The Definition of Slave Labor for Criminal Enforcement and the Experience of Adjudication: The Case of Brazil

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THE DEFINITION OF SLAVE LABOR FOR CRIMINAL ENFORCEMENT AND THE EXPERIENCE OF ADJUDICATION: THE CASE OF BRAZIL

The Honorable Carlos H. B. Haddad*

Abstract: The paper examines the intersections and differences between “slave labor” as used in the Brazilian domestic sphere and “slave labor” as applied to international law. The former shows an approach centered on criminal law, as opposed to human rights law. This paper explains why degrading working conditions and debilitating workdays should continue to be prohibited and punished. It also compares the sanctions of the Brazilian Criminal Code with those of similar crimes in other jurisdictions. It concludes with a discussion of the current bill proposed by Senator José Sarney, which would replace the current definition with one that more closely reflects international standards.

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debilitating workdays should be seen as components of the criminal offense defined in Article 149. It also compares the sanctions of Article 149 with those of similar crimes in other jurisdictions. It then considers a recent bill proposed by Senator José Sarney, which would replace the current definition with one that more closely reflects international standards.¹

In addition, this paper reports empirical data collected by the author, a federal judge, in deciding more than fifty criminal cases involving charges of slave labor in Brazilian rural areas from 2008 to 2010.

In Brazil, ownership of persons as property was abolished only in 1888.² The first formal recognition of modern labor conditions as “slavery” came about in 1971.³ A Church in Conflict with Amazon Landlordism and Social Marginalization, the Pastoral Letter of Pedro Casaldáliga, Bishop of São Félix do Araguaia, in the state of Mato Grosso, was the first public text to expose the reality of rural workers in Brazil for what it was: slave labor.⁴

Two issues that are rarely made explicit in the study of slave labor in Brazil are: 1) Why punish the conduct? and 2) How should we determine the dimensions of that punishment? The answers to these questions have become important in determining whether to approach the issue from the perspective of criminal law or human rights law.⁵ In general, the focus on criminal sanctions often shifts focus from the victim to the perpetrator, whereas the focus on human rights does the opposite.

By addressing these questions directly, we may better understand the definition of slavery in current Brazilian domestic law. Although Article 149 of the Penal Code dates back to the 1940s, the first Brazilian statute to explicitly address the issue of contemporary slavery is relatively recent, especially compared with longstanding international standards.⁶ In the years since the statute’s enactment, the Brazilian government has made

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¹ Projeto de Lei do Senado No. 236, de 10 Julho de 2012, DIÁRIO DO SENADO FEDERAL [D.S.F.], 106: 33173-33797, Julho 2012 (Braz.).
² Lei Aurea, de 13 de Maio de 1888 (Braz.) (The Lei Aurea was enacted in 1888 and it had only two articles. Article 1 reads, “from this date forward, slavery is declared abolished in Brazil,” Article 2 reads, “all dispositions to the contrary are revoked.”).
³ ˆAngela de Castro Gomes, Repressão e mudanças no trabalho análogo a de escravo no Brasil: tempo presente e usos do passado, 32 REVISTA BRASILEIRA DE HISTÓRIA 167, 174 (2012).
⁴ Pastoral Letter from Pedro Casaldáliga, Bishop of São Félix do Araguaia (Oct. 10, 1971), http://www.servicioskoinonia.org/Casaldaliga/cartas/1971CartaPastoral.pdf (Casaldáliga notes that it was practically impossible for the church to provide pastoral action to workers unless it accepted the social oppressiveness of landowners. In doing so, he refers to “the workers” as peões escravos, which can be understood as slave serfs.).
⁶ Decreto No. 9.777, de Dezembro 1998, CÓDIGO PENAL [C.P.] de 29.12.1998 (Braz.) (Amending Articles 132, 203, and 207 of the Penal Code, which is a “basket of crimes” related to slave labor as follows: 132 - Exposing a person’s life or health to direct and imminent danger; 203 - thwarting the rights secured by labor legislation by fraud or violence; 207 - enticing workers and transporting them from one place to another within the national territory by fraud).
continuing efforts to eradicate slave labor. But the difficulties are countless. First, how should the government define slave labor? Here, precision is important for the purposes of criminal enforcement.

I. THE BRAZILIAN DEFINITION OF SLAVE LABOR

Since gaining independence from Portugal in 1822, Brazil has had three criminal codes. The first, the Criminal Code of the Empire of 1830, was passed when slavery was legally allowed, and considered slaves to be potential criminals rather than victims. References to slavery regulated punishment: the Code stated that moderate corporal punishment of slaves by masters was justifiable (Article 14 (6)); it established the punishments that could be applied to slaves and to what degree (Article 60); and it defined the crime of insurrection (Articles 113-115) as “[g]athering up twenty or more slaves to seek freedom through violence. Penalty: death.”

Slaves were for most purposes legally considered to be non-persons unless they committed a crime (or sued for their freedom). This Code of 1830 did include a crime of “reduc[tion] to slavery” (Article 179), which made sense in a time when slavery was legally regulated and society was divided by attributed status into free and unfree people. In addition to the widespread practice of illegal enslavement, there were several legally sanctioned situations – such as conditional manumissions and revocation of freedoms – “that often made the boundaries between slavery and freedom uncertain, thus constituting a structural feature of that (Brazilian) society, conducive to strategies for the control of workers, slave and free, based on personal dependence and paternalist ideology”

The subsequent Penal Code of 1890 was silent on any crime related to slavery, surely because the institution was formally abolished in 1888. The Penal Code of 1940, however, did criminalize the conduct of “reducing a person to a condition analogous to that of a slave,” designating it a felony. The inspiration for this move seems to have come from Article 603

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8. Lei de 16 de Dezembro de 1830, 39 livro 1º de Leis, Secretaria de Estado dos Negocios da Justiça de 07.01.1831 (Braz.).


10. Lei de 16 de Dezembro de 1830, supra note 8. This crime was defined as reducing to slavery a free person who is in possession of his freedom. The Penalty was three to nine years in addition to a fine.


12. Decreto-Lei No. 2.848, art. 149, de 7 de Dezembro de 1940, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31.12.1940, 23911 (Braz.) (enacting the Penal Code through presidential decree in 1940, when Congress was closed for the period of Estado Novo under President Getúlio Vargas). The current wording of Article 149 was defined by a 2003 statute: Lei No.
of the Italian Penal Code of 1930, enacted in the Mussolini era (which coincided in Brazil with the rule of Getulio Vargas): “Anyone who submits a person to his or her power in order to reduce [that person] to a total state of subjection shall be punished with imprisonment from five to fifteen years.”

The incorporation of the Italian model was determined more by the usual influence of European models on Brazilian legal order than by a conscious acknowledgement of the need to criminalize the practice of slavery-like situations. One of the drafters of the Brazilian Penal Code of 1940, Nélson Hungria, reacted resolutely against criticism from Eugenio Florian, who, in his book Delitti contro la liberta individuale (Crimes Against Individual Freedom, 1936), referred to the enslavement (asservimento) of workers on Brazilian farms. Hungria accused Florian of having as little knowledge about Brazil as he did about the language spoken there. He believed that criminal cases involving slave labor in Brazil would be very rare, and had included the conduct of reducing someone to slavery in the Code only because there might be an exceptional case. And yet, more than seventy years after Florian’s observation, we are still addressing l’asservimento on Brazilian farms.

