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On the unstoppable growth of the bloc of global emerging economies

Deilton Ribeiro Brasil
Scientific Direction President

Prologue
Elena Evgenyevna Gulyaeva

Conhecimento

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Conhecimento Editora
Belo Horizonte
2024

Conhecimento
www.conhecimentolivraria.com.br

Editores: Marcos Almeida e Waneska Diniz

Revisão: Responsabilidade do autor

Diagramação: Reginaldo César de Sousa Pedrosa

Capa: Waneska Diniz

Imagem capa: Arkadiusz Warguła

Conhecimento Livraria e Distribuidora
Rua Maria de Carvalho, 16 - Ipiranga
31140-420 Belo Horizonte, MG
Tel.: (31) 3273-2340
Whatsapp: (31) 98309-7688
Vendas: comercial@conhecimentolivraria.com.br
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www.conhecimentolivraria.com.br

337.1 B823c 2024

Brasil, Deilton Ribeiro
The crucial challenges facing the Brics: on the unstoppable growth of the bloc of global emerging economies / [organized by] Deilton Ribeiro Brasil. - Belo Horizonte: Conhecimento Editora, 2024.
188p. ; 24cm

ISBN: 978-65-5387-369-8
Various authors.

1. Foreign economic relations. 2. Brazil- Economic conditions-21st century. 3. Brazil- Politics and government. 4. Global economy of emerging countries. 5. Brics- American South. 6. Global governance. 7. Human rights- Brazil. 8. Economy and trade relations. 9. Trade and political relations. 10. Migration law- Policies. 11. Globalization. I. Gulyaeva, Elena Evgenyevna (Prol.). II. Título.

CDD(23.ed.)– 337.1

Elaborada por Fátima Falci – CRB/6-nº700

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ÍNDEX

PROLOGUE

"The Crucial Challenges Facing the BRICS: On the Unstoppable Growth of the Bloc of Global Emerging Economies" is a book that compiles nine research papers, each published as a chapter, and authored by leading academic researchers from Latin America, Europe, and Asia. This book addresses a broad spectrum of issues in international law, international relations, politics, and the global economy, providing an in-depth analysis of human rights protection, migration policies, and trade and political relations between states in a changing global landscape. It includes contributions from Peru, Brazil, China, India, and Russia, and features publications in English. The compiled works offer diverse perspectives on these issues, providing readers with valuable opportunities for reflection and analysis on international human rights law, challenges and threats to international relations, and global governance.

The multipolar world implies the existence of various decision-making centers that interact and shape global politics. In such a world, states or their coalitions form international organizations, political and military alliances, and integration associations. It is worth noting that the current international relations system has become increasingly imbalanced. The UN, initially established as an international organization to uphold and enhance global peace and security and to foster cooperation among states, has become an instrument of domination and paralysis, primarily advancing the interests of the collective West. Although the UN was once viewed as a key instrument of globalization, its structure has become outdated following the collapse of the bipolar world order and the exit of the socialist bloc. This outdated framework now obstructs efforts to create a new global paradigm. Given this decline in relevance and effectiveness, a new multipolar order might be better supported by international organizations like BRICS, the Shanghai Cooperation Organization, and the Eurasian Economic Union. This book examines BRICS's role on the global stage. The association represents a unique example of cooperation between leading developed and developing countries, responding to global changes and aiming to strengthen its members' positions.

BRICS is an ideal platform for establishing a new multipolar world. This is evidenced by the significant increase in countries seeking to join the association, now including nine members. The key factors unifying BRICS include developed multipolarity, global economic growth, substantial human

and resource potential, and the formation of shared traditional values. BRICS has established itself as a cornerstone of economic security, notably through the creation of institutions like the New Development Bank. The association has the potential to become a powerful global entity capable of asserting its demands.

Nevertheless, BRICS faces challenges that hinder its objectives. The chapters in this book explore how internal problems within BRICS impact its cooperation and potential fragmentation. The group aims to challenge the contemporary world order and establish a fairer multipolar world, but this ambition presents difficulties that could affect its efficiency and cohesion. The BRICS countries encounter a range of obstacles, including economic disparities, internal conflicts among members, geopolitical tensions, political disagreements on the evolving global landscape, and institutional issues. Overcoming these challenges will require consensus and dialogue to strengthen cooperation and enable BRICS to effectively influence the development of a polycentric world order.

We commend and celebrate this work by distinguished academic researchers for its contribution to the academic, professional, and non-scientific discourse in international law, international relations, politics, and the global economy.

Today, I would like to share some insights on the role of countries within the BRICS group, as well as current trends and future prospects for cooperation among its member states. BRICS has established itself as a significant factor in global economic and political processes. Its goal is to develop joint responses to a range of international challenges to ensure sustainable development and long-term economic growth. Through the comprehensive implementation of the BRICS Economic Partnership Strategy until 2025, member states have the opportunity to strengthen their positions in the global economy and political arena. The prospects include enhancing the role of BRICS states in the international monetary and financial system, advancing interbank cooperation, and expanding the use of national currencies. Certainly, the priorities involve fostering partnerships in science and innovation, healthcare, education, cultural exchanges and strengthening humanitarian ties. Many BRICS member countries view the development of a shared cultural space as essential, including the exchange of art, literature, music, and cinema. This effort fosters stronger connections and helps to build a unified cultural identity. BRICS is committed to addressing global challenges such as climate change, poverty, and infectious diseases, with intercultural interaction facilitating the exchange of experiences and resources. Candidate states for BRICS also play a vital role, representing potential for cooperation in sectors such as agriculture, energy, and high technology.

In conclusion, the BRICS format provides members with opportunities to strengthen their positions in the global economy and politics. Despite the challenges and difficulties, we face, our collaboration within this association holds the potential to positively influence the global financial landscape and contribute to our own economic development.

We are confident that this work will be highly valuable to academics, students, and legal professionals, and we hope it will be received with the same enthusiasm as our previous publications.

The international political system is continually evolving. While some states are gaining strength, others are weakening and losing their former leading positions. Political regimes, borders, and foreign policies are in flux. Despite the instability and constant changes in the system, it still adheres to specific forms and rules that enable detailed examination and analysis of various events and processes. A critical aspect of examining the modern world order is analyzing the existing global system. This system determines the dominant forces in the world and establishes informal rules governing bilateral and multilateral relations between states.

Since 1991, the world has experienced a unipolar system dominated by the United States and its allies, which have exerted their will over the global community. States opposing this dominance or failing to align with the collective West have faced sanctions, including economic pressure, color revolutions, or outright military interventions. This unipolar system has manifested as a poorly disguised form of terror and tyranny, affecting numerous states and millions of people. The unipolar model, following the bipolar era of superpower rivalry between the US and the USSR, has revealed flaws and contradictions, highlighting the advantages of a multipolar system.

However, the bipolar system also had its weaknesses, leading to discussions since the mid-2000s about creating a new multipolar system. The BRICS association, established in 2009 and initially comprising Brazil, Russia, India, China, and South Africa, has emerged as a key platform for developing this new world order.

This position is particularly significant given that, over the past 15 years, BRICS has steadily grown and evolved, emerging as a major player in global politics. Understanding how this group, initially focused solely on economic functions, has transformed into a key force in the international political system is crucial. It is also important to consider how this evolving partnership will shape its future trajectory and impact the broader global landscape.

Today, BRICS is engaged in systematic development to build a multipolar world. It is an interstate association of countries pursuing independent

foreign policies. The BRICS association now includes nine countries from four continents: Brazil, Egypt, India, Iran, China, UAE, Russia, Ethiopia, and South Africa. Initially, BRICS interactions occurred on the sidelines of various international organizations, particularly the UN. Gradually, formal negotiations involving business representatives were introduced, expanding cooperation from interstate to legislative measures. This development enables us to classify BRICS as an interstate institutional structure of cooperation— a permanent entity that does not yet attain the status of a formal international intergovernmental organization. To align the world order with the realities of a multipolar world, the Russian Federation plans to prioritize efforts to enhance the potential and elevate the international role of the BRICS association.

Universal international legal norms should emerge from the sovereign will of states, with the UN remaining the primary platform for developing and codifying international law. The BRICS interstate association facilitates the organization of various working group meetings, focusing on areas such as interbank cooperation, senior energy officials, scientific and technical information exchange, anti-terrorism efforts, environmental issues, and more. The BRICS alliance operates as a complex mechanism of interaction, uniting countries with diverse political systems and cultural traditions.

This publication exemplifies legal cooperation and the professional exchange of ideas and experiences among legal professionals, from BRICS countries, promoting "legal diplomacy," and fostering closer ties between legal communities. The work also highlights the exchange of legal theory and practice, the use of law as a tool for economic cooperation and social development, the strengthening of the rule of law, and the advancement of international law. It emphasizes collaborative efforts to elevate the status of lawyers, advance the legal profession, and establish comprehensive partnerships with international legal institutions.

Colonialism, global governance, artificial intelligence, genomic security, criminal policy, human rights, the role of alternative dispute resolution in strengthening economic and trade relations, non-discriminatory guidelines in migration law, the application of stringent economic-based administrative penalties, and the intersection of migration law and human rights in a globalized society are all critical issues facing the modern world. These topics reflect the growing complexity of governance, justice, and human rights in an increasingly interconnected global landscape.

In light of this, we welcome and congratulate this work by Deilton Ribeiro Brazil, as it revitalizes the academic, professional, and scientific discourse within the legal field. The presentation of clear, objective analyses highlights that while the process of scientific production may seem simpler than expected, it remains inherently complex. This is especially true for the majority of professionals involved in teaching, research, or legal dissemination, for whom presenting a topic in a structured and impactful way can be a significant challenge.

