-240.

²⁴ CHALHOUB; SILVA, Op.cit.



paradigm of agency, according to which the actions of enslaved, freed and urban workers resulted from negotiations, choices and decisions in the face of institutions and regulatory powers. In the latter, according to the authors, a line of studies on the history of workers was developed that expanded the concept of worker in the academic imagination, in which emphasis was given to grouping professionals (textiles, graphics, ports, etc.), their forms of organization, specific movements and dynamics, the composition of the workforce, among others, which allowed new relevant theoretical and empirical inflows.²⁵

Thus, these paradigmatic changes in the Social History of Labor more recently allowed Antonio Luigi Negro and Flávio dos Santos Gomes²⁶ to correct the assertion of the myth of the radical immigrant as a prejudice, considering that, between silences and forgetfulness, prevents the national worker - starting with the enslaved –to appear as the protagonist of workers' fights. In this sense, the authors point to the emergence that the working class cannot be linked only to immigration, considering the history of strikes - at the time, *walls* -, common practice of collective action and resistance of the enslaved and free people during the 19th century.

Accordingly, what is intended to demonstrate is the existence, even in the second mid-nineteenth century in Brazil, of experiences of struggles promoted by the enslaved or freed in the urban scene of the main cities, in diverse work environments, through which it is possible to build paths that lead to the process of formation of the working class in the country, not only with the arrival of immigrants and their union activities. Thus, it is explained that the process of constituting the working class worker is not limited to the formation of the wage labor market in the country.²⁷ One cannot fail to also observe the

²⁵ In this sense, it is relevant to point out the work of Maria Celia Paoli, Éder Sader and Vera da Silva Telles - *Pensando a Classe Operária: os trabalhadores sujeitos ao imaginário acadêmico (notas de uma pesquisa)*. Revista Brasileira de História, n. 6, p. 129-149, set. 1983 -, in which the authors examine the modes of construction of workers' image in the Social Sciences and the transformations they place at the center of reflection on the problem of the emergence of workers as a political subject. Then pass the class worker as "determined by external conditions to its concrete existence" to an orientation that seeks to "capture in the experiences of the dominated by the intelligibility of their practices".

²⁶ NEGRO, Antonio Luigi; GOMES, Flávio dos Santos. *As greves antes da "grève": as paralisações do trabalho feitas por escravos no século XIX*. Cienc. Cult., vol. 65, n. 2, pp. 56-59, 2013.

²⁷As an example, one can point to riots, strikes and demands in 1858 (typographers), in 1866 (salesmen's struggle against the opening of shops on Sundays), in 1873 (strike of the coachmen of the Jardim Botânico, demanding the readmission of dismissed companions), all in Rio de Janeiro, as well as the struggle of workers in bakeries, in the cities of Santos (1876) and São Paulo (1877), through the leader of the category, João de Mattos, the first strike in the country, that of the Ganhadores, in the city of Salvador (1857).



sharing of work experiences between enslaved and free workers as well as their articulations for mobilizations and fights, which demonstrates bonds of solidarity for the formation of the working class as a political subject.

Because of this, the observation of Marcelo Badaró Mattos²⁸ is precious, in the sense that, in the early decades of the 20th century, when the number and diversity (emigrants foreigners, former artists, ex-slaves, migrants from rural areas) of urban areas workers expand, the experiences common to enslaved and free in the second half of the nineteenth century will have left quite significant marks on the process of formation of working class.

Thus, in view of these paradigmatic changes in the Social History of Labor, could the critical field of Labor Law remain indifferent or oblivious to these theoretical flows, with a strong empirical basis? Why then the place of the black worker in the historicity of Labor Law sector still lacks these valuable contributions? Would this critical field be oriented by commonplaces, devoid of new historiography perspectives on labor relations in Brazil? Let's see in the next section.

3 Discussing the racial deficit in the critical field of Labor Law

Presenting a debate or historical analysis in the legal area has proved to be a Herculean task that raises strong chills for the professionals of the craft - the historians -, in view of the tendency of the subjects of the legal profession to seek in the past elements of a certain linearity that inexorably confirm their intensions or arguments. Almost always, contradictions, tensions and conflicts do not appear, as it doesn't the respective historical subjects, history being only a univocal tangle of legislative and protocol norms for the apogee of legal dogmatics. Going out this trap - or trying -, a notion of how to understand the historic phenomena can guide the incursion in this area.