The crime was inserted into the chapter of crimes against personal freedom and was concerned exclusively with curbing behaviors that attempted to limit freedom of movement. This left a mark so strong that

13. In 1981, the Italian Constitutional Court (sentenza n. 96) re-evaluated this old provision, and declared the entire article to be unconstitutional. According to the Court, the various and conflicting interpretations of Article 603 reflected its imprecision and vagueness. It was impossible to attribute any objective, rational, or consistent meaning to its application. The article could thus be applied to any event involving the psychological dependence of one human being on another human being, and there was no objective measure to determine the degree of subjection. The article thus ran counter to the principle of lex certa in criminal matters, as enshrined in Article 25 of the Italian Constitution, and therefore had to be regarded as unconstitutional. Corte Cost., 9 aprile 1981, n. 96 (It.).


15. 6 NELSON HUNGRIA, COMENTARIO AO CODIGO PENAL 200 (Forense 5th ed. 1980).

16. Id.


18. Several decisions by the Tribunal Regional Federal da 1ª Região only recognize that the crime of reducing someone to a condition analogous to that of a slave has been committed when there is restriction of movement. See Mariana Dias Paes, O Crime de Redu-
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the Justice of Supreme Court, Dias Toffolli, could argue as late as 2012
that there was no crime when there was no restriction on freedom of
movement of the worker, on the grounds that the crime had always been
interpreted as an attack on personal freedom.19 Forced labor, however,
has in fact acquired new meanings in more recent contexts,20 This trans-
formation has come about through the globalization of the Brazilian econ-
yomy and the increasingly precarious nature of the traditional social
relationships that had established identity boundaries in families, in
school, and at work. It was in the 1970s in Brazil that the category of “slav-
ery” again became active, attained its legal and political standing, and be-
came a powerful resource for social mobilization.21 The issue at hand,
then, is not so much the term’s existence tout court, but rather how it ac-
quired multiple meanings as well as new political force. That story must
track the interventions of a series of social players since the 1970s, culmi-
nating in major legislative changes in 2003.

The original text of Article 149 simply labeled as a crime “reduc[ing]
someone to a condition analogous to that of a slave.”23 The laconic style
rendered the rule vague and uncertain, which is generally considered to be
unacceptable in criminal law matters.24 In 2003, however, Congress passed
a statute that clarified the Article’s meaning.25 This reform stemmed from
the experiences of Special Mobile Inspection Teams, inspectors who wit-
tnessed the working conditions during visits to the country’s hinterland.26

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                JUDICIÁRIO ELETRÔNICO [D.J.E.], 12.11.2012 (Braz.).

20. Ângela de Castro Gomes, Trabalho Análogo a de Escravo: Construindo um

21. The word “slavery” began to appear much more often in government texts and in
                the speeches of civil society, especially those by Catholic Clergy, in the 1970s. See Luciene Aparecida Castravechi, Correntes do Araguaia: A Exploração de Trabalhadores Migrantes
                Federal de Mato Grasso Cuiabá).

22. Gomes, supra note 20, at 21.


26. The Special Mobile Inspection Team was created in 1995. When workers were
                found working in conditions analogous to slavery, they were to be rescued by the Special
                Group, whose main objective is securing the safety and rights of workers. These groups re-
                main in operation. The labor inspectors compile infraction reports, give out work permits,
                register workers for unemployment insurance and close places down when necessary. But
The reform occurred shortly after the Brazilian government signed, for the first time in its history, a Friendly Settlement recognizing international responsibility for human rights violations committed by private persons, as well as for the conditions that had given rise to the case of José Pereira, which was heard before the Inter-American Commission on Human Rights (IACtHR). Despite this kind of solution being common among OAS member countries, Brazil had never before assumed responsibility in these terms. The result came through a suit initiated in 1994 by the Center for Justice and International Law (CEJIL), the Pastoral Land Commission (CPT) and Human Rights Watch, denouncing the Brazilian state’s failure to prevent and punish the practice of slave labor.

José Pereira, who was seventeen years old, was enslaved and, along with more than sixty other workers in the same area, had his freedom of movement obstructed by hired thugs. Trying to escape from the farm, Pereira and another worker were shot at with rifles. According to reports, Pereira escaped “by a miracle” because he was presumed dead by the attackers. The other worker, named “Paraná,” died from the shooting. Their bodies were thrown into a field, but Pereira managed to reach a nearby farm and get help. He lost his eye and the movement of his right hand, but survived. His first complaint was filed with the Federal Police in 1989.

they also have an important role in gathering evidence for criminal enforcement. The Special Group has proved to be an efficient mechanism to rescue workers, apply administrative penalties, recover workers’ assets (from payments to severance pay) and, most importantly, for the purposes for the present essay, to provide evidence for the Federal Public Prosecutor. The Special Group is constituted of labor inspectors whose work is supported by prosecutors of the Labor Prosecutions Office (Ministério Público do Trabalho - MPT), agents and marshals of the Federal Police (Policia Federal - PF), and the Federal Highway Police (Policia Rodoviária Federal - PRF). The conception of the Group represents an innovation in terms of inter-institutional cooperation. Cristiano Piaxão & Leonardo Barbosa, Perspectives on Human Dignity (On Judicial Rulings Regarding Contemporary Slavery in Brazil), 44 Quaderini Fiorentini 1167, 1168 (2015).

28. The IACHR is one of the two organs of the Inter-American system entrusted with promoting and protecting human rights. See Org. of Am. States [OAS], What is the IACHR?, http://www.oas.org/en/iachr/mandate/what.asp.
29. All thirty-five independent countries of the Americas have ratified the OAS Charter and belong to the Organization. The following twenty-one member states met in Bogotá, Colombia, in 1948 to sign the OAS Charter: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay, and Venezuela (Bolivarian Republic of). Subsequently, the following fourteen member states joined: Barbados, Trinidad and Tobago (1967); Jamaica (1969); Grenada (1975); Suriname (1977); Dominica (Commonwealth of), Saint Lucia (1979); Antigua and Barbuda, Saint Vincent and the Grenadines (1981); The Bahamas (Commonwealth of) (1982); St. Kitts & Nevis (1984); Canada (1990); Belize and Guyana (1991). See Org. of Am. States [OAS], Member States, http://www.oas.org/en/member_states/default.asp.
31. Telma Barros Penna Firme, O Caso José Pereira: A Responsabilização do Brasil por Violação de Direitos Humanos em Relação ao Trabalho Escravo 19 (Dec. 2, 2005) (un-
Brazil’s public recognition of its own responsibility began with the establishment of the National Commission for the Eradication of Slave Labor (CONATRAE) on September 18, 2003, which represented an intensified commitment to make efforts to end slave labor.\(^{32}\) Since the Friendly Settlement, there have been numerous successes in the fight against slave labor, ranging from combating recruitment of workers to farms, legislative actions to clarify criminal practices, and increased efforts toward awareness campaigns.\(^{33}\)

However, those achievements were not enough to convince the IACtHR that Brazil’s efforts in this area had been sufficient. The Brazilian government had indeed taken steps in 2003 to revise the Penal Code, but these were not satisfactory to remove the IACtHR jurisdiction. On March 6, 2015, the IACtHR submitted the case of Fazenda Brasil Verde, another farm in the same region, to the jurisdiction of the Inter-American Court.