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INTRODUCTION

A Critical Analysis of the the Challenges of BRICS, examines the multifaceted challenges confronting the BRICS (Brazil, Russia, India, China, and South Africa) grouping. While BRICS nations have collectively emerged as significant players on the global stage, achieving their shared objectives remains a complex undertaking. This paper analyzes key challenges within the group, including economic disparities, political differences, geopolitical tensions, and the evolving global landscape. It explores the potential impact of these challenges on BRICS's future trajectory, considering both opportunities for collaboration and the potential for fragmentation.

The BRICS grouping, represents a collective force of emerging economies with significant global influence. The group's rise has been marked by a shared aspiration to challenge the existing global order and create a more equitable and multipolar world. However, the journey towards achieving these ambitions is fraught with challenges that threaten to undermine the group's unity and effectiveness.

About the challenges facing BRICS, we have in the first place, the economic Disparities: One of the most significant challenges facing BRICS is the stark economic disparity between its members. China's economic dominance overshadows the other members, leading to concerns about unequal benefits and potential dominance within the group. Brazil, Russia, and South Africa face economic vulnerabilities, including high levels of inequality, volatile commodity prices, and political instability. These disparities create tensions and complicate efforts to achieve common economic goals.

Then, the Political Differences: BRICS members have diverse political systems, ideologies, and foreign policy priorities. These differences can create friction and hinder consensus-building on key issues. For example, Russia's invasion of Ukraine has strained relations with other members, particularly India and South Africa, who have maintained neutrality or condemned the conflict. This highlights the difficulty in navigating complex geopolitical situations while maintaining group cohesion.

Next, the geopolitical tensions: The global political landscape is characterized by increasing geopolitical tensions, with BRICS members often finding themselves on opposing sides of major conflicts. The US-China rivalry, for example, creates a challenging environment for BRICS, as members grapple

with balancing their relationships with both powers. Additionally, territorial disputes, such as those between India and China, further complicate the group's ability to act in unison.

In turn, the Evolving Global Landscape: The global landscape is in constant flux, with emerging technologies, climate change, and the rise of new economic powerhouses shaping the international order. BRICS needs to adapt to these changes and find ways to leverage its collective influence in a rapidly evolving world. The group's ability to respond effectively to these challenges will be crucial for its long-term success.

Hereinafter, the Institutional Challenges: BRICS lacks a strong institutional framework to support its goals. While the group has established several institutions, such as the New Development Bank (NDB), these institutions are still relatively young and face challenges in terms of governance, funding, and effectiveness. Building robust and effective institutions will be essential for BRICS to achieve its objectives and maintain its relevance.

Here below, the Internal Conflicts: Beyond the external challenges, BRICS also faces internal conflicts that can undermine its unity. For example, tensions between India and China over territorial disputes have flared in recent years, creating a potential obstacle to cooperation. Additionally, disagreements on issues like trade policy and development priorities can lead to internal divisions and weaken the group's collective bargaining power.

As final lines, we can say that the BRICS grouping faces a complex set of challenges that threaten to impede its progress towards achieving its ambitious goals. Economic disparities, political differences, geopolitical tensions, and the evolving global landscape all pose significant obstacles. However, BRICS also possesses considerable potential for collaboration and influence. By addressing these challenges through dialogue, compromise, and strategic partnerships, BRICS can overcome these obstacles and emerge as a powerful force for positive change in the global order.

Next, we would like to express our indelible gratitude to the great Russian jurist and friend, Prof. Dr. Elena Evgenyevna Gulyaeva, for agreeing to write the important foreword to this issue.

We would also like to thank the prestigious publishing company Conhecimiento Editora therefore, without their decisive intervention, this publication would not have seen the light of day.

It is worth mentioning that the present work has an insular nature of additional relevance: that is, the global view of its important co-authors. This is due to the fact that, although it is true that its content is in tune with the nature of the BRICS, it embraces a worldwide development.

Finally, it is our wish that this "The crucial challenges facing the BRICS. On the unstoppable growth of the bloc of global emerging economies", like our previous proposals, will be well received by the global community.

THE SCIENTIFIC DIRECTION

CHAPTER II

GENOMIC SECURITY AND CRIMINAL POLICY IN THE BRICS

Elena N. Trikoz[1]
Elena E. Gulyaeva[2]
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1.1 Introduction

In light of the great relevance of scientific studies on the human genome and their real-world applications in medicine, forensics, agriculture and other fields, in recent years there have also been active questions about the regulation of legal, ethical and moral issues arising in this area, including pressing issues of biosafety and the genomic sovereignty of entire nations.

Experimentation with human genes and the radical invasion of the human genome are not considered acceptable in the world today, as they are still not fully aligned with international and national norms, as well as professional ethical standards [*Li, Walker, Nie, Zhang*, 2019, p. 32-38]. Beyond the uncertainties in the legal framework for biosafety and the chaotic use of genetic technologies by private individuals, this state of affairs is due to the subsequent irreversible reactions resulting from "genetic enhancement" and genome editing, unintentional or desired changes to the genetic code, with subsequent transmission to future generations who in turn have not consented to such consequences.

More than five years have passed since the heated debate about the first engineered babies born in China distracted the entire community from the real benefits of gene editing technologies that could make a real difference in the

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lives of adults with their serious medical conditions. Some fifty experimental studies are now carried out worldwide on human volunteers whose genes are being edited to treat diseases ranging from cancer to HIV and blood diseases (such as sickle-cell disease), 40 of these using the CRISPR[4] or "genetic scissors" (*Regalado*, 2023).

1.3.1. Chinese experience of national legal regulation in the genomics field

Bio-medicine and the development of high-performance medical technologies are in the "Made in China 2025" strategy document, which sets ambitious goals for China to become a global leader in genetic technology production. In January 2022, the Ministry of Commerce and the National Development and Reform Commission issued a general opinion on liberalizing market access in the southern metropolitan area of Shenzhen as part of efforts to further promote reform and openness in the Guangdong-Hong Kong-Macao Greater Bay Area. The document calls for easing market access restrictions for pharmaceutical drugs and medical devices, streamlined permitting and access services for human genetic resources.

Over the past decade, there has been impressive financial support for genetic and genomic development in China, both at government and commercial company level [Science and engineering indicators, 2012]. The "Thousand Talents Plan" or *Qianren Jihua* is considered to be the leading scientific program of the central government of the PRC. With the involvement of almost every government agency in China, this program is the most prestigious and influential government science program in the world. *Qianren Jihua*'s overall aim is to promote financial and specific scientific areas such as genetics industry and biotechnology in general, as these are considered of paramount and strategic importance by the Chinese government [Jing-Bao Nie, 2018].

Contributing to the increased attention in this area has been the pioneering yet controversial experience of Chinese scientist *He Jiankui* (贺建奎; born 1984), who by coincidence and talent had been invited to the Chinese government's aforementioned program the day before. This associate professor with the Southern University of Science and Technology publicly announced in November 2018 that he had previously conducted a genetic experiment in his Shenzhen research laboratory, secretly and without a license, to create the world's first children with artificially altered genome – DNA altered to

[4] Acronym *CRISPR* stands for "clustered regularly interspaced short palindromic repeats".

prevent from contracting HIV (the "designer babies" effect) by applying the revolutionary "genetic scissors" technology (CRISPR/Cas9). A third child was born the following year.

He Jiankui took advantage of China's lack of an explicit ban on editing a viable human embryo to carry out a risky experiment without expecting to be prosecuted by the authorities. "He Jiankui's manuscript shows how he ignored ethical and scientific norms in creating the gene-edited twins Lulu and Nana" [Regalado, 2019]. And predictably, his act was universally condemned not only by Chinese government agencies and international organizations, but also by the scientific community around the world, including experimental geneticists and bioethicists (Krimsky, 2019, p. 19-20).

One year later in December 2019, a daring Chinese biophysicist was sentenced by the Nanshan District People's Court of Shenzhen to three years in prison and fined RMB 3 million for illegally editing the genes of three human embryos intended to be reproduced in the womb of a biological mother, resulting in the birth of three genetically modified babies. The court said in its verdict that researcher *He Jiankui* "in the pursuit of personal fame and gain" had "deliberately violated" the country's medical regulations and "rashly applied gene editing technology to human assisted reproductive medicine". *He Jiankui*'s research was illegal because he had violated more than 15 years' worth of regulations banning unethical or immoral research on the human genome. Two other scientists from two medical institutes in Guangdong Province – Zhang Renli and Qin Jinzhou – were also sentenced to two and a half years in prison respectively and fined for illegal gene editing in assisted reproductive medicine.

The field of human genome editing in China remains unregulated in the form of a comprehensive law. In the 1990s and 2010s, China progressively strengthened legislation on genomic research, the handling of genetic information and the operation of genetic data biobanks. The "*Reproductive Technology Act*" prohibits the use of embryos for commercial goals. The "*Maternal and Child Health Protection Law*" 1995 regulates the conduct of genetic tests, and does not require authorization for genetic diagnosis. But it is done by a physician with a license from the Ministry of Health of the PRC to carry out genetic tests.

In 1998, the State Council adopted "Interim Measures for the Management of Human Genetic Resources". Secondary legislation has also been used, notably the 2003 Ethical Guiding Principles for Research on Human Embryonic Stem Cells, which set out a detailed procedure for conducting such research. For example, artificially created embryos can only be studied for 14 days and cannot subsequently be implanted into the human body. It also established the principle

of free and informed consent. In 2008, China established its first independent ethics committee at the Shanghai Clinical Research Centre, which is guided by the WHO's "*Principles of Conduct for Ethics Committees Reviewing Biomedical Research*" and aims to protect patients' interests in the clinical research and manipulation.