²⁸ MATTOS, Marcelo Badaró. Experiências comuns: escravizados e livres no processo de formação da classe trabalhadora no Brasil. In: ANPUH, XXIV Simpósio Nacional de História, 2007, pp. 1-10.



Clóvis Moura²⁹ notes that a fundamental epistemological position vis-a-vis historical fact and science must be the historian's first duty, founded on the understanding that history is a process, which takes place through shocks and contradictions that occur in objective reality and are subject to causality. In this sense, for the author, history has a diachronic dimension, which, in turn, implies the realization of a process and that this process of man being and to-be is his objective. For the author, social praxis is contradictory, which is why history reflects, in their categories and on their logical basis, an antinomic process in which social groups, classes or estates act with specific objectives and, often, conflicting.

On the other hand, João Bernardo³⁰ observes that history deals with the relationship between facts, which is why a fact only acquires a historical dimension if it enters into a relationship with other facts, guided by contradictions, in the form of a structure, in which the explanation of causal links is sought. Thus, for the author, the structure is hierarchical and all levels of historical analysis must refer to, or presuppose, a mode of production. In his view, in the final analysis, history must only be socio-economic. Finally, for the Portuguese, the historian is not a tribute of a vision of the past, but a desire of the future, and historical concepts are a way of interpreting the past and shape the future.

However, Antônio Carlos Wolkmer³¹ points towards a legal national historicity trajectory marked by myths, fallacies and contradictions, with a profile and ideological nature, in which the legal tradition is deeply committed to a social elitist, agrarian-mercantile, anti-democratic and formalist. In that sense, for the author, is a legal historicity structured in the theoretical-empirical tradition built by the force of authority, continuity, accumulation, predictability and formalism. In his view, obtaining a new historical reading of the legal phenomenon as a cultural expression of ideas, thoughts and institutions implies the reinterpretation of the sources of the past under the bias of interdisciplinarity and methodological reorganization, in which the law is described from a demystifying

²⁹ MOURA, Clóvis. *As injustiças de Clío: o negro na historiografia brasileira*. Belo Horizonte: Oficina de Livros, 1990.

³⁰ BERNARDO, João. *Propostas para uma metodologia da História*. *História Revista*. 11 (2). Available in: <https://www.revistas.ufg.br/historia/article/view/9006/6231>.

³¹ WOLKMER, Antônio Carlos. *História do Direito no Brasil*. 3 ed. Rio de Janeiro: Editora Forense, 2002.



perspective. Thus, it is necessary to replace the theoretical models, built in an abstract and dogmatized manner, by historical investigations, engendered from the dialectic of production and concrete social relations.

In this sense, how to articulate such considerations for our problem in question? From how the historical narrative of Labor Law is processed. Note that this narrative shows itself, in its hegemonic expression, as a subsidiary to the study of the Labor Law dogmatics, presents a linear and evolutionary history, which ends, uncritically, for the free and salaried work relationship, it is based on the impossibility of setbacks, involutions and discontinuities, and is unable to show the laws as resulting from social tensions and conflicts, as well as their contrasts in different forms of social organization.³² What does this imply, the reader would ask, for the arguments of this text? The contradictions and subjects of each formation in Brazil do not appear in their historical dimension nor the roles they play in the modes of production for the characterization of Labor Law.

As a result, the critical field of Labor Law cannot be subject to such historical misunderstandings, having to break with these *common places* to which traditional dogmatics leads us. In this sense, it is imperative to break with certain understandings crystallized in the critical field of Labor Law regarding this racial deficit, as well as to what extent certain readings can be complemented, as they lack a closer look.

If it is true that the advent of rules regulating work relations should not be confused with the emergence of Labor Law,³³ as we understand as a legal form, it is not inconsiderable to observe that work relation should not be framed mechanically towards the societal form of capital, under penalty of losing the “dynamic tensions in which we detect the rupture with the past”, in the words of João Bernardo. Thus, a break with the past requires to be attentive to the differences in which they made it possible for Labor Law in the country to structure itself as such, based on a dialectical process. This way, enslaved labor and free labor are put side by side, as expressions of labor relations in dispute for hegemony, in the dynamic history of Brazil, reason for which the critical branch of Labor Law must not lose sight of the fact that the tensions of coexistence of these working

³² In this regard, please see: SILVA, Vanessa Rodrigues. “Escravidados livres”: crítica ao discurso jurídico sobre a história do direito do trabalho a partir da representação historiográfica do trabalho escravo. 2015. Monografia de Graduação (Bacharelado em Direito). Universidade de Brasília. Brasília.