Since 1989, state authorities had been conducting inspections of the Fazenda Brasil Verde to check on workers’ conditions.\(^{34}\) These visits verified the existence of slave labor, work irregularities, and other flaws in compliance at the estate. Workers who managed to escape reported that there had been death threats should they leave the estate, a deterrent to moving freely; lack of payment or the provision of only paltry wages; imposition of debt vis-à-vis the estate owner; and lack of decent housing, food, and health care, among other improprieties.\(^{35}\) The Commission argued that the information available warrants characterizing practices at the estate as “forced labor and indentured servitude as a modern form of slavery.”\(^{36}\) The IACHR declared that Brazil should be held responsible for failing to ameliorate this situation. Even though it was aware of the case, the State failed to take reasonable prevention and response measures and failed to provide victims with an effective judicial mechanism for the protection of


\(^{33}\) One of the campaigns launched by the Minister of Labor and Social Security (MTPS) is called “Slave Labor Never Again.” The campaign brings together a series of videos that tell real stories of workers rescued from conditions analogous to slavery, and the development of the fight against the practice in Brazil. For the campaign see Ministério do Trabalho e Previdência Social, \textit{Trabalho Escravo Nunca Mais}, TRABALHO.GOV.BR, http://trabalho.gov.br/trabalhoescravonao/ (last visited May 21, 2016).


\(^{35}\) \textit{Id.} at 4.

their rights, the punishment of those responsible, and the procurement of reparations.

A Friendly Settlement had not been reached by 2011, and Brazil was judged not to have advanced in complying with the recommendations contained in the Commission’s Merits Report. Although the state had submitted extensive information on the regulatory and public policy on the matter, it had not advanced recommendations to adequately compensate victims for general, punitive, and special damages, nor had it presented information on measures to implement the recommendations relating to the investigations of the case facts.

IACHR notes that this case also involves issues of inter-American public order. The jurisprudence might usefully focus on developing criteria on forced labor and contemporary forms of slavery. The court might develop criteria under which a member state may be considered responsible for the existence of such practices – in particular, the extent of the obligation to prevent acts of this nature by individuals and the scope of the duty to investigate and punish such violations.

While the Brazilian government’s efforts were not sufficient to remove the court’s jurisdiction in the case of Fazenda Brasil Verde, they have resulted in changes to the Brazilian Penal Code. With the 2003 emendations, Article 149 now reads:

Reducing someone to a condition analogous to that of a slave:

- submitting a person to forced labor, debilitating workdays, or degrading conditions of labor;
- restricting, by any means, a person’s freedom of movement under the guise of a debt undertaken with the employer or with someone entrusted to act on his behalf;
- restricting a worker’s access to proper transportation, with the intent of keeping him or her in the workplace; or by maintaining guards at the workplace or retaining documents or personal belongings of a worker in order to keep him or her in the workplace.

Penalty - imprisonment from two to eight years, fine and an addition penalty corresponding to violence.

The penalty is increased by half if the crime is committed:

I - against a child or adolescent;

37. Id.
38. Id.
40. Id.
II - because of prejudice based on race, color, ethnicity, religion or origin.41

Although the 2003 language defines the crime more precisely, it merely identifies factors indicative of slavery. For the purposes of criminal prosecution (as opposed to the imposition of fines by labor inspectors), it remains the role of the judge to inject normative content and to evaluate the presence of the factors on a case-by-case basis. Furthermore, the descriptions of the conditions analogous to slavery are very broad and, as we will see, incorporate various situations showing different kinds of “analogies to slavery.”42

The title given to Article 149 – “reducing to a condition analogous to that of a slave” – has its own story and reflects the influence of international norms. The article refers to “condition,” not “status or condition,” because there is no status of slavery under Brazilian law. Legal ownership of a person is impossible, and consequently Article 149 is concerned with de facto slavery.43 As was decided in R v. Tang in 2008, ownership ordinarily is to be understood as referring to a legally recognizable relationship between an owner and one who is owned.44 Here “[t]he High Court’s unanimous reasoning emphasized three key attributes of the definition of slavery: the distinction between de jure and de facto slavery; the indicia of slavery; and the role of consent.”45 The court stressed that the solution to the issue of distinguishing slavery from exploitation lay in looking at the capacity of the defendant to handle the victims as commodities and not in the property powers being exercised. On the other side, the Bellagio-Harvard Guidelines intends to create an approach to interpreting the established, internationally recognized definition of slavery that would capture the notion of “property” with that of the actual, lived experiences of slaves. The owner has a collection of rights to what is known in law as the powers permissibly exercised over the thing owned.46 According to Professor Jean Alain, the 2012 Bellagio-Harvard Guidelines, while remaining true to the property paradigm in which the definition was constructed, reflects a definition based on control.47

Article 149, by contrast, cannot be read as requiring the identification of a set of powers that the law would permit to be exercised over a person,

42. Id.
43. Id.
because ever since 1888, Brazilian law no longer recognizes the possibility that one person may own another. The article states instead that the crime is to be interpreted as the imposition of a condition analogous to that of a slave (which may include degrading conditions and debilitating work days).

The strategy of analogical reasoning was a familiar one in Brazilian legal procedure, and the expression “analogous” had already appeared in international law in the 1926 Slavery Convention of the League of Nations. It reappeared later when practices of debt bondage, serfdom, servile marriage, and child trafficking were discussed in various international forums as instances of slavery or servitude. In 1951, three of the four members of the United Nations Ad Hoc Committee on Slavery expressed the opinion that debt bondage, forced marriage, and child trafficking fall within the definition of slavery contained in Article 1 of the International Slavery Convention of 1926. The drafters of the Penal Code apparently chose the word “analogous” not to try to enlarge the definition so as to equate slavery with lesser servitudes but rather to show that the focus of their efforts concern was to include de facto slavery.

II. Submitting a Person to Forced Labor

There are many types of forced labor practices that persist in Brazil. The International Labour Organization (ILO) office in Brazil has in fact decided to use the term “slave labor” instead of the more familiar ILO term “forced labor,” thereby justifying this usage through the following definition: every type of forced labor is degrading, but not all degrading labor necessarily conforms to the longstanding definition of “forced la-


49. See Decreto-Lei No. 3,689, de 3 de Outubro de 1941, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.10.1941 (Braz.) (stating “the criminal procedure will allow extensive interpretation and analogical application, as well as the addition of general principles of law.”).

50. Slavery Convention art. 5, Sept. 25, 1926, 212 U.N.T.S. 17 (“The High Contracting Parties recognize that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.”).


52. Allain, supra note 5, at 165.

53. The National Agreement to Eradicate Slave Labour (May 19, 2005), http://www.reporterbrasil.com.br/documentos/national_agreement.pdf (“[T]here is a list of all employers and/or their middleman who exploit people through slave labour in Brazil [ ] by means of physical and moral constraint restricting both free option and free action on the part of workers[ . . . ] [T]here still remain stops of forced labour in Brazil and in the rural area this forced labour usually assumes the features of slavery because of debts.”).
What differentiates one concept from the other is freedom. For this reason, “international lawmakers have distinguished slavery from forced labor, and they have long been hesitant to categorically and publicly prohibit forced labor.”55 Only the 1957 Abolition of Forced Labour Convention – which few states have ratified – prohibits forced labor for public works that exclusively serve a country’s economic development, but not for military service or emergency response to a natural disaster.56 As a result, the concepts of slavery and forced labor have been treated distinctly, and were even put in hierarchical order by the preamble of the 1957 Convention, which states that it is necessary to “prevent compulsory or forced labor from developing into conditions analogous to slavery.”57 This formulation was echoed in later treaty agreements on slavery and forced labor, which distinguished the two terms from each other but left the relation between them quite unclear.58

Forced labor might refer to a publicly ordered service, one not identical to slavery as a private relation between individuals.59 The concept of slavery discussed among the members of the League of Nations to some extent followed the legalistic tradition of sociology, in which slavery is understood as a social relationship between private individuals, based on property rights.60 More recently, however, the phrase “forced labor” has also been used more broadly, as in the 1998 Declaration of Fundamental Principles and Rights at Work, which does not mention the words “slave” or “slavery” but refers to forced labor in general.61


56. Id. at 230–31.


58. See U.N. Office on Drugs and Crime Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2004), http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf (providing the most recent reference to slavery and forced labor without clear distinction between the terms, and criminalizing trafficking in persons “for the purpose of exploitation” including, “at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”).