Under the auspices of the Ministry of Science and Technology of the State Council of the People's Republic of China, the "Guidelines for the Collection, Trade, Export and Export of Genetic Resources" were approved in 2015, and the "*Regulation on the Procedure for Review and Approval of Optimization of Human Genetic Resources*" came into force in 2017. Following the sensational case of *He Jiankui*, the Chinese Ministry of Science initiated a special review of the administrative management of licenses issued for the use of human genetic resources in 2018.

On 29 November 2018, the China's Vice Minister of Science and Technology called for the suspension of any work at *He's* lab, while the Minister of Industry and Information Technology announced a "zero tolerance" policy and banned *He* from competing for a government award for which he had previously been nominated [Regalado, 2018]. The China's Ministry of Education sent out notices to self-check gene-editing research in all universities and called for stricter ethics control in the area of research and "monitoring of research related to gene-editing technology" (Yanan and Fu, 2019).

In early 2019, China's President Xi Jinping called for stricter regulation of gene editing through new legislation, and China's State Council announced new regulations on "high-risk" technologies and the establishment of a National Medical Ethics Committee to supervise high-risk clinical trials and samples (Qiu, 2019).

Nevertheless, there has long been no formal criminal law ban on DNA editing in viable embryos in China. The government qualified CRISPR technology as a medical technology, not a medicine, so no central government approval was required. It was enough to obtain approval from the ethics committee of the hospital or IVF clinic in the case of embryo research to ensure that patients gave informed consent and were not faced with unnecessary risks. This is why such research flourished in China, with 12 medical trials using CRISPR registered, more than in the rest of the world at the time.

This legal gap was exploited by He Jiankui, a biotechnologist and geneticist. His semi-legal experiment had such an effect that it led to amendments to the draft Civil Code and an expansive interpretation of the current Criminal Code of China. Thus, it was proposed that human genes and human embryos also be

included in the section of the Civil Code on individual rights to be protected. Experimentation with genes in adults or embryos that threatens public health or is contrary to ethical rules, respectively, could be considered a violation of fundamental human rights (Cyranoski, 2019).

Most importantly, the recently adopted PRC National Regulations on the Management of Human Genetic Resources, 2019 aims to strengthen the protection of genetic data and related human biomaterials, and to tighten the mechanism for regulating and monitoring their proper use[5]. The relevance of the regulation stems from the fact that pharmaceutical companies in China collect large amounts of genetic material for the purpose of drug trials and other research. By the way, it was the Chinese company SiBiono GeneTech Co. developed the world's first commercial gene therapy product, Gendicine®, which was approved by Chinese regulators in 2003 for the treatment of head and neck malignancies with p53 gene mutations [Melnikova, 2019, p. 61].

This document defines "genetic resources" as the relevant genetic material (human organs, tissues and cells containing genes) and genetic information (data that have been obtained through genetic research). The legal status of "genetic banks" is determined and they are subject to a number of requirements: legal entity status, approved ethical rules for the use of genetic material, an official license, the absence of which can entail both administrative and criminal liability, etc.

According to Article 4 of the regulation in question, the Ministry of Science and Technology of the State Council of the People's Republic of China has the main authority for regulating genomic research. This body is responsible for organizing research on human genetic resources in China, as well as developing specific methods for declaring and implementing a registration system for human genetic materials (Art. 5).

This Regulation also contains the following important points. The Chinese State is responsible for the rational use of human genetic resources in scientific research, diagnostic and therapeutic activities and the development of the biomedical industry (Article 6). There is a prohibition on the collection, storage, use and transfer of human genetic material by foreign individuals and organizations (Article 7). The collection, storage or use of human genetic material and genetic information must not endanger national security, public

[5] Zhonghua renmin gonhego zhenlei yichuan guanli tiaoli (Human Genetic Resources Management Regulations of the PRC), 2019. URL: http://www.gov.cn/zhengce/content/2019-06/10/content_5398829.htm.

health or the public interest (Article 8). But, on the other hand, these activities must also comply with ethical principles and approved standards, respecting the patient's right to privacy and the right to prior informed consent (Article 9). The commercial use of human genetic material is prohibited (Article 10).

Note that the Ministry of Science and Technology can stop the activities of the offender, confiscate illegally collected, illegally stored or illegally used genetic materials and impose fines for violation of the articles of the Regulation in question (Articles 36-43).

In April 2020. In April 2020, the Standing Committee of the National People's Congress will consider a new draft of the *Biosecurity Law*[6], which aims to introduce a separate chapter on biosecurity. The draft law proposes a specific chapter on the management of human genetic resources. It would provide for strict administrative penalties for violations of regulations governing the management of human genetic resources.

In the PRC today, genomic research activities are carried out by research and scientific centers, educational institutions and medical facilities. But they are carried out directly with state support and governmental control. The PRC has three of the largest institutions working with large genomic databases and biobanks. They are the Chinese National Human Genome Centre in Shanghai (South Centre), the Chinese National Human Genome Centre in Beijing (North Centre), and the Beijing Institute of Genomics (Shenzhen) [Yoshizawa, 2014]. In 2021, for example, it was revealed that the All-China Genetic Company, which sells prenatal tests around the world, developed them in collaboration with the Chinese military and used them to collect genetic data from millions of women, ostensibly for subsequent large-scale studies of population traits. This genetic data, collected both within and outside China, is stored in the PRC government-funded gene database, one of the largest in the world [Special Report: China's gene, 2021].

Those and other organizations shall be provided with the necessary certified equipment and the research they carry out shall comply with an approved quality control system. Strict records shall be kept of the research carried out and shall be regularly sent to the State Council of China. All genomic research organizations shall follow an approved list of procedures and services. All new methods of genomic research shall undergo compulsory registration. In case of ethical problems or high risk, these methods are subjected to review by the competent state organizations [Vasiliev, 2020, p. 112].

[6] Zhonghua Renmin Gonghego sheng anquan fa (qao'an) (The People's Republic of China Biosecurity Bill), 2020. URL: http://law.foodmate.net/file/upload/202005/01/093552211434922.pdf

In the autumn of 2022, it became known that the Chinese authorities were collecting DNA samples throughout the Tibetan Autonomous Region, including from kindergarten children, without the explicit consent of their parents, as part of a campaign to "solve crimes". Systematic DNA collection began back in 2019 as part of the *"Three greats"* (inspection, investigation and mediation) designed to strengthen China's intense grassroots policing system. State tenders have even been issued for the establishment of local DNA databases in 2019.

Although several human rights activists have suggested that the police had no credible evidence of criminal behavior to justify such collection, and people could not refuse to participate in the collection of genetic data, which is a serious human rights violation as such a measure "cannot be justified as necessary or proportionate".

Although Chinese law restricts the collection of DNA samples to individuals linked to a specific criminal case, police often conduct campaigns to collect biometric information and DNA data from ordinary citizens for an unspecified need to solve crimes. While any forcible collection or taking of blood samples without informed, meaningful and voluntary consent and then use of such data by the state is "a serious infringement of the right to privacy, human dignity and physical freedom" [Davidson, 2022].

1.3.2 National legal regulation of genomic security in India

India has a number of laws governing clinical research, including genetic research: *Drugs and Cosmetics Act*, 1940; *Medical Council of India Act*, 1956; *Guidelines for exchange of biological material*, 1997; *Right to Information Act*, 2005 and others.

The *Indian Penal Code*, 1860, in several articles of the Special Part makes direct or indirect reference to the use of DNA technology, particularly in offences such as culpable homicide (sec. 299), murder (sec. 300), culpable homicide by causing the death of a person other than the person whose death was interned (sec. 301), causing death by negligence (sec. 304-A), dowry death (sec. 304-B), abetment of suicide (sec. 306), causing miscarriage (sec. 312), causing miscarriage, injuries to unborn child, exposure of infant's concealment of birth of baby (sec. 313 – 315), rape (sec. 375), intercourse of man with wife during separation (sec. 376A), intercourse by a public servant with a women in custody (sec. 376B), intercourse by superintendent of jail, remand home (sec. 376C), by management staff of hospital (sec. 376D), adultery (sec. 497) (Krasheninnikova, Trikoz, 2022).

Yet, such legal acts are unclear and incomplete with regard to the identification of persons based on genetic data (e.g., for the purposes of identifying victims of natural disasters, or missing persons, etc.). In 2016, therefore, The Department of Biotechnology, Government of India initiated a special Bill on "*Use and Regulation of DNA based Technology in Civil and Criminal Proceedings, Identification of Missing Persons and Human Remains Bill*" and sent it to the Law Commission for approval.

The drafters of the bill argued that DNA profiling technology, based on proven scientific principles, is very effective for social order and stability in society, protecting against rampant crime and allowing the justice system to identify criminals by their genotype. DNA technology is actively used in solving crimes and identifying unidentified corpses, in certain types of civil disputes (succession, inheritance, paternity search), for medical purposes, etc. (Mishra, 2017).

Multiple court cases have confirmed that the DNA test has 99.99% correct conclusions and should be perceived as an objective scientific test that is almost impossible to disprove[7]. Another case highlighted that genetic testing by a party to a criminal case definitely constitutes corroborating evidence for his stand[8]. DNA testing has become an established part of criminal proceedings and the admissibility of test results has become common practice in court [Singh, 2011]. The Supreme Court of India has repeatedly upheld the admissibility of DNA testing as evidence in the process along with and in combination with other evidence, but has clarified that when there is a discrepancy between ocular evidence and medical evidence (expert-DNA evidence), the former takes precedence[9].

The very first use of DNA testing in Indian courts came in 1988 in Kerala in the paternity case[10] of *Kunhiraman v. Manoj*, just a year after the first use of genetic testing in US courts.