³³ Observation made by Jorge Luiz Souto Maior in the referred citation, p. 11.



modalities can be overcome automatically with the end of the colonial slavery. And yet, how such tensions shaped the reading about the emergence of Labor Law as a historical reality in the country as well as we apprehend it in a critical dimension.

In this sense, Jorge Luiz Souto Maior embarks on the task of understanding the history of Labor Law in Brazil from a structural dimension, in which associates the emergence of labor legislation and, consequently, of labor, to the formation of the capitalist model. In his words, “work relationships in Brazil are involved, since their formation, in capitalist logics, but that materialize under slave and servile structures”.³⁴Hence, it seeks to highlight the relevance of slavery to Brazilian sociability and, notably, to labor relations, at the same time that it exposes forms of rebellion of the enslaved in front of the repressive system of colonial slavery.

The author observes that “slavery, once institutionalized, has produced wealth, increasing inequalities, at the same time it has provided a production of a repressive rationality of the human condition”, and Abolition, “legally considered, it did not alter the material bases of its existence”. In his understanding, blacks are “considered legally free in a society that intends to be bourgeois and liberal, but which does not cease to be slaver”.³⁵

It is interesting how Souto Maior highlights the coexistence of enslaved labor with the free labor of the immigrant, emphasizing how the work performed by the later was subsumed under the logic of slavery, from the perspective of the interests of the land owners. For the author, “the participation of slaves in factories [...] had the effect of lowering wages and even establishing a manorial-type relationship between industry owner and workers”. Thus, he concludes by noting that “the liberal project of contractual freedom, for the diffusion of labor relations, meets perfectly to the interests of capital”.³⁶Would this not be an obvious example of how the social order of capital already appears on the Brazilian horizon making use of the racialized structure of colonial slavery, mobilizing free labor relations on a slavery base? Definitely yes.

In this reading, the author analyzes, in a laconic way, the presence of enslaved people in the industrial sector, in parallel with the use of the free worker, leaving the latest

³⁴ MAIOR, op. cit, p. 17.

³⁵ MAIOR, *Ibidem*, p. 54 e 55.

³⁶ MAIOR, Jorge Luiz Souto. Op, cit, p. 98.



approaches to the experience of manufacturing and industrial work carried out by enslaved people, as well as the complexity of this modality, urban and rural, with the technological and ideological transformations of the 19th century, in multiple slavers societies. It is true that Souto Maior does not shy away from thinking about occupational destiny of the ex-enslaved, in the transition to the First Republic, however it is clear that difficulty in positioning such workers in the actions of Brazilian working class, summing up to the assertion that the “association between enslaved and free poor white gave the initial tone of the working class in Brazil, especially in Rio de Janeiro”.³⁷

In this sense, how can we reconcile the author's assertion that the mass worker who was formed at the end of the last decade of the 19th century was diversified with the invisibility of the black worker, who does not appear as an agent of the concrete struggle of working class in search of social legislation?

See that Souto Maior shows that the freed workers assumed less prestigious occupations, with low wages, or worked in own organizational structures, such as the port sector, but it would be credible to assume the absence of capacity for an organized collective struggle? If so, how to explain the general strike of bakery workers, in the year of 1912, in the city of Rio de Janeiro, a category with a massive presence of ex-slaves? See that Marcelo Badaró Mattos³⁸ highlights that former enslaved people and their descendants, who performed port work in the second mid-nineteenth century, not only continued in the sector, but also organized themselves in unions in the city of Rio de Janeiro.

It can be seen that, in the analysis of labor movements in Brazil, brought by Souto Maior, the black element is phagocytized by the experiences of anarchist struggles and socialists in the industrial urban sector, coming from immigrants, who would end up giving the tone of the working class in the dispute over future social legislation. It is not noticed, therefore, the action of black workers in this endeavor. Hence, although according to the author, “most of the workers were foreigners, this does not mean that only foreigners were engaged in the workers' struggle”,³⁹ it does not allow to leave from the *commonplace* of the

³⁷MAIOR, Jorge Luiz Souto. Op, cit, p. 126.