60. See Slavery, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/slavery-sociology (last visited September 11, 2017) (explaining a general agreement among sociologists that slavery is a condition in “which one human being was owned by another. A slave was considered by law as property, or chattel, and was deprived of most of the rights ordinarily held by free persons.”).

One definition of forced labor can be extracted from the 1930 Forced Labour Convention (n. 29), which states in Article 2 that “the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” 62 Similarly, Article 149 of the Brazilian Penal Code treats compulsory uncompensated labor as a condition analogous to slavery. Forced labor involves a relationship between individuals, and thus this supersedes the notion of forced labor as a publicly ordered service.

Uncompensated compulsory labor, however, is rarely found even in Brazilian rural areas. 63 In Brazil the agricultural sector nonetheless experiences a high occurrence of labor relations that are in other respects analogous to slavery. 64 Farm workers are particularly vulnerable, and a number of factors contribute to this: agricultural wages have long been stagnant and working conditions poor, legal protections for rural workers are weak, the monitoring of work conditions is insufficient; and in the most isolated areas rural workers have only a tenuous direct connection to systems of public education, health and welfare that would bring them within the ambit of state protection. 65 The participation of workers in trade unions and associative groups is very limited, making it difficult to organize collective action that aims to improve working conditions. According to ILO data from Brazil, in a 2011 survey on the profile of victims of slave labor in Brazilian rural areas, only 6.8% of workers interviewed had registered their jobs on their labor cards, which is a condition of legal employment. 66 Employers often do not want to register workers because costs go up if they do so. These costs are taxes that fund social security, workers’ compensation, and unemployment insurance. 67

63. CARLOS H. B. HADDAD & LÍVIA MENDES MOREIRA MIRAGLIA, TRABALHO ESCRAVO: ENTRE OS ACHADOS DA FISCALIZAÇÃO E AS RESPOSTAS JUDICIAIS (forthcoming 2018) (A study prepared by the Slave Labor and Human Trafficking Clinic of UFMG, based on the analyses of 142 reports of labor inspections in the state of Minas Gerais between 2004 and 2017, detected uncompensated compulsory labor in only 2.82% of the cases).
64. Eduardo Paulon Girardi et al., Mapeamento do Trabalho Escravo Contemporâneo no Brasil: Dinâmicas Recentes, ESPAÇO E ECONOMICO, no. 4, at 1, 4 (2014), https://espace economic.revues.org/804 (stating that between 2003 and 2012 slave labor was found predominantly in rural areas and linked to agricultural activities in 93% of cases).
67. According to the former president of the Labor Lawyers Association of São Paulo, the cost of a registered employee is almost double the salary. “Other countries do not have so many burdens and pay better wages. And that’s why many companies prefer not to hire more employees,” he said. Custos com Empregado Vão além do Salário, PORTAL BRASIL (Jan. 2,
When depressed wages, poor working conditions, and a lack of legal protections are combined with an increasing demand for cheap farm labor, the result is often a continuum of abuses, of which slave labor is the most extreme.68 The army of indigent people who work on farms is easily replaced, so there may be no need to oblige them to work: just call the next in line.

III. Restricting by Any Means a Person’s Freedom of Movement

The new language of Article 149 also punishes conduct that undermines freedom of movement. The injury to personal liberty is not restricted to personal movement; the reduction to a condition analogous to slavery is regarded as a crime against individual freedom. Freedom in this sense goes beyond the right to come and go. It encompasses an individual’s freedom of self-determination, in which the person has the right to make decisions about his or her actions.

The Brazilian courts recognize the practice of slave labor when there is a restriction on freedom of movement because it is the most visible evidence of an exercise of a power that would otherwise attach to ownership—even though formal ownership of persons is legally impossible.69 This facet of the definition thus stems from a property paradigm and is consistent with international texts, including the 1926 Slavery Convention and the 1956 Supplementary Convention as well as the 1930 Forced Labour Convention and the 1957 Abolition of Forced Labour Convention.70 The definition of slavery developed in the 1926 Slavery Convention remains, broadly speaking, the accepted definition in international law, although its interpretation remains subject to substantial debate. For these purposes, Article 1 defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”71

70. Allain, supra note 5, at 121 (explaining that the property paradigm definition means that the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised).
Particular conditions accompany the three modalities of restrictions of freedom specified in the Brazilian domestic law. The first one consists of restricting a person’s freedom of movement under the auspices of a debt undertaken with the employer. This conduct is a feature of debt bondage, which occurs when a person commits his or her labor as security for the repayment of a debt or other obligation. Article 1(a) of the 1956 Supplementary Convention on the Abolition of Slavery defines debt bondage as “the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.” It is also known as peonage.

The other two modalities – restricting a worker’s access to proper transportation, with the intent of keeping him or her in the workplace, and maintaining guards at the workplace or retaining documents or personal belongings of a worker to keep him or her in the workplace – are directly related to possession. Possession may be an intricate concept for some purposes, but the intricacies belong largely to civil rather than criminal law. For these purposes, in criminal law, “‘possession’ is best understood as a reference to a state of affairs in which there is ‘the intentional exercise of physical custody or control over something or someone.’” When workers are deprived of freedom due to direct action from the employer, Article 149 is violated.

IV. DEGRADING CONDITIONS AND DEBILITATING WORKDAYS

Reducing someone to a condition analogous to that of a slave by subjecting a person to debilitating workdays or degrading conditions of work is a groundbreaking criminalization introduced into the Penal Code in the 2003 revisions. In this aspect, Brazilian legislation deviates from concepts of slavery, forced labor, and servitude developed in international texts and, innovatively, recognizes two singular behaviors that qualify as “analogous to slavery.” This dimension of Article 149 has merit in that it escapes an emphasis on the “lock and key” aspects of slavery while also acknowledging the importance of not debasing the currency of language or diminishing the weight of crimes against humanity by using the term “slavery” for run-of-the-mill labor violations. As we will see, the terms debilitating workdays or degrading conditions of work help to define contemporary slavery in Brazil’s current circumstances, and have developed very specific meanings. To better understand when submitting people to debilitating workdays or degrading conditions reaches what can be considered slave

72. Código Penal [C.P.][Penal Code] art. 149 (Braz.).
labor, it is necessary to return to the reasons chattel slavery has been abolished in the western hemisphere.