The Criminal Procedure Code, 1973 indirectly makes provision for DNA testing, which has long been used in complex investigative and judicial situations. For example, Article 53 of the Code provides for the examination of an accused person by a medical practitioner at the request of a police officer or investigator who has reasonable grounds to believe that the examination will yield relevant

[7] *Veeran v. Veeravarmalle & Anr*., AIR 2009 Mad. 64; *Harjinder Kaur v. State of Punjab & Ors*., 2013 (2) RCR (Criminal) 146.
[8] *Simpson v. Collinson*, (1964) 1 All ER 262.
[9] *State v. Sughar Singh*, 1978 Cr LJ 141: AIR 1978 SC 191; *Surinder Singh v. State of UP*, 2003 Cri LJ 4446; *State v. Suraj Singh Yadav*, 2004 Cri LJ 2132 (All).
[10] *Kunhiraman v. Manoj*, 1991(2) K.L.T. 190 at 195.

evidence of a crime. Section 54 provides for examination of an arrested person by a registered medical practitioner at the request of the arrested person.

In the case of *D.J. Vaghela v. Kantibai Jethabai*, 1985, the High Court held that the taking of blood, semen, saliva, urine and other samples under Section 53 of the Code of Criminal Procedure did not violate Article 20(3) of the Constitution which allows protection against self-incrimination under Sections 156 and 174 of the Code of Criminal Procedure.

The Code of Criminal Procedure (Amendment) Act, 2005 added a new Section 53-A to the code, under which a rape accused may be examined by a medical practitioner for the purpose of taking bodily samples from the accused for further genetic analysis and DNA testing [Kumar, 2018, p. 136].

Section 27(1)15 of Prevention of Terrorism Act, 2002 states that the investigating officer must make a written request to the court for permission to take samples of blood, saliva, semen, hair, handwriting, fingerprints, footprints or voice of an accused who is reasonably suspected of involvement in a terrorist offence. In that case, the court may order such samples to be given by the accused to a police officer, either through a medical practitioner or otherwise, as the case may be [Sati, 2016].

In India, barriers to realizing the potential of DNA evidence include a lack of clear communication between law enforcement agencies and court and laboratory personnel, limited resources in carrying out research on human DNA, and the use of incompatible systems for genetic testing. Corruption, falsification of court records and false results as evidence, and most importantly, the political authority of the accused, as highlighted in the high-profile Madhumita Shukla case of Uttar Pradesh (Madhumita case, 2007), remain major barriers.

After examining various court orders and constitutional provisions, the Law Commission of India in its 2017 annual report titled 'The DNA Based Technology (Use and Regulation) Bill'. Two years later, the Minister of Science and Technology of India has introduced the Lok Sabha Bill, 'The DNA Based Technology (Use and Application) Regulation Bill, 2019'. It provides for mandatory accreditation and regulation of DNA laboratories under the aegis of the DNA Regulatory Board, reliability and enhanced protection of DNA test results against misuse or misuse. The law proposes the establishment of national and regional genetic data banks, including for the purposes of forensic DNA-based investigations and forensic analysis, and the identification of missing persons, victims, offenders, suspects, missing persons and unknown deceased persons. The proposed legislation has prompted the development of a single set of ethical guidelines for all laboratories involved in DNA testing [Dhillon, 2021].

The Digital Personal Data Privacy Bill has also recently been passed, removing the distinction between sensitive personal data and general personal data.

In January 2022, after the DNA Bill was introduced in the Upper House, the Directorate of Forensic Science Services (DFSS), which comes under the MHA, issued guidelines and recommendations for collecting forensic evidence in sexual harassment cases, and set up a state-of-the-art DNA analysis laboratory - the Central Forensic Sciences Laboratory, Chandigarh. Along with this, in April 2022, the Criminal Procedure (Identification) Bill was passed, which seeks to empower investigators to collect biometric details of prisoners, despite strong protests from the opposition, which saw the law as a precursor to the police state. The law allows police to collect a variety of biometric data on inmates, including iris and retinal scans, fingerprints, palm prints, footprints, photographs, other physical and biological samples, and even behavioral traits such as handwriting samples and signatures. By "prisoners" is meant all those who have been arrested, detained, convicted or any person sent under the direction of a judicial or executive magistrate - in effect "any person involved in any crime".

Ironically, almost a century later, the previous British Identification of Prisoners Act, 1920 has been repealed and in its place the Indian government is introducing a law even more intrusive on personal data and with fewer checks and balances. For instance, this 2022 Act allows personal data records of "inmates" to be kept for 75 years and allows the National Crime Records Bureau to hand over personal data to "any law enforcement agency". This violates data protection best practices, including the principle of "purpose limitation". And the refusal of an inmate to provide a police officer with his biometric data and samples would be an offence under Section 186 of the Indian Penal Code - "obstructing public servant in discharge of public functions". This is reminiscent of the post-pandemic and external threat era methods of biopolitics on the part of state authorities.

1.3.3. Legal experience of South Africa on genetic regulation

In South Africa's multicultural and multilingual society, different perspectives on the use of biological materials prevail, as local culture attaches great importance to heritage and self-identity, passed down through generations in local tribal communities. The South African health care system therefore emphasizes that a patient's decision to participate in clinical testing should also be obtained from his or her family and tribal community. For example, the South African San Institute has developed a separate "*Code of Research Ethics*" in

which five principles are included based on the San worldview: respect, honesty, care, justice and fairness.

They are expected to be followed by geneticists and other medical researchers, adapting the usual principles of clinical ethics and due respect to San tribal culture (South African San Institute's "San Code of Research Ethics", 2017). On the other hand, the South African Constitutional Court has repeatedly stressed that constitutional values should be deciphered through the prism of the *Ubuntu philosophy* (Makwanyane, 1995).

Culturally, many ethnic groups in South Africa view family or community as central, but respect individual choice. Thus, the most important decisions are necessarily made in consultation with the family or community. The South African specificity of informed consent for DNA testing is discussed in the DoH's guidelines on Ethics in Health Research: Principles, Processes and Structures, 2015. Respect for the people of the Ubuntu tribal community requires discussion of decisions about participation in genetic testing and about sharing and consenting to genomic data with family members, as well as the secondary use of such personal data and gene samples for potentially useful research. It is characteristic of Africa that most research scientists and patient clients do not have sufficient practical and professional experience in the genomic ethics associated with DNA and exome sequencing studies. Obtaining data with genotypes and phenotypes as well as information on an individual's lineage should be monitored more closely to avoid identifying individuals, their families or tribal communities. (Wright et al., 2013).

The *South African Constitution* protects autonomy and self-determination: the right to life, dignity, psychological and physical integrity, security and control over body, and control over reproductive decisions. Article 12(2)(c) stipulates that "no one shall be subjected to medical or scientific experimentation without their informed consent" (Neethling et al., 2005).

Article 9(3) and (4) of the Constitution prohibit direct or indirect discrimination on one or more grounds, some of which are listed in the article itself (open list). The *Promotion of Equality and Prevention of Unfair Discrimination Act*, 2000 was enacted which gives effect to the constitutional equality provision. In the case of indirect discrimination, genetic abnormalities may be attributable to a particular ethnicity or even race. The sickle cell anemia is mainly found in individuals of African descent.

Article 14(d) of the Constitution enshrines a "right to know nothing and to have no information" of a personal nature in the event of breach of confidentiality of communications, which protects the confidentiality of any

communication between a person undergoing genetic testing and their physician regarding their genetic result.

A judicial example of protecting the constitutional right to privacy and personal information is *S v. Orrie*, 2004 for taking blood samples for DNA testing as part of a criminal investigation without first obtaining consent for such testing (Human Genetics in South Africa, 2018, p. 56). Particular attention should be paid to the consent requirements for minors or persons under the age of 18 in clinical settings, as provided for in sec. 129 of the *South African Children's Act*, 2005.

Article 71 of the *SA National Health Act* states that research or experimentation on a living person may only be carried out in accordance with established procedures and with the written consent of the person. The person must be informed of the purpose, the objects of the research or experiment, and any potential positive or negative effects on health (*Human Genetics in South Africa*, 2018, p. 46-47).

This raises the issue of the need to include a separate question on the informed consent form indicating whether the individual wishes to be informed if genetic data or genomic information relating to his or her lineage or tribe is accidentally discovered (De Vries et al., 2012). The *CIOMS guidelines 2016* on the ethical criteria at the point of obtaining or accidental discovery of research results: there must be analytical validity, clinical relevance and efficacy in order to qualify for returned results (Human Genetics in South Africa, 2018, p. 62).

The *Promotion of Access to Information Act*, 2000 gives effect to the constitutional right of access to any information held by the state or any person. Another Act, the *SA Protection of Personal Information Act,* 2013 requires that an individual must be given specific and explicit information about the use of his or her personal data at all times and the informed consent form must be as close as possible to the requirements of the Act. The Act emphasizes the confidentiality of medical and biometric information (including DNA information), designating these two categories as specific personal data, access to and processing of which is limited to the healthcare sector and must be in the interests of patients and clinical trial participants.

The *POPI Act* imposes a general prohibition on the processing of special personal information, but allows a number of exceptions, for example where the personal data subject has consented to its processing or where it is necessary for research, statistical or historical purposes.

It is quite rare for South African courts to hear cases of informed consent to clinical trials. For example, a landmark case was *Venter v. Roche Products* 2014, which dealt with a claim for non-medical harm resulting from a patient's

participation in a clinical trial (pain and suffering as well as loss of income, none of which was covered by the clinical insurance policy).