³⁸ MATTOS, Marcelo Badaró. *Trabalhadores e Sindicatos no Brasil*. 1 ed. São Paulo: Expressão Popular, 2008.

³⁹ MAIOR, Op, cit, p. 133.



overvalued perception of union activity, in which one deprives evidence of the participation of black workers in Brazilian working class struggles.

Note that Marcelo Badaró Mattos⁴⁰ signals the relatively small weight of the typical industrial working class in the workforce as a whole (13.8% of the employee population). If this is so, why then an emphasis on this working class, with a strong presence of immigrants, in view of their reduced share in the composition of the worker class at the time? It would not be such a marginal category in the Brazilian working class of yore? Where would black workers be, if not outside that class?

Finally, Souto Maior's effort to break with a reading tradition devoid of historicity, in which tensions and contradictions are replaced by the ideological elements of social pacification promoted by law, which only covers up our rigid social hierarchy. At the same time, it seems to me that such an effort does not overcome a certain linearity in the understanding of the history of Labor Law in Brazil. By not treating in detail the experiences of enslaved, free and freed, such as work relationships, subject to social regulation, even if under another corporate form - and how this affects the capitalist transition -, historical analysis loses the dialectical movement that allows us to relate the past to the present, as well as project the problems to be overcome in the capital-labor conflict, in future actions. And this is exactly the problem involved in the transition from colonial slavery to class society, which is satisfied in the reading of the aforementioned author.

Wilson Ramos Filho,⁴¹ in spite of signaling the growth in the use of enslaved Africans as the predominant workforce, a derogatory view of Brazilian worker and the prolongation of slavery in Brazil, as well as for the origins of the national proletariat prior to European immigration, there is a brief analysis, quasi-protocol, of the transition from slavery to class society. See that the author immediately proceeds to punctuate the experiences of the organized working class, without mentioning, at any time, how it is formed, emphasizing exclusive to the European immigrant in the conformation of the union action. There is, therefore, no space to understand how the black worker, recently freed from slave-holding ties - and until recently, the main workforce -, is inserted in the class society and in which

⁴⁰ MATTOS, Marcelo Badaró. Op. cit, p. 36.

⁴¹ RAMOS FILHO, Wilson. *Direito Capitalista do Trabalho: história, mitos e perspectivas no Brasil*. São Paulo: LTr, 2012.



occupations, in an evident demonstration of the inability of the author to position such a historical subject in the new capitalist societal dynamics.

In this sense, the author explicitly ignores the racialized structure, except when it directly points to the predominant link of European immigrants in the formation of the Brazilian working class at the beginning of the 20th century. Although the author does not link the origins of the working class in Brazil to European immigration, there is in his work a historical subject, who leads riots and strikes and has union action, but which, however, is extremely abstract, reduced to aseptic nomenclatures of “anarcho-syndicalists”, “anarchists”, “socialists” and “communists”, at no time identifiable to a concrete historical fact in its entirety.

Finally, here the racial deficit in the critical readings of Labor Law is shown by the complete silencing of the racialized structure and, therefore, the black worker does not even present itself as a historical subject of the Brazilian working class.

With regard to Maurício Godinho Delgado,⁴² the author is concise in observing that, in a country with a colonial formation, with an essentially agricultural economy, with an economy built around the slave labor relationship until the end of the 19th century, there is no need to talk about the existence of the Labor Law, due to the absence of legally free work. The only mention of slavery by the scholar is its extinction by the Golden Law, by eliminating from the socio-legal order a relationship production incompatible with the labor sector and, consequently, encourage the incorporation of the labour power in the form of an employment relationship.

There is, therefore, by the aforementioned author, a complete silencing of the racialized structure. Although the understanding that Labor Law, as a historical experience, stems from the legal form under capital, it would only be the free labor capable of promoting the formation of proletarian groups, which would enable the generation of ideologies of collective action and organization, able to produce legal rules, as the author expressly indicates?

As Marcelo Badaró Mattos⁴³ well observes, in Brazilian society, marked by the longevity of colonial slavery, it would not be possible to think of the emergence of a salaried

⁴² DELGADO, Maurício Godinho. Curso de Direito do Trabalho. 18 ed. São Paulo: LTr, 2019.