V. EQUALITY AND AUTONOMY

The ending of the ownership of property in persons was a lengthy process in the West, spanning from the late-eighteenth to the late-nineteenth century. Scholars continue to debate the relative roles in that process of anti-slavery social movements, changes in political philosophy, shifting modes of production and trade, religious and humanitarian principles, and the corrosive effects of warfare.75 Underlying much of the anti-slavery movement, however, was a bedrock concern with human dignity. In modern philosophical terms, one might also say that slavery is now considered to be radically impermissible because it stunts the development of the capacities people need in order to exist as social equals.76 Any society is harmed by the dependency and servility of its members, and liberal societies have often placed limitations on the authority that people can have over each other.77 This means not only ensuring that people have equal rights, but also that they are able to see themselves as having equal basic rights, can understand and act as justice requires, and are able accept that they and others around them are self-authenticating and do not need to ask permission to have and make demands related to their own wellbeing.78

The state has good reasons not to lend its support to arrangements that depend on the exploitation of the vulnerabilities of the most vulnerable, permanently bind one person to another, give one person inordinate power over another, or undermine the capacities of individuals to stand in society as equals.79 Too much inequality in the basic structure of society undermines the fairness of agreements people make - for example, to undertake certain jobs, at a given wage. In an intensely unequal society, people are not truly free to choose and pursue their values and ends.80

There are, moreover, conditions that are necessary for individuals to assert their personalities, in their cultures, at any given historical moment, and circumstances that should be avoided so that their personhood not be undermined.81 Denying these basic minima can be degrading to the point of threatening that personhood. Slaves were property objects and were

75. See generally Celia M. Azevedo, Abolitionism in the United States and Brazil: A Comparative Perspective (1995); Seymour Drescher, Civil Society and Paths to Abolition, 34 Historia (São Paulo) 29 (2015).
77. Id. at 183.
78. Id. at 185.
79. Id.
81. Brunelos Stancioli, Renuncia ao Exercício de Direito de Personalidade ou Como Alguém Se Torna o Que Quiser 92 (2010).
consequently deprived of the right to develop a legal personhood. In our time, we do not permit the loss (even if apparently voluntary) of basic rights of personhood. The absolute deprivation of the capacity of human beings to have rights and obligations would transform subject into object. A person for whom the available jobs impose conditions without minimum hygiene requirements, without clean water or sanitary facilities, can be seen as having been subjected to “inhuman treatment.” A particular value (shelter in adequate conditions) that allows for a life of dignity may be seen as a component of what is considered for contemporary western culture to be constitutive of personhood.

Slavery denies two inalienable rights: equality and autonomy. Degrading conditions and debilitating workdays, as expressions of contemporary slavery, also negate equality and autonomy by harmful exploitation and by constraining freedom of choice.

VI. EXPLOITATION AND FREEDOM OF CHOICE

Each of the actions described in Article 149, when present, results in the same situation: abuse of the workforce. When workers are submitted to forced labor or debilitating workdays, the employer extracts from their labor something that goes beyond what is reasonably required, disregarding normal physical limitations to benefit the enterprise. Debilitating workdays severely reduce the capacity of the human body to sustain itself or to function efficiently. The mistreatment or neglect of a person that imposes physical or psychological exhaustion may be regarded as an act of slavery, because it treats the worker as a disposable unit of labor rather than a human being with a claim to life and safety. The subjection of the worker to degrading working conditions raises an employer’s profits because she pays for the manpower but doesn’t pay for cleanliness, toilets, sanitation, running water, electricity, ventilation and/or nutritious food. Restricting, by any means, a person’s freedom of movement in order to keep him in the workplace similarly has the purpose of acquiring more

82. Fernando Gonzaga Jayme, Direitos Humanos e Sua Efetivação Pela Corte Interamericana de Direitos Humanos 121 (2005).
83. Stancioni, supra note 81, at 93.
84. Maria Aparecida de Moraes Silva, professor at UNESP (Universidade Estadual Paulista), concluded that the search for higher productivity requires cane cutters to harvest up to 15 tons per day. In the 1980s and 1990s, an employee could generally be active in this sector for an average of 15 years. From 2000, the average was reduced to 12 years. Due to the repetitive action and physical exertion, the worker begins to have health problems. According to historian Jacob Gorender, the lifecycle of slaves in agriculture was 10 to 12 years until 1850, before the ban on the slave trade from Africa. After that date, the owners began to take better care of the slaves, and the lifetime increased to 15 to 20 years. Mauro Zafalon, Cortadores de Cana Têm Vida Útil de Escravo em São Paulo, (Nov. 12, 2014, 9:40 PM), http://www1.folha.uol.com.br/fsp/dinheiro/fi2904200702.htm.
85. Miraglia, supra note 68.
exertion than the worker would willingly offer, or of subjecting the worker to risks he should not be expected to assume according to the labor law.86

In all of these situations, we perceive a significant disequilibrium of power that goes beyond the mere managerial subordination of waged and salaried employment. There is abuse of the workforce that can be summarized as harmful exploitation.87

VII. THE EXAMPLE OF THE BRAZILIAN AMAZON

Labor “analogous to slavery” has repeatedly been identified in the South of the Brazilian state of Pará, in the Amazon region, where I served on the federal bench between 2006 and 2010. From my exchanges with victims of degrading labor conditions, my impression is that many of them perceived their own domination and exploitation as somehow “natural.” This posture of submission and helpless tolerance – itself perhaps a form of self-defense in the face of intense risk – is a contributing factor in the perpetuation of slave labor in Pará (Sharma 2004).

Ricardo Rezende Figueira, who interviewed a large group of rural workers, studied the discourse and social practices regarding slave labor in Pará. The testimonies of workers, who were mainly recruited in the states of Piauí and Mato Grosso, indicate that they came to Pará with the hope of having a better life, or simply as an alternative to unemployment.88 Instead, they were subjected to conditions that inspired considerable fear. This fear, as repeatedly expressed in the interviews, inhibits escape from workplaces, even when the workers return to their home cities during the off-season. They are afraid for their lives or of being beaten by thugs, whom the farmers use to control their movement.89

Further, research suggests a strong correlation between such conditions and the employment of workers who are illiterate or have had very few years of study. They are almost all men (98%), between eighteen and forty years (75%), and offer physical strength as their primary asset. They work on arduous tasks, especially clearing forests or cleaning already-deforested areas for pastures (80%) or other agricultural inputs.90 Although under some circumstances workers themselves file complaints in terms of rights that they believe have been violated, in other circumstances they seem to have concluded, as a practical matter, that they have no rights to

87. See Jean Allain & Kevin Bales. Slavery and Its Definition, 14 GLOBAL DIALOGUE, Aug. 15, 2012, at 4 (listing elements that indicate the existence of exploitation or slavery).
89. Id. at 175.
claim, as can be seen in the book Dama da Liberdade.°1 The book includes the story of a worker rescued by the Mobile Team. He had a huge scar on his hand from being punished for asking for clean water to drink instead of water that was yellow and full of worms. But he also did not understand that he had legal rights that had been violated.°2

Although “exploitation” does not appear in Article 149, the imposition of conditions analogous to slavery undoubtedly includes several forms of exploitation. An employer’s behavior can be considered a crime under Article 149 if it leads to anything that, under international law, constitutes slavery. This includes partial or total destruction of the victim’s legal personality, restriction or control of an individual’s freedom of choice, or freedom of movement, psychological control or oppression of an individual, threat or use of force or other forms of coercion, and exaction of forced labor, often without remuneration.°3 Whether exploitation exists cannot be analyzed in general terms but rather depends on the particular circumstances, such as the nature, conditions, and duration of the work, restrictions imposed on the individual in question, and the employer’s economic benefit to be gained from the work.°4 In weighing these and other relevant factors, the standards that apply in Brazilian society for decent working conditions could be adopted as the frame of reference. The victims work far below the standards for Brazil if they work eleven to fourteen hours a day, for a monthly income less than the minimum wage, if they have no more than four days off a month, if they share water with cattle, and are not provided with beds or sanitary installations, and the food is spoiled or non-existent.°5

The sight of Brazilian workers in rural areas laboring under degrading working conditions or submitted to debilitating workdays also recalls features of chattel slavery prior to Brazil’s 1888 abolition.°6 Degradation does not necessarily entail actual ownership; it would be presumably possible to recognize slavery even in cases where the slave owner did not exercise the powers of ownership. As Orlando Patterson has shown, every possible variation in the rules governing the slave relationship existed in one place or time throughout history, and the fact that a slave owner could not sell the

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°1. Decreto-Lei No. 5.452, de 1 de Maio de 1943, Diário Oficial da União [D.O.U.] de 9.8.1943 (Braz.) (explaining that every worker is entitled to jus postulandi, allowing a worker to file complaints himself without legal assistance).