The *Criminal Law (Forensic Procedures) Amendment Act,* 2013 contains a requirement for informed consent for biological samples as well as provisions on access to information obtained from such samples. Article 12 of the Regulations describes the process for "removal of forensic DNA profiles from the NFDD on application": such removal must be carried out within 30 days of receipt of the relevant notifications. DNA samples for forensic purposes must be processed at an accredited laboratory that meets the appropriate ISO standard as prescribed by the *South African Police Service Act,* 1995, and the *Forensic DNA Regulations,* 2015. Clause 10(1) of the *Forensic DNA Regulations* provides that buccal and DNA samples must be destroyed no later than 30 days after receipt of the forensic DNA profile or processing of the DNA sample by the Forensic Science Laboratory.

According to the *Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act,* 2006, genetic testing and genomic laboratories must be accredited by the South African National Accreditation System. Although accreditation of laboratories in South Africa is still not a legally mandatory requirement, with the exception of forensic laboratories performing genetic tests. For forensic scientists using DNA testing, the Memorandum of Understanding between the South African Council for Natural Scientific Professions and the Health Professions Council of South Africa is important.

According to Article 4(2) of the *NHA's regulations* (regulations relating to the import and export of human tissue, blood, blood products, cultured cells, stem cells, embryos, fetal tissue, zygotes and gametes, 2012), import and export of placental tissue, embryonic or fetal tissue, stem cells are prohibited without written permission by the Director-General of Health. Article 4(10) of the *NHA's regulations* provides that biological material may only be exported to Southern African Development Community countries. However, the *NHA's regulations* do not cover the import of adult biological material, which is confusing and open to abuse in practice.

In the South African context, where particular views on biological material and human data in terms of tribal identity philosophy prevail, the role of communities in genome management and their involvement in the genetic protection of their community is important. Here, a regulatory framework called the "DNA on Loan" model, pioneered by Aboriginal and geneticist researchers in Canada, could be quite applicable. The essence of this model is that the sacredness and profound religious significance of biological material to Aboriginal peoples in Canada is initially recognized, and this is enshrined

in arrangements for the release of bio-samples in trust or on loan to geneticist researchers for specific projects. And if they wish to conduct further research or make the samples available to other experts, an application must be made to the Aboriginal communities who decide whether or not to allow such further use and whether reuse of the samples is appropriate (Arbour and Cook, 2006).

The current agenda is to introduce and adapt training programmes in South Africa to provide quality training for genetic counsellors who do not yet have adequate experience in interpreting whole genome sequencing and stranding results. Still, local clinicians and practitioners are not sufficiently trained to provide feedback to test participants and patients (Human Genetics in South Africa, 2018, p. 83-84), as medical curricula in South Africa do not take into account the rapidly evolving field of genomics and genetics. An independent and professional body, the Human Genetics Advisory Board, should be established to assess the genetic tests offered to patients in public and private health facilities, in terms of their scientific and analytical validity and clinical utility, and to investigate complaints of misuse of DNA tests, which should be targeted and appropriate to the specific population and communities in South Africa (the *value of Ubuntu*).

1.3.4. Legal regulation of genomic issues in Brazil

The right to genetic identity is an implicit fundamental right within the Brazilian legal-constitutional framework, particularly stemming from human dignity and the fundamental right to life, within the scope of a materially open concept of fundamental rights, as an implicit general clause safeguarding all essential manifestations of human personality. The genetic identity of the human person, being the biological basis of personal identity, is one of these essential manifestations of the complex human personality (Petterlee, 2007, p. 92-93).

In the constitutional level, the Article 225 of the Brazilian Federal Constitution establishes the protection of an ecologically balanced environment, essential to a healthy quality of life. In further explanation, it provides the entire legal framework necessary for the security of biodiversity, establishing a connection between human life with dignity and health, in line with the principle of intergenerational justice aimed at the protection and preservation of present and future generations, through the actions of the Public Authority and the entire community.

The ecological balance of the environment is linked to the concept of a common good of the people and essential to a healthy quality of life; therefore,

the environment, within which biodiversity is integrated, is available to meet the dignified existence of human beings, assuming that it is properly balanced. And balance stems from the preservation of life in all its forms (Martinotto, 2011, p. 75).

The legal definition of the environment adopted by the Brazilian Federal Constitution of 1988 was received based on Federal Law No. 6,938, dated August 31, 1981, which implemented the National Environmental Policy. In its Article 3, clause I, the environment is understood as the set of conditions, laws, influences, and physical, chemical, and biological interventions that allow, shelter, and govern life in all its forms (Brazil, 1981 and 1988).

In the infraconstitutional level, Federal Law No. 11,105, dated March 25, 2005, known as the Biosafety Law, established safety standards and oversight mechanisms for activities involving genetically modified organisms (GMOs) and their derivatives, aiming to protect human, animal, and plant life and health. It also regulated the permission for the manipulation of embryonic stem cells for research and therapy. This law unfolds into nine chapters: Preliminary and General Provisions (Chapter I), The National Biosafety Council - CNBS (Chapter II), The National Technical Biosafety Commission - CTNBio (Chapter III), Registration and Inspection Bodies (Chapter IV), Internal Biosafety Commission - CIBio (Chapter V), The Biosafety Information System - SIB (Chapter VI), Civil and Administrative Liability (Chapter VII), Crimes and Penalties (Chapter VIII), and Final and Transitional Provisions (Chapter IX) - (Brazil, 2005).

In addition to establishing safety standards and oversight mechanisms, it also established general concepts regarding genetically modified organisms (GMOs), defining them as organisms whose genetic material - DNA/RNA - has been modified by any technique of genetic engineering (Article 3, clause V). It defined GMO derivatives as products obtained from GMOs that do not have autonomous replicative capacity or do not contain a viable form of GMO (Article 3, clause VI). The law also delineated exclusion scenarios for GMOs (Article 3, paragraphs 1 and 2), as well as requiring prior approval before commercial release and the creation of a Biosafety Information System (Brazil, 2005).

The aforementioned law was the subject of a decision by the Brazilian Supreme Federal Court through Direct Action of Unconstitutionality (ADI) No. 3510-DF, which allowed, for research and therapeutic advancements purposes, the use of embryonic stem cells obtained from human embryos produced through *in vitro* fertilization and not used in the process. It is also noted that the use of embryos may only occur if they are unsuitable for gestation and have been frozen for 3 (three) years or more at the time of the publication of this Law (Article 5, clause II).

Furthermore, the Federal Law No. 13,123, dated May 20, 2015, regulated access to genetic heritage, the protection and access to associated traditional knowledge, and benefit-sharing for the conservation and sustainable use of biodiversity. It is important to note that this law does not apply to human genetic heritage (Article 4). Its articles 1 and 2 outline the goods, rights, and obligations protected by it and also provide the concepts and definitions to be observed when interpreting and applying the norm. The Law incorporated into its text the definitions and concepts contained in the Convention on Biological Diversity (CBD).

According to Article 2, clauses I and II, genetic heritage is considered to be the "genetic origin information of plant, animal, microbial species, or species of another nature, including substances derived from the metabolism of these living beings." Associated traditional knowledge is defined as "information or practice of indigenous population, traditional community, or traditional farmer regarding the properties or direct or indirect uses associated with genetic heritage" (Brazil, 2015).

For access to genetic heritage and associated traditional knowledge for research or technological development purposes, Law No. 13,123/2015 imposes the following requirements: i) The person accessing genetic heritage or associated traditional knowledge must not be a foreign natural person (Article 11, paragraph 1); ii) The activity must be registered with the CGEN (Article 12). The manner in which the registration will be carried out and its operation will depend on regulatory norms (Article 12, paragraph 1); iii) Prior registration with the CGEN is also required for the transfer to third parties, the application for intellectual property rights, the commercialization of intermediate products, or the disclosure of results, whether final or partial, in scientific or communication media, or the notification of finished products or reproductive materials developed as a result of access (Article 12, paragraph 2).

Regarding administrative offenses against genetic heritage or associated traditional knowledge, any action or omission that violates Law No. 13,123/2015 constitutes an offense. There are several applicable sanctions, including warnings, fines, seizure of samples containing genetic heritage, seizure of instruments used for obtaining or processing genetic heritage and/or associated traditional knowledge, seizure of products derived from these samples, temporary suspension of manufacturing and commercialization of the derived product, to partial or total closure of the establishment, among others (Article 27).

By this way, the lawmaker highlighted as fundamental principles of Law No. 11,105/2005 the principles of transparency, access to information, risk analysis, and public participation. Whereas in Law No. 13,123/2015, it regulated Article 225 of the Federal Constitution, establishing the duty of the Public Authority to preserve the diversity and integrity of the country's genetic heritage.

1.4 Conclusion

Two expert panels have been set up internationally in response to the announcement of the controversial experiment by Chinese geneticist *He Jiankui*. The UN WHO has established a multidisciplinary expert advisory committee to examine a range of issues (scientific, ethical, social, legal problems) related to genome editing and subsequently develop a global framework for the regulation of legislation in this area. In addition, at the initiative of the US Academy of Sciences, the US National Academy of Medicine and the Royal Society of London, an International Commission on the Clinical Use of Human Germline Genome Editing has been convened.

Most BRICS countries should also establish special ethical committees in the field of genomic research and manipulation of human genetic resources, which will assess genetic scientists' and clinicians' compliance with ethical and humanistic principles in the implementation of innovative developments and genetic technologies.

Against the backdrop of rapid scientific and technological progress and a strong push for experimental medicine in the BRICS countries, a legal and ethical framework aimed at regulating genomic research and protecting genetic integrity is gradually taking shape (Travieso, et al., 2021). Although in most of these countries human genome research is strictly controlled by state authorities, there are still many gaps in legislation and clinical practice in terms of ensuring the safety of genomic research and national biopolitics in general.