⁴³ MATTOS, Marcelo Badaró. Op. cit, p. 16-17 e 21.



working class without taking into account class struggles, and their values and references, which unfolded between enslaved workers and their masters. The author emphasizes that salaried workers, when sharing work spaces and urban life with the enslaved, acted collectively and organized for their liberation, evidencing a certain modality of solidarity in the struggle for freedom, as part of the arsenal of values of the new class in formation.

Thus, it is evident that Jorge Luiz Souto Maior has produced an effort in his work to discuss the racialized structure of Brazilian society and its impact in Labor Law, while in the respective works of Wilson Ramos Filho and Maurício Godinho Delgado has an explicit racial deficit in their critical readings. Therefore, the intention, by signaling such a framework, is to propose a public debate that includes Labor Law critical thinking in a perspective of breaking with the racialized structure, promoting a rethinking of labor historicity relations in the country.

For Max Horkheimer,⁴⁴ “determining the content and purpose of their own achievements, and not only in the isolated parts but in their totality, is the hallmark characteristic of intellectual activity. Its very condition leads it to historical transformation.” In the author's view, the conformism of thought, the insistence that this constitutes a fixed activity, a separate realm within the social totality, makes the thought leaves its own essence.

In this sense, Guerreiro Ramos⁴⁵ observed that the tasks of criticism and self-criticism cannot be carried out without a change of attitude among intellectuals, as such tasks are incompatible with individualism. In his opinion, the criteria for thought are induced from concrete reality, and this induction is an effort to understanding, in which one is subject to illusory perceptions, which is why the need for self-criticism, by which the thinker can free himself from mistakes. For the author, self-criticism also implies the willingness to support the debate, because the induction of the criteria of thought from reality is collective work, whose validity is guaranteed by the control of all.

Thus, faced with the problem of criticism and self-criticism, it is necessary to carry out certain tasks. Among others, the critical review of our intellectual production, carried

⁴⁴ HORKHEIMER, Max. Op. cit, p. 162.

⁴⁵ RAMOS, Alberto Guerreiro. Introdução Crítica à Sociologia Brasileira. Rio de Janeiro: Editora UFRJ, 1995, p. 51 e 53.



out until now, in the light of the facts of the Brazilian reality, and the stimulus of self-analysis, as an instrument for purging misunderstandings and mental vices and for adjusting the intellectual producer to the propensities of reality. In this way, in his opinion, being critical is to be able to see the indirect or implied meaning of the intellectual product, or to be capable of surprising the real 'driving forces' that 'move' the producer. Finally, concludes by pondering that it is necessary to “provoke controversy, because through it, it is possible to liquidate the false coins that still circulate among us, with their debatable value”.

Final considerations

Given the above, it is necessary to face the challenges imposed by the racial deficit critical field of Labor Law.

First, the hallmark of our sociability is precisely to be permeated historically by the racialized structure, in a context of dependent capitalism, which underpins the genesis of the social regulation of work in the country. In this sense, any intention to analyze the formation of labor relations and the emergence of Labor Law duty capable of explaining the role played by the enslaved worker for the constitution of the free and salaried society. In this sense, on the one hand, collective struggles and daily life carried out by the enslaved as historical subjects, in a social structure that objectified them, made it possible to establish the conditions for the formation of the Brazilian working class. On the other hand, the mobilizations, strikes and riots of the black workers in the First Republic show their political action for the design of a socially protected system in Brazil. Thus, Labor Law critical field should recognize the black worker as a relevant agent in the historicity of labor relations in Brazil, deconstructing commonplaces through exercise of a collective and politically directed (self)criticism, through its intellectual production.

Second, it is extremely necessary for this field to absorb the new readings of the Social History of Work, introjecting its theoretical and empirical contributions, in a concrete way to face, in their intellectual profession, the repositioning of the black worker in the union and collective action of the working class. Breaking ideological constructions of a



modern, rational and disciplined immigrant to the relations of free and salaried work, an inexorable historical subject of Brazilian trade unionism, naturally white, urban, industrial and apt to the transformations arising from the industrialization and modernization.

Third, be willing to face the racial debate. The tensions, conflicts and contradictions of the Brazilian racialized structure imposes that the researcher in the critical field of Labor Law is capable of mobilizing intellectual resources to overcome it, through historical transformation. And that means stepping out of academic comfort zone and go to the public debate, in which, through tension and self-criticism, outputs collectives are possible.

So, let the racialized structure and the racial deficit be our false currencies.

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