°3. See Allain, supra note 5, at 120 (stating that the Human Rights and Equal Opportunity Commission in the Prosecutor v. Kunarac case before the International Criminal Tribunal for the Former Yugoslavia mentioned these factors might indicate slavery).

°4. Scott et al., supra note 20.


°6. Castro Gomes, supra note 20, at 35.
slave, grant access to the slave or possession of the slave to another does not mean that slavery did not exist in that instance.\textsuperscript{97}

In some Brazilian courts the element of history in the analogy is misused to diminish the value of the landmark legislation of Article 149 by interpreting the statute to mean that criminal sanctions should be imposed only against perpetrators who used physical force or threats. These judges have suggested, for example, that it is not a crime when psychological coercion or trickery holds victims in bondage.\textsuperscript{98} Some interpretations of international law seem to endorse this position by holding that:

\begin{quote}
Where a person is required to labor for less than minimum wage under the menace of being fired, such an instance of forced labor while being exploitive does not meet the threshold of enslavement. The individual involved has freedom beyond the workplace, they can leave their job at will.\textsuperscript{99}
\end{quote}

Whatever its underlying logic, it is not at all clear that this general observation can be extended to labor in the Brazilian Amazon, where the workplace is often distant from the worker's family, where the only possible lodging and food are those provided by the employer, and where recruitment itself is often tied to desperation for the worker and deceit by the recruiter.

When people buy and sell things under conditions of deep inequality or dire economic necessity, injustice often arises. Further, coercion rarely takes the form of direct compulsion that deprives individuals of all choice. Market exchanges are not necessarily as voluntary as market enthusiasts suggest. A peasant may agree to sell his kidney or cornea to feed his starving family, but his agreement is not truly voluntary. He is coerced, in effect, by the necessities of his situation. This is not an objection to markets, only to markets that operate against a background of inequality severe enough to create such coercive bargaining conditions. What seems like a free exchange of goods or services for money may not be truly voluntary, because economic coercion, or dire economic necessity, is in play.\textsuperscript{100}

Slave labor arrangements tend to arise in desperate circumstances that exploit the most vulnerable and make some people utterly dependent on the will and whims of others.\textsuperscript{101} Many of the problems associated with slave labor have to do with the intense poverty, insufficient education,

\textsuperscript{97} Orlando Patterson, Slavery and Social Death: A Comparative Study 32 (1982).


\textsuperscript{99} Allain, supra note 5, at 129.

\textsuperscript{100} Sandel, supra note 80, at 110.

\textsuperscript{101} Satz, supra note 76, at 173.
flawed information, and lack of civilized alternatives for the poor that pre-
cede the actual imposition of slave labor. In other words, poverty, social
exclusion, and the denial of human rights may well be concomitants of (or
even necessary conditions for) the subjection that underlies labor in a con-
tdition “analogous to that of a slave”, even though they are not sufficient
conditions in themselves to lead to such labor.102 The circumstances of
radical inequality might be seen as the seedbed of slave labor, but the
crime itself is committed when the employer plants the seed of
exploitation.

VIII. THE CRIMINAL LAW FRAMEWORK

As a criminal statute, Article 149 of the Penal Code turns on not the
circumstance of the worker but the conduct of the accused. A worker’s
absence of choice may result from multiple factors; some of these, such as
the worker’s wealth or status, the conduct of third parties, and the social
environment where he lives, may be present independently of the conduct
of the accused. But these factors provide context in which the conduct of
the accused must be assessed. If the employer can provide decent work
conditions but does not do so then she makes her intention of predatory
exploitation of the workforce clear.103 In short, the application of Article
149 seems to depend on an understanding of what makes an act of ex-
change voluntary as opposed to coerced. Situations in which workers ap-
pear to be exploited or subjected to degrading working conditions or
debilitating workdays thus require a case-by-case analysis.104

Punishment for the crime of imposing slave labor on another is based
in part on preventing that crime in the future. An alternative justification,
focused on the past actions of the offender, seeks retribution from offend-
ers for their crimes. Independent of the underlying philosophy, the penalty
is to be established by the legislature and applied by the courts with an eye
toward proportionality.

Here I analyze whether the penalties provided in Article 149 of the
Brazilian Criminal Code, in comparison with the penalties for similar
crimes in other countries, represent an appropriate measure of punish-
ment. I have selected eight countries from the 193 listed in the database on
the site www.qub.ac.uk/slavery105 and compared the penalties under the

102. KANCHANA N. RUWANPURA & PALLAVI RAI, FORCED LABOUR: DEFINITIONS, IN-
103. ORGANIZAÇÃO INTERNACIONAL DO TRABALHO, COMBATE AO TRABALHO FOR-
104. See Scott et al., supra note 20.
105. The objective of this project is to identify and gather domestic legislation relating
to human exploitation from each of the 193 member states of the United Nations. The
database includes legislation “referring to: The exploitation of the prostitution of others or
other forms of sexual exploitation[, f]orced labor or services[, s]lavery[, p]ractices similar to
slavery[, s]ervitude[, t]he removal of organs[, and t]rafficking. . . . To populate the Database,
a number of web-based public access websites were utilized. These included: National Gov-
ernment sites, open access intergovernmental sites such as the country reports emanating
criminal law. I selected countries whose law provides penalties lower than those established in the Brazilian Penal Code, as well as countries with much higher penalties, usually as a result of laws that were issued at a later date. As it turns out, punishments for crimes under Article 149 are of average severity when compared with those in other countries. Less severe penalties are found in China, Haiti and India, while stronger sanctions are part of the law of Italy, New Zealand, Timor Leste, the United Kingdom, and the United States. It would be difficult to explain why they have more or less severe jail terms because that would require analyzing whether other crimes in the domestic system receive the same lenient or rigorous treatment. But it can be noticed that more recent laws tend to establish more rigorous punishments in the matter of slavery, a trend which was not necessarily followed by Brazilian legislators.

The Brazilian Penal Code was modified in 2003, but the punishment enacted in 1940 – imprisonment for two to eight years – did not change. This punishment is the same as that for aggravated injury (injury that results in permanent incapacity for work, loss or destruction of the limb, sense or function, abortion, etc.), aggravated theft, and soliciting bribes. The multiplicity of crimes described in Article 149, ranging from forced labor to debt bondage, through the debilitating workdays and restriction of freedom of movement, should be evaluated for purposes of sentencing within the limits of the punishment established by the penal code.