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CHAPTER VIII

THE POLITICAL, SOCIAL AND ECONOMIC DIMENSIONS OF THE BRAZILIAN MIGRATION LAW AND HUMAN RIGHTS IN A GLOBALIZED SOCIETY[1]

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1. BACKGROUND ISSUES

The Brazilian lawmaker has turned his attention to the issue of migratory flow, especially in light of the enactment of Decree No. 9,199 of 20 November, 2017, published in the Official Gazette on 21 November, 2017. This decree regulates Law No. 13,445 of 24 May, 2017, which was sanctioned with vetoes by the Presidency of the Republic of Brazil. The main vetoes pertained to the occupation of positions, employment, and public functions by migrants, excluding those reserved for native Brazilians in accordance with the Constitution; automatic grant of residence in the country to those approved in public competitions; use of public health services, social assistance, and social security; the right to family reunification in cases of other kinships, affective dependence, or factors of sociability; revocation of expulsions prior to 1988 and amnesty for migrants who entered without documents until July 2016; non-expulsion of migrants residing

[1] Paper revised, updated, and expanded originally published in Portuguese in Argumentum – Argumentum Journal of Law, eISSN 2359-6889, Marília/Sao Paulo, v. 19, n. 3, pp. 757-774, Sep.-Dec. 2018.

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in Brazil for more than four years who committed crimes; non-requirement of impossible or unreasonable documentary proof that hinders or prevents the exercise of their rights, including access to positions, employment, or public function; exemption from military service for Brazilians by choice or naturalized individuals who have already fulfilled their military obligations in their country of origin; as well as the free movement of indigenous peoples and traditional populations in lands occupied by their ancestors. The law that instituted the Migration Law in Brazil expressly repealed Law No. 818 of 18 September, 1949, and Law No. 6,815 of 19 August, 1980 (Statute of the Foreigner). The decree, with 319 articles, regulated issues such as the granting of visas, political asylum, refuge, residence authorization, nationality and naturalization, extradition, and infractions and their respective penalties. The law came into force on 21 November, 2017, after the expiration of the 180-day vacatio legis (Brazil, 1949), (Brazil, 1980), (Brazil, 2017).

Thus, the Migration Law treats migrants and refugees as subjects of rights and duties on an equal footing with nationals, ensuring the inviolability of the right to life, liberty, equality, security, and property, as well as guaranteeing access to public health services, social assistance, social security, the guarantee of compliance with legal and contractual obligations, and the application of labor protection standards, among other rights.

In this context, this chapter initially presents some observations on the Brazilian constitutional project for building a more fraternal society, highlighting the meaning of the word "fraternity" and the significance of the preamble to the Brazilian Federal Constitution of 1988, and making some considerations on the Brazilian Migration Law as a mechanism for realizing a more fraternal society, addressing issues related to migration, the distinction between migrants and refugees, the mobility of capital and labor. It also contextualizes the Migration Law and Decree within the Brazilian legal framework, highlighting their main innovations, and finally draws attention to some incongruities of Decree No. 9,199 of 20 November, 2017.

The method used for this research was descriptive-analytical, with an approach to categories considered fundamental for the development of the theme on the recent migration law in Brazil as a mechanism for building a fraternal society as a value that can and should be (re)constructed by law, in an approach in light of human rights and fundamental rights. The technical procedures used in the research for data collection were bibliographical, doctrinal, and documentary research. The bibliographical survey provided the theoretical and doctrinal bases from reference books and texts, both national and foreign. While

the bibliographical framework uses the authors' foundation on a subject, the documentary framework articulates materials that have not yet received due analytical treatment. The primary source of the research is the bibliography that instructed the analysis of constitutional and infraconstitutional legislation, as well as the doctrine that informs the concepts of a dogmatic order.

2. THE BRAZILIAN CONSTITUTIONAL PROJECT FOR BUILDING A MORE FRATERNAL SOCIETY

The word "fraternity" originates from the Latin term "frater," which means brother, and its derivatives "fraternitas," "fraternitatis," and "fraternitate." It is a feminine noun with three meanings: a) the relationship of siblings; brotherhood; b) love for others, fraternization; and, c) union or coexistence of siblings, harmony, peace, concord, fraternization. The verb "to fraternize," on the other hand, comes from the combination of "fraternal" + "ize" and has four meanings, namely: a) to unite with intimate, close, fraternal friendship; b) to unite closely, as between siblings; c) to ally, to join; and d) to make a common cause, to share the same ideas, to harmonize (Ferreira, 1986).

The preamble of the Brazilian Federal Constitution of 1988 conveys in its text a message that "communicates to the Brazilian people the purpose of the instituted Constitutional State" (Silva & Brandão, 2015, p. 126):

> We, the representatives of the Brazilian people, gathered in the National Constituent Assembly to establish a Democratic State, aimed at ensuring the exercise of social and individual rights, freedom, security, well-being, development, equality, and justice as supreme values of a fraternal, pluralist, and unprejudiced society, founded on social harmony and committed, in both domestic and international order, to the peaceful resolution of disputes, promulgate, under the protection of God, the following Constitution of the Federative Republic of Brazil (Brazil, 1998).

The text of the preamble reveals that the established Brazilian Democratic State is destined to ensure the exercise of social and individual rights and to consider them as supreme values of a fraternal, pluralistic, and unprejudiced society, as well as freedom, security, well-being, development, equality, and justice, which should be founded on social harmony and committed to the peaceful resolution of disputes, both in domestic and international order.

A fraternal society is understood as a type of society built by "human beings stimulated to perceive the meaning of their own existence and because

they perceive the meaning of their own existence, they adopt ways of life that give meaning to the existence of humanity and its continuity in the time and space of the biosphere" (Silva & Brandão, 2015, p. 151).

The prospect of building a global fraternal society, through the conception of a worldwide public space based on a cultural project that has as its foundation the meaning of human existence, presents a great and new challenge to humanity. In organizing their own coexistence, humanity must prioritize the human aspect over the functional aspect, wherein the human is the "relational sense of thinking and acting of the human being" (Silva & Brandão, 2015, p. 151).

As a consequence, there is a notable concern experienced in the analysis and study of contemporary society. To envision a future for all and by all human beings, it is necessary to reflect on the present, reevaluating the community in which one is inserted without forgetting that humanity lives in a global village (Sturza, 2016, p.394).

Thus, the concreteness of human dignity, the highest and fundamental value of Human Rights, will only occur in a society considered fraternal, where there is respect for others and harmonious coexistence to govern relationships among individuals. In other words, this fraternity should be understood as a virtue of citizenship that surpasses the borders of the homeland or nation (internal citizenship) in a universal perspective of the human being (global citizenship), claiming the meaning of human existence and its continuity in time and space (Machado, 2013, p. 79).

3. THE BRAZILIAN MIGRATION LAW AS A MECHANISM FOR CONCRETIZING A MORE FRATERNAL SOCIETY IN POLITICAL, SOCIAL AND ECONOMIC DIMENSIONS.

According to Bichara (2015, p. 234), states, as a rule, must adapt to international demands and, when it comes to immigration, adjust their rules. In light of recent events on the international stage, we observe an evolution in modern international law, with norms increasingly aimed at guaranteeing the mobility of people, thereby providing responses to issues related to the protection of the rights of foreigners. In all these situations, states inevitably must fulfill their international commitments, whether conventionally or non-conventionally made, respecting jus cogens (a set of imperative and non-derogable legal norms binding on all subjects of international law regardless of their will), and proceed with internal legislative reforms. The Brazilian state follows this line of thought with the promulgation of Law No. 13,445, of 24 May, 2017, which was regulated by Decree No. 9,199, of 20 November, 2017.

Migration and the protection of refugees are distinct but complementary topics. However, they are often confused in debates on irregular migration and, particularly, in the application of control measures to combat it. This often creates distortions and misunderstandings among the public and politicians. Thus, on various occasions, asylum policies are being replaced by migration policies, and immigration control measures are indiscriminately applied to asylum seekers and refugees, who are considered "migrants" until proven otherwise (Murillo, 2008, p. 27).

Migration can be defined as the movement of people who settle temporarily or permanently, being internal when within the same country or international when from one country to another. The causes for the movement of people are varied and can result from natural disasters, lack of economic alternatives, or survival conditions. In these cases, migrating to another country becomes an alternative to restart life, by seeking job opportunities and satisfying basic needs such as health, education, and food security (UNHCR; IMDH; CDHM, 2007).

As stated by Bichara (2015, p. 222), the mass migrations observed today are mainly driven by economic motivations, as some populations seek more favorable living conditions in more successful economies. This applies to both the more affluent and the less privileged, as developed states act as poles of attraction for this population movement. This sociological phenomenon of international dimensions has brought challenges to recipient countries, especially concerning illegal immigration.

Therefore, migratory movements can be seen as a creative way for individuals to deal with adverse situations or adapt to sudden changes in their context. The first perspective emphasizes the scenarios of suffering or vulnerability that migrants find themselves in, making categories like "forced migration" relevant. The premise of this view is that the connection to a place, land, or nation is a condition for a person's identity or dignity. Moreover, displacement is viewed as a form of anomaly that makes individuals vulnerable rather than a way for individuals or groups to reaffirm their dignity or cope with adverse political and economic situations (Inglês, 2015, p. 170).

In this context, refugees are a specific category resulting from forced migrations, characterized by the need imposed on individuals to leave their country of origin due to causes beyond their control without the possibility of return. Thus, refugees are those who cannot rely on the protection of their state of origin and suffer persecution based on race, nationality, religion, their political opinions, or are victims of severe human rights violations (UNHCR; IMDH; CDHM, 2007).