Prosecution for the imposition of labor in conditions analogous to slavery forces us to face complex questions. In most cases we have to ask whether the worker in question was “free” to decline the conditions of labor, and if not, when and how that person was deprived of his will or freedom of choice (a question of fact), and to what degree. At the same time, if there is a charge of subjecting the worker to degrading conditions, from the Treaty Bodies of the United Nations, nongovernmental sources such as Anti-Slavery International, Free the Slaves, and academic sources such as the Human Trafficking Working Group.”

106. Criminal Law of the People’s Republic of China (promulgated by Nat’l People’s Cong., Jul. 1, 1979), art. 244 (stating that the punishment for forced labour is a maximum of three years or a fine.).

107. Decree of Mar. 20, 1982, art. 1 (Haiti), http://www.qub.ac.uk/slavery/?page=count ries&category=3&country=73 (punishment of six months to three years or a fine).

108. No. 45 of 1860, PEN.CODE, sec. 374 (India), http://www.qub.ac.uk/slavery/?page= countries&category=3&country=77 (punishment of one year).

109. Legge 11 agosto 2003, n. 228(1), art. 600 (It.) (stating that the punishment for forced labor is 8 to 20 years).


111. Penal Code of the Democratic Republic of Timor-Leste, art. 162 (punishment of 8 to 20 years).

112. Modern Slavery Act 2015, c. 30 Art. 5, (U.K.) (Indicating that the punishment is imprisonment for life).

113. 18 U.S.C. §§ 1581, 1589 (punishment of 20 years).

114. Lei No. 7.209, arts. 129(2º); 155(4º), de 7 Novembro de 1984 (Braz.).
we must determine whether the conditions were indeed imposed by the employer, or rather were a corollary of the worker’s poverty and outside the control of the employer. The degree of freedom or denial of freedom is useful in deciding the appropriate punishment for each instance.

In the Brazilian legal system, if the prescribed sentence is equal to or less than four years’ imprisonment, the chance of the accused being incarcerated is sharply decreased. Generally, imprisonment that does not exceed four years is replaced by alternative measures, such as community service, fines and restitution. This is why among the more than fifty defendants who have been convicted in the Federal District Court of Marabá in the state of Pará only one is serving time in prison. These relatively light sentences have emerged after all appeals have concluded. The convictions, then, do not have the effect of removing the perpetrator from the society.

In the cases that I oversaw in Pará, the crime had generally been committed against more than one person, sometimes against dozens of people. However, under Brazilian law, punishment is not applied cumulatively. The Brazilian Criminal Code envisions two juridical fictions that can govern sentencings: one is formal concourse, and the other is continual crime. If a defendant’s conduct victimizes more than one person, the judge chooses the punishment between the ranges of two to eight years

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115. Id. art. 44.
116. Id. art. 43.
117. Federal District Court of Marabá/PA has had 192 criminal cases involving charges pertaining to Article 149, of which 55 cases have already been decided in a first trial. Of these, 42 cases are being processed in the First Federal Circuit Court to the judgment of appeals, and only 13 cases have final criminal convictions. Usually, each criminal case has more than one defendant and, to date, in these 55 cases, 54 people have been convicted and 42 acquitted.
118. In several criminal cases, the punishment was reduced to four years or less after the appellate court’s decision. For example: six years was reduced to four years (Criminal Appeals 1178-43.2006 and 564-04.2007); four years to two years and eleven months (Criminal Appeal 363-75.2008); five years to two years and four months (Criminal Appeal 561-49.2007); six years to four years (Criminal Appeal 449-46.2008); four years and eight months to three years and four months (Criminal Appeal 811-48.2008); four years and eight months to two years and four months (Criminal Appeal 816-07.2007); four years and eight months to two years and eight months (Criminal Appeal 656-79.2007). See generally Justiça Federal, portal.trf1.jus.br/portaltrf1/pagina-inicial.htm (website of the Brazilian Federal Regional Court of the 1st region providing free access to cases).
119. Decreto-Lei No. 2.848, art. 71, (Braz.) (“When the agent, through a single act or omission, performs two or more crimes, identical or not, the law applies the most severe of the penalties applicable or, if equal, applies only one of them, but increased in any case, between a sixth and a half. The penalties apply, however, cumulatively, if the act or omission is willful and concurrent crimes result from independent intent, as provided in the preceding article”).
120. Id. (“When the agent by more than an act or omission, practicing two or more offenses of the same kind, and the conditions of time, place, manner of execution and the like must be regarded as the subsequent continuation of the first, applies the penalty of one of the crimes, if identical, or the worst, if they are different, increased, in any case, one-sixth to two-thirds”).
and increases it by one-sixth to one-half.\footnote{Id. art. 70.} If there is more than one type of conduct, and the offense is against more than one person in a similar time and locale and under similar circumstances, the sanction will be increased by one-sixth to two-thirds.\footnote{Id. art. 71.} Thus, if a defendant submitted ten workers to forced labor and the penalty applied for each crime was three years, he would not receive thirty years; rather, the judge would select one of the sanctions and would add one-sixth to one-half to the sentence so that the total penalty could be up to four years and six months.

When a crime is committed against a child or adolescent or because of prejudice based on race, color, ethnicity, religion, or origin, the penalty is increased by half.\footnote{Id. art. 149(2º).} According to Brazilian legislation, a child is any person under twelve years old and an adolescent is between twelve and seventeen years old.\footnote{Decreto-Lei 8.069, art. 2º, de 13 de Julho de 1990, CODIGO PENAL [C.P.] (Braz.).} In order to increase the penalty, at least one identification document is required to prove that the victim is under eighteen years old.\footnote{Decreto-Lei 3.689, art. 155, de 3 Outobro de 1941, CODIGO PENAL [C.P.] (Braz.).}

The Brazilian Penal Code also provides for a fine because Article 149 involves free labor and thus an economic transaction, for which the criminal code punishes whoever has profited from the infraction. The code is clear that the “judge should consider primarily the economic situation of the defendant in setting the fine” (Article 60). The legislation establishes limits such that the lowest value of the fine in the Brazilian criminal justice system corresponds to somewhat less than a hundred dollars,\footnote{Exchange rate as of November 2017: US $1.00 = R$3.2778. BANCO CENTRAL DO BRASIL, http://www4.bcb.gov.br/pec/taxas/port/ptaxnpesq.asp.} and the maximum reaches close to US $515,000, bearing in mind that the Brazilian minimum salary is currently equivalent to around US $285 a month. Article 60, Section One of the Penal Code authorizes increases up to three times the amount of the fine if it would otherwise be ineffective, considering the economic situation of the defendant—allowing, in theory, a fine of over one million dollars.

Following an international trend, the code prohibits converting the fine into a prison sentence if the defendant does not have assets to pay.\footnote{Mary Daunton-Fear, The Fine as a Criminal Sanction, 4 ADELAIDE L. REV. 307, 312 (1972).} In this case, the fine will be charged only if the defendant improves her financial situation. In Pará, the defendants were generally large landowners with very extensive ranching operations and many herds of cattle. In some instances, however, the perpetrators were themselves small-scale farmers.
IX. DOMESTIC LAW AND INTERNATIONAL LAW: A STEP FORWARD OR BACKWARD?

The Brazilian Congress is currently reviewing a new draft penal code.\textsuperscript{128} It is common for bills to be discussed for many years without ever becoming statutes.\textsuperscript{129} However, the current debate deserves attention, as there are significant proposed changes to Article 149. They include increasing the minimum penalty from two to four years, keeping the maximum penalty of eight years, and eliminating the fine altogether. However, the most substantial proposed change is criminalizing enslavement as a separate offense. The proposed language is like that of Article 149, but as we can see in the draft text below, draws a definition within a property law paradigm directly from international law:

Enslavement

Article 462. Exercising over a person any power attaching to the right of ownership or reducing someone to a condition analogous to that of a slave: submitting a person to forced labor, debilitating workdays, or degrading conditions of labor; restricting, by any means, a person’s freedom of movement under the guise of a debt undertaken with the employer or with someone entrusted to act on his behalf.

Penalty - imprisonment from 10 to 15 years.\textsuperscript{130}

The proposed new crime is to be listed as one against humanity and thus carries a more severe penalty. According to the drafters,\textsuperscript{131} the conduct involved here is more egregious than that described in Article 149, because enslavement is a systematic attack in an environment of hostility or widespread conflict.\textsuperscript{132}

We can anticipate controversy about the interpretation of both proposed statutes. In particular, the sizeable difference between the punishments for Article 149 and the proposed new crime of enslavement (four to eight years and ten to fifteen years, respectively) suggests that the criteria for distinguishing between them should be made unequivocal. Despite this the bill does not provide such clarity.

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\textsuperscript{128} Projeto de Lei do Senado No. 236, de 10 Julho de 2012, Diário do Senado Federal [D.S.F.], 106: 33173-33797, Julho 2012 (Braz.).
\textsuperscript{129} In 1961, President Jânio Quadros had the first initiative to reformulate the Penal Code of 1940. The bill was presented in 1963 and promulgated in 1969 to enter in force in 1970. There were successive extensions of vacatio legis while the code received numerous amendments. It was revoked in 1978 without ever becoming a statute.
\textsuperscript{130} Projeto de Lei do Senado No. 236, de 10 Julho de 2012, Diário do Senado Federal [D.S.F.], 106: 33415, Julho 2012 (Braz.).
\textsuperscript{131} A special commission composed of fifteen jurists, among them lawyers, prosecutors, judges and law professors, and presided over the Judge of Superior Court of Justice, Gilson Dipp, worked for eight months to prepare the new penal code.
\textsuperscript{132} Projeto de Lei do Senado No. 236, de 10 Julho de 2012, Diário do Senado Federal [D.S.F.], 106: 435, Julho 2012 (Braz.).
\end{flushleft}
Moreover, if the bill becomes a statute, is it indeed advisable that the crime of reducing a person to a condition analogous to that of a slave coexist with the separate crime of enslavement? Would the adoption of a definition of slavery encompassing language drawn from international law be a step forward, because it would bring Brazil closer to the international standards? Or it would be a step backward, since the shift from an international jurisprudence of “control tantamount to possession” to a domestic jurisprudence of freedom of choice and protection from degradation has already been well established? There are also many questions to which the courts have no answer. More specifically, since the protections in international human rights law are meant to provide a floor, not a ceiling, for the protection of rights, it may be unwise to reach for the language of the “powers attaching to a right of ownership” if this is likely to be interpreted by domestic courts as referring to a largely unattainable threshold of “total subjection,” hence granting effective impunity to exploiters for what had previously been considered crimes under domestic law.133

Moreover, there are consequences for the Brazilian state as a result of the Inter-American Court of Human Right’s decision on the Fazenda Brasil Verde case. In a judgment issued in late December, 2016, the court ruled that Brazil had failed to put in place adequate measures and policies to prevent modern slavery and ordered the government to pay five million U.S. dollars to the workers.134 The 128 men were used as slave labor on Fazenda Brasil Verde, one of the biggest cattle ranching enterprise in the north of the country.135 Up to the time the court issued the ruling in December, 2016, no criminal charges had successfully been leveled at Fazenda Brasil Verde and none of the workers had received any compensation. Reparations required by the Court include that the Brazilian state must: publish the Court’s sentence, restart the legal investigations and prosecution of the case, adopt measures to ensure that the crime of slave labor is not subject to the statute of limitations, and reimburse legal costs and pay compensation to the victims.

The specific and inclusive domestic law definition of slave labor, already under attack within Brazil by politicians allied with landowners, wasn’t undermined by the court decision. “Degrading conditions” and “debilitating work days” continue to be keys to successful prosecutions within the labor courts.


135. Id.
CONCLUSION

The Brazilian agricultural sector experiences a high occurrence of labor in conditions analogous to slavery. Poverty, social exclusion, and the denial of human rights may be necessary conditions, but they are not in themselves sufficient to constitute slavery-like situations. While these circumstances create an environment ripe for the imposition of labor in conditions analogous to slavery, the crime is only committed when a specific employer chooses to engage in exploitation, extracting labor from workers by imposing additional constraints on their freedom or subjecting workers to conditions that are in themselves degrading or debilitating. The army of indigent people at risk and the ease with which a given worker can be replaced both reinforce the necessity of adopting protective measures against harmful exploitation.

Article 149 in its modern form was forged in response to situations uncovered by inspectors during their visits to the country’s hinterland. The two singular situations outlined in Article 149 – degrading conditions and debilitating workdays – are expressions of contemporary slavery, as they subtly attack the inalienable rights\(^{136}\) of equality and autonomy. At the same time, they violate the protections of dignity guaranteed in the 1988 Constitution, developed as Brazil was emerging from decades of military dictatorship. When the law does not protect against violations of dignity, workers may well come to see themselves as having no rights, a result reminiscent of an era when rights were attributed only to free people, and denied to those who occupied the status of slaves.

An absence of choice on the part of the worker may result from the combined effect of multiple factors, but what Article 149 of the Penal Code proscribes is the conduct of the accused. The punishment established by Article 149 is not particularly severe when compared with those of other countries. Still, the language represents an option towards a jurisprudence of dignity and respect for freedom of choice.

It is in this context that a call to adjust Brazilian law to international norms seems particularly problematic. Even with an explicitly expansive domestic definition of “conditions analogous to slavery” we still find decisions from Brazilian courts that focus on the jurisprudence of control, and the illusory search for definitive evidence establishing “absolute subjection.”\(^{137}\) It may well not be the intention of international treaties to set such an unattainably high bar, but some modes of interpretation may have the result of doing just that – even including the otherwise helpful and

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136. The Declaration of the Rights of Man and of the Citizen pmbl., arts. 1, 4 (Fr. 1789) (setting forth the natural, inalienable, and sacred rights of man in which is included equality and liberty (autonomy)).

carefully – framed Harvard-Bellagio guidelines on the interpretation of international law on slavery. The language of “powers attaching to ownership” and “control tantamount to possession” comes uncomfortably close to the language of “absolute subjection” as used by Brazilian judges who overturn the convictions as they come up on appeal from the trial courts.

The proposed draft of a new penal code, which intends to introduce a crime called “enslavement,” brings the discussion about the definition of slavery back to a property law paradigm, and could lead to a crowding-out of the “degrading labor” and “debilitating work days” language. Along with that, the decision of Inter-American Court in the Fazenda Brasil Verde case has repercussions for domestic law, specifically regarding the adoption of measures to ensure that the crime of reducing someone to a condition analogous to that of a slave is not subject to the statute of limitations. The movement seems to be oscillatory, but that is the nature of the law: when one imagines that a given question has been settled, it is exhumed and put on the table for future ruminations.