It is important to note that the origin of refugee rights is closely linked to the emergence of the International Human Rights System. Codified by the Universal Declaration of Human Rights in 1945 by the United Nations (UN), Refugee Law sees its first reflection in the rights of minorities. Subsequently, the 1951 Refugee Convention and the 1967 Additional Protocol emerged as the primary sources of international refugee law (Veiga, 2017, p. 29).

Currently, migratory flows are primarily driven by the inequalities existing between countries worldwide and/or within the same country, posing a significant challenge to the "state form of closed belongings, governed by ambiguous mechanisms that include citizens while excluding all others." Migratory flows generate concerns about the ineffective protection of human rights, precisely because these rights are inherent to humanity itself, yet they are "those that can only be threatened by humanity itself" (Resta, 2004, p. 12-13).

International migrants are nearly 150 million at the beginning of this century, as we define a migrant as anyone residing in a foreign country, representing 2.5% of the global population. There were 75 million in 1965 and 120 million in 1990, according to available figures. And even though these estimates, calculated solely based on stocks, are inaccurate, they highlight the progression of displacements over the last forty years. But the predictions are even higher if we consider that, according to some sources, by the end of the century, nearly 1 billion people will be on the move (Hily, 2003, p. 1-2).

As indicated by Bauman (1999, p. 69), national border controls and international cooperation in managing migrations have become highly restrictive, driven by the interests of a minority. Most people do not have the economic resources or political rights necessary for free movement. We are far from a world of borderless mobility. The complexity and diversity of the global population redistribution process, with about 244 million immigrants in 2015, point to a new geopolitical context of international migrations with implications for Brazil (UN, 2015).

The mobility of capital and labor and their impacts on daily social life, labor markets, the societies of arrival and departure, financial flows, and international migrations are reshaping countries within migratory spaces in the international division of labor. In this sense, a new international and national migratory configuration emerges from places embedded in the logic of global production, with various forms of flows (re)designed within the scope of transnational migrations (Baeninger, 2017, p. 13), (Sassen, 1988), (De Hass, 2010), (Guarnizo, Portes & Haller, 2003), (Portes, 2004).

In any case, international migrations are likely to intensify, corresponding to the same pace as capital mobility in contemporary times, with the consequent

redefinition of the relationship between migration and development. In the hierarchy of global geopolitics, transnational refugee migrations, their directions, and meanings become expressions of the functioning of the global market and the labor market (Baeninger, 2017, p. 13-14), (De Hass, 2010), (Basso, 2003).

4. CONTEXTUALIZING THE LAW AND DECREE ON MIGRATION WITHIN THE FRAMEWORK OF THE BRAZILIAN LEGAL SYSTEM FROM THE PERSPECTIVA OF HUMAN RIGHTS.

In establishing a legal typology of migrants, Law No. 13,445 of 24 May, 2017, regulated by Decree No. 9,199 of 20 November, 2017, abandons the concept of "foreigner" (from the Latin extraneus, commonly meaning alien, evasive, strange, or improper). This term not only carries a pejorative connotation in our culture but is also legally enshrined in the existing law as a second-class subject, unjustifiably deprived of a significant portion of the rights granted to nationals in a democratic regime (Morais, Pires Júnior & Granja *et al.*, 2014).

In line with this perspective, Law No. 13,445 of 24 May, 2017, in its Article 1, addresses the rights and duties of migrants and visitors, regulates their entry and stay in the country, and establishes principles and guidelines for public policies concerning immigrants and refugees. It subsequently defines, in its clauses, the term "immigrant" as a person of another nationality or a stateless individual who works or resides and settles temporarily or permanently in Brazil; "emigrant" as a Brazilian who establishes themselves temporarily or permanently abroad; "border resident" as a national of a neighboring country or a stateless person who maintains their habitual residence in a border municipality of a neighboring country; "visitor" as a person of another nationality or a stateless individual who comes to Brazil for short stays without intending to settle temporarily or permanently in the national territory; and finally, "stateless person" as someone who is not considered a national by any State under its legislation, as per the 1954 Convention Relating to the *status* of Stateless Persons, promulgated by Decree No. 4,246 of 22 May, 2002, or as recognized by the Brazilian State (Brazil, 2002), (Brazil, 2017).

Article 3 handles Brazilian migration policy, which is governed by principles and guidelines such as the universality, indivisibility, and interdependence of human rights (clause I); the non-criminalization of migration (clause III); non-discrimination based on the criteria or procedures by which the person was admitted to national territory (clause IV); humanitarian reception (clause VI); equal treatment and opportunity for migrants and their families

(clause IX); social, labor, and productive inclusion of migrants through public policies (clause X); equal and free access for migrants to services, programs, and social benefits, public goods, education, comprehensive public legal assistance, work, housing, banking services, and social security (clause XI).

As a result of this strong body of premises, Article 4 is in harmony with the constitutional text, ensuring that migrants in the national territory, in equal conditions with nationals, have the inviolability of the right to life, freedom, equality, security, and property, as well as guaranteeing, among others: access to public health and social assistance services and social security, in accordance with the law, without discrimination based on nationality or migratory status (clause VIII); guarantee of compliance with legal and contractual obligations and the application of labor protection norms, without discrimination based on nationality and migratory status (clause XI); exemption from the fees referred to in this Law, upon declaration of economic insufficiency, in the form of regulation (clause XII).

Specifically, Decree No. 9,199 of 20 November, 2017, in its Article 1, introduces the concept of a refugee as a person who has received special protection from the Brazilian State, as provided in Law No. 9,474 of 22 July, 1997 (clause VII). Article 3 is categorical in stipulating that it is prohibited to deny a visa or residence or to prevent entry into the country on grounds of ethnicity, religion, nationality, membership of a social group, or political opinion. In this open scope, the centrality of human dignity (Federal Constitution of 1988, Article 1, III); the construction of a free, just, and solidary society (Federal Constitution of 1988, Article 3, I); and the promotion of the well-being of all, without prejudice based on origin, race, sex, color, age, or any other form of discrimination (Federal Constitution of 1988, Article 3, IV), gain special importance and require that the Brazilian legal system be realized without losing sight of these constitutional scopes (Brazil, 1988), (Brazil, 2017).

The horizon to be pursued is the universal citizenship of migrants and refugees, which cannot differ from that of a national citizen, configured in the set of inalienable rights intrinsic to the human being, whose respect and protection cannot vary based on whether a person was born here or elsewhere, or because they hold this or that nationality (Milesi, 2007).

In this perspective, the concept of citizenship presupposes three basic elements in its constitution, namely: the civil element, which includes individual freedoms, the right to come and go, freedom of the press, thought, and faith, the right to property and to conclude valid contracts, and the right to justice. The second element is the political one, which implies the right to participate in the exercise of political power - the right to vote and to be voted for (institutions

corresponding to parliament and local councils). The third element concerns the social life of citizens, meaning that everyone has the right to a minimum level of social and economic well-being produced by all, and that no one can be excluded from the social heritage of a given society. This is achieved through the educational system and social services (Silva, 2017, p. 87), (Marshall, 1967, p. 63-64).

With the increase in human mobility in its different facets, including labor migrants, refugees, returnees, displaced persons, forced migration, undocumented migration, among others, the debate around the rights of migrants, even in situations of undocumented *status* and social vulnerability, is growing. This is because the right to life should prevail over the regulations established by national states, which are generally restrictive and discriminatory. In this context of rights violations, the concept of "transnational citizenship" begins to be discussed, both in the realm of social movements and international organizations (Silva, 2017, p. 88).

An example of this is the various international conventions, including the 1990 United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (which Brazil has not signed and has not yet adhered to); the residence agreements signed within the scope of MERCOSUR; the Declaration of the Union of South American Nations (UNASUR), signed in Brasília in 2008, with the primary objective of expanding "cooperation in the field of migration, with a comprehensive approach under the unrestricted respect of human and labor rights for migratory regularization and the harmonization of policies" - Article 3, point k. (Silva, 2017, p. 88).

Other important instruments for the protection of migrants are the International Labor Organization (ILO) Conventions, including the Migration for Employment Convention No. 97 (revised) of 1949; No. 143 of 1975; and No. 189 of 2011, which address the rights of a less protected category among migrants, namely domestic workers (Silva, 2017, p. 88).

A notable novelty is Article 55, II, subparagraph "a" of Law No. 13,445/2017, with an identical provision in Article 193, II, subparagraph "a" of Decree No. 9,199/2017, where the Ministry of Justice and Public Security shall not proceed with the expulsion of those referred to in Article 192 when the expellee "has a Brazilian child under their guardianship or economic or socio-affective dependence, or has a Brazilian person under their tutelage."

In this context, the Justice Marco Aurélio of the Supreme Federal Court, when ruling on *Habeas Corpus* 148.558-SP, published in the Official Journal on 12 December, 2017, granted a preliminary injunction to suspend the act of expulsion provided for in Ordinance No. 2,911/2008 of the Ministry of Justice.

This was a reinterpretation of the impossibility of expelling the patient of Peruvian nationality due to the existence of a Brazilian daughter without the need for any chronological criterion according to revoked legislation.

The judgment marks the end of the sentence served for the offenses described in Articles 12 (drug trafficking) and 14 (association for trafficking) of Law No. 6,368/1976, which was in force at the time, and the conviction became final on 30 March, 2004. Faced with the imminent compulsory removal from Brazilian territory, the patient submitted the birth certificate of a child born on 27 June, 2010; a handwritten statement from the mother of the minor; and bank deposits claimed to be intended for the daughter.

According to the Justice, Law No. 13,445/17 entirely revoked Law No. 6,815, dated 19 August, 1980, known as the Statute of the Foreigner. Article 55, Section II, Subsection "a" of the so-called Migration Law removes the chronological condition regarding the birth of children in the country, requiring only the existence of a Brazilian descendant under the foreigner's guardianship or economic or socio-affective dependency to prevent expulsion. This justifies the suspension of the compulsory expulsion process until a merit judgment is made.

Another peculiarity is the regulation of the transfer of convicted persons, as provided in Article 285 of the regulatory decree. This functions as a mechanism of international legal cooperation of a humanitarian nature, aimed at contributing to the social reintegration of the beneficiary. It can be granted when the request is based on a treaty to which the country is a party or there is a promise of reciprocity of treatment.

Lastly, Decree No. 9,199/2017 allows the migrant to request, at any time, the inclusion of their social name, alongside their civil name, in the migrant registry databases (Article 69, Paragraph 4). However, according to Article 76, changes to the civil name can only be made after a judicial decision. Therefore, the migrant is solely responsible for keeping their registry data updated (Article 70, sole paragraph).

4.1 Inconsistencies of Decree No. 9,199, November 2017

Undoubtedly, Decree No. 9,199, 20 November, 2017, which regulated Law No. 13,445, 24 May, 2017, introduced significant advances in the protection of immigrants and refugees in Brazil, reflecting its commitment to obligations assumed through international human rights treaties.

However, the Decree includes aspects that clearly oppose the spirit of the Migration Law, such as Article 28, Section V, which regulates the denial of a visa

to a person who has committed an act contrary to the principles or objectives laid out in the Federal Constitution of 1988. By not defining what constitutes an "act contrary to the principles or objectives laid out in the Constitution," the lawmaker grants discretionary power to the Executive Branch to refuse visas and residence permits to individuals deemed undesirable. This provision is also found in Articles 133, Section V, and 171, Section IX.

The Decree also fails to regulate the National Policy on Migration, Refuge, and Statelessness prescribed in Article 120 of Law No. 13,445/2017, which provides for the participation of civil society and other social and governmental actors to implement it in accordance with the principles and guidelines of the Migration Law, reflecting the values of the Federal Constitution of 1988.

Similarly, the Decree remains silent on the regulation of granting temporary visas for humanitarian reception, as provided in Article 14, Section I, Subsection "c," Paragraph 3 of the Migration Law, which states:

> the temporary visa for humanitarian reception may be granted to stateless persons or nationals of any country facing severe or imminent institutional instability, armed conflict, large-scale calamity, environmental disaster, or serious violations of human rights or international humanitarian law, or in other situations, as provided by regulation.

Article 36, Paragraph 1 of Decree No. 9,199/2017 further stipulates:

> a joint act of the Ministers of State for Justice and Public Security, Foreign Affairs, and Labor shall define the conditions, deadlines, and requirements for issuing the visa mentioned in the caput for nationals or residents of specified countries or regions.

Unfortunately, the progress envisaged by the reading of Article 14, Section I, Subsection "c" of Law No. 13,445/2017 was only theoretically robust. In practice, its regulation was transferred to a joint act of the Ministers of State for Justice and Public Security, Foreign Affairs, and Labor.

Another commendable provision is the granting of a temporary visa for the purpose of family reunification, as provided in Article 45 of the Decree, which will be granted to immigrants: i) a spouse or partner, without any discrimination, according to Brazilian legal framework; ii) a child of a Brazilian or of an immigrant holding a residence permit; iii) an individual who has a Brazilian child; iv) an individual who has a child who is an immigrant holding a residence permit; v) an ascendant up to the second degree of a Brazilian or of an

immigrant holding a residence permit; vi) a descendant up to the second degree of a Brazilian or of an immigrant holding a residence permit; vii) a sibling of a Brazilian or of an immigrant holding a residence permit; or viii) an individual who has a Brazilian under their guardianship, curatorship, or custody.

However, in accordance with Article 37 of Law No. 13,445/2017, such a concession should occur "without any discrimination," but the Decree improperly adds the expression "according to Brazilian legal framework" to Section I (first).

Though, another aspect of particular importance must be highlighted: this concerns the possibility of granting temporary visas for research, teaching, or academic extension; for work; for carrying out investments or activities of economic, social, scientific, technological, or cultural relevance; and for artistic or sports activities under a fixed-term contract as provided by law in Article 34, Paragraph 6; Article 38, Paragraph 9; Article 42, Paragraphs 3 and 4; Article 43, Paragraphs 3 and 4; and Article 46, Paragraph 5. These visas depend on the approval of a residence permit by the Ministry of Labor prior to the issuance of the temporary visa, which will require the Ministry of Labor to define the bureaucratic procedures due to its new responsibility.

Regarding the granting of temporary visas to migrants seeking work in Brazilian territory (Article 14, Subsection "e" of Law No. 13,445/2017; Article 38, paragraph 1º, Section I of Decree No. 9,199/2017), it must be acknowledged that this provision represents significant progress in this area. However, there arises a question regarding the requirement of a "formalized job offer by a legal entity operating in the country" as per Article 14, Paragraph 4. Clearly, an employment contract does not constitute an offer but rather the consummation of the legal act of an employment or service relationship completed by the parties. Therefore, this requirement will increase the difficulty for migrants in obtaining visas, leaving those without a job offer unprotected. This scenario may prevent companies from hiring migrants due to the legal uncertainties arising from having employees waiting for a temporary work visa.

In turn, Article 171 opens the possibility, after an individual interview and through a substantiated act, to prevent the entry of a person into the country for not complying with the temporary or permanent recommendations of public health emergencies of national importance as defined by the International Health Regulations (Section XIII); or for not complying with the temporary or permanent recommendations of public health emergencies of national importance as defined by the Ministry of Health (Section XIV). This could provide grounds for potential discrimination against migrants for health reasons.

Another issue is the use of the term "barred or clandestine immigrant" in the caput of Article 172 and its sole paragraph, which could certainly contribute

to increasing discrimination against migrants in irregular situations in Brazil and cause an offense to the provision of Section II of Article 3 of the Migration Law, which provides for the "repudiation and prevention of xenophobia, racism, and any forms of discrimination."

Among these provisions, Article 27, Section IV, must be highlighted for containing an authoritarian bias by stipulating that a visa will not be granted "to anyone who, at the time of the visa application, behaves in an aggressive, insulting, or disrespectful manner towards the agents of the Brazilian consular service." Undeniably, this provision, in addition to contradicting the mens legislatoris of the Migration Law, could also lead to undesirable arbitrariness.

No less important is the wording of Article 81 of Decree No. 9,199/2017, which establishes the obligation of Civil Registry Offices to send monthly information about the registrations and deaths of migrants to the Federal Police. Given the broad scope of the term "registrations," it is unclear whether all records or only birth records will be included. Moreover, there is no plausible justification for the Federal Police to maintain this database.

Another issue pertains to Article 123, which states that "no one shall be deprived of their liberty for migration reasons, except in cases provided for in this law," which in practice means ensuring access to legal assistance and due process of law. In turn, Article 211 of Decree No. 9,199/2017 opens up the possibility of ordering the arrest of deportees and/or immigrants in an irregular situation, based on the provision that allows the Federal Police delegate to request from the federal court the arrest or another precautionary measure. This undermines the ethnic, racial, religious, and cultural pluralistic character of Migration Law No. 13,445/2017.

Thus, in conducting its migration policies, the host country must imperatively take into account its international obligations, which will prevail over its territorial competence. However, the exercise of the state's territorial competence may require some balancing, given the demands of international coexistence. Hence, the boundary between state self-determination and international law is indeed shifting, evolving according to the contingencies of humanity, where states are obliged to respect, especially concerning the rights of immigrants (Jubilut & Menicucci, 2010, p. 279-280), (Bichara, 2015, p. 227).

Therefore, there is a need to advocate for the implementation of the minimum standards of human rights agreed upon internationally, so that the protection of human dignity remains constant and not just a simple palliative, in situations where the violation is so severe that it causes the individual to lose what makes them human: their community (Jubilut, 2007, p. 2007).

5. FINAL CONSIDERATIONS.

It is never unnecessary to recall that the Universal Declaration of Human Rights of 1948 (even though it is considered a soft law instrument) guarantees every human being the right to free movement between states, the right to establish their residence within the borders of each state, and the right to leave and return to their home state or the state where they currently reside at their convenience (Article 13, paragraphs I and II), also conceived as a human right.

The dimensions of human dignity are updated at every moment, which may lead to an expansion of the content of rights or even the creation of new Fundamental rights (Habermas, 2012, p. 14). Thus, the global change in perspective in the treatment of migrants necessarily involves the internal legislative changes of countries, such as Brazil, that can understand the issue of migration as an undeniable and challenging reality. This issue, beyond merely controlling, policing, and state aspects, should be viewed as a social matter, under the paradigm of respecting human rights in their entirety. The phenomenon of international migration points to the need to rethink the world not based on economic competitiveness and the closure of borders but rather on the promotion of universal citizenship, solidarity, and fraternity, and on humanitarian actions (Milesi & Marinucci, 2005).

The normative advancement of Brazilian migration legislation, which advocates for the equality and integration of migrants and refugees into Brazilian society as subjects of rights and duties, is evident. These foundations align with the principles and rules established by the Federal Constitution of 1988 and are important for the image of a country that knows how to deal with complex and highly relevant international issues, such as migration.

However, the incongruities highlighted in the migration legislation could lead to an institutional discourse of restriction and selection of migrants, with clear detriment not only to national development through cultural exchange and human development but also due to the failure to fill job vacancies in certain sectors of the economy. This situation will require a revision of Decree No. 9,199, 20 November, 2017.

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