



# **Social movements and the Migration Law (Law 13,445/2017) in complex society: pathways for the democratic legitimation of counter-hegemonic migratory policies in the Brazilian legal order**

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## **Abstract**

This paper discusses the importance of social movements in constructing a new framework for migratory policies in the Brazilian State. It asks about the participation of social movements in the elaboration of Law nº 13.445/2017, as a legal statute based on a counter-hegemonic logic of human rights and legitimately democratic. The text is constructed from the dialectical approach, using the methodological procedures of bibliographical (theoretical production related to the theme) and documentary research (Constitution of the Federative Republic of Brazil of 1988, the Foreigner Statute and Migration Law), submitted to the technique of analysis of content. It starts from the context of complexification of international migrations and the elaboration of migratory policies based on functionality. The importance of social movements is highlighted in the claim and construction of new rights, in the search for the emancipation of migrants as a minority group in a complex society, and in the process of renegotiating the social contract. Considering the scenario of migratory policies in the Brazilian State and the models established by the Foreigner Statute (Law nº 6.815/2017) and the Migration Law (Law nº 13.445/2017), it is understood that the last legal statute marks a framework of migratory policies based on a counter-hegemonic logic of human rights, establishing rights and guarantees that enable the emancipation of migrants as subjects of law. The Migration Law, as a result of the joint work of the specialists on these subjects and of social groups and movements that defend the rights of migrants, guarantees a process of democratic legitimation, also generating the possibility of migrants' participation in the renegotiation and elaboration of migratory policies.

**Keywords:** Migrations. Social Movements. Migration Policies. Human Rights. Democratic Legitimation.

**Movimentos sociais e a Lei de Migração (Lei nº 13.445/2017) na sociedade complexa: caminhos para a legitimação democrática de políticas migratórias contra-hegemônicas no ordenamento jurídico brasileiro**

**Resumo**

Este artigo analisa a importância dos movimentos sociais na construção de um novo arcabouço de políticas migratórias no Estado brasileiro. Pergunta-se pela participação dos movimentos sociais na elaboração da Lei nº 13.445/2017, enquanto diploma legal fundado numa lógica contra-hegemônica de direitos humanos e legitimamente democrático. O texto é construído a partir da abordagem dialética, utilizando como procedimentos metodológicos a pesquisa bibliográfica (produção teórica atinente ao tema) e documental (Constituição da República Federativa do Brasil de 1988, Estatuto do Estrangeiro e Lei de Migração), submetidos à técnica da análise de conteúdo. Parte-se do contexto de complexificação das migrações internacionais e da elaboração de políticas migratórias a partir da funcionalidade. Destaca-se a importância dos movimentos sociais na reivindicação e construção de novos direitos, na busca da emancipação dos migrantes enquanto grupo minoritário na sociedade complexa e no processo de repactuação do contrato social. Considerando o cenário de políticas migratórias no Estado brasileiro e os modelos estabelecidos pelo Estatuto do Estrangeiro (Lei nº 6.815/1980) e pela Lei de Migração, (Lei nº 13.445/2017), entende-se que o último diploma legal marca um quadro de políticas migratórias pautadas em uma lógica contra-hegemônica de direitos humanos, estabelecendo direitos e garantias que viabilizam a emancipação dos migrantes enquanto sujeitos de direito. A Lei de Migração, enquanto fruto de trabalho conjunto de especialistas na temática e dos grupos e movimentos sociais defensores dos direitos dos migrantes, garante um processo de legitimação democrática, gestando, também, a possibilidade de participação dos migrantes na repactuação e reelaboração das políticas migratórias.

**Palavras-chave:** Migrações. Movimentos sociais. Políticas Migratórias. Direitos humanos. Legitimação democrática.

**Los movimientos sociales y la ley de migración (Ley n.º 13.445/2017) en la Sociedad compleja: vías para la legitimación democrática de las políticas migratorias contrahegemónicas en el orden jurídico brasileño**

**Resumen**

Este artículo analiza la importancia de los movimientos sociales en la construcción de un nuevo marco para las políticas migratorias en el Estado brasileño. Se pregunta por la participación de los movimientos sociales en la elaboración de la Ley nº 13.445/2017, como diplomado jurídico contrahegemónico de los derechos humanos y legitimamente democrático. El texto está construido a partir del enfoque dialéctico, utilizando como procedimientos metodológicos la investigación bibliográfica (producción teórica relacionada con el tema) y documental (Constitución de la República Federativa de Brasil de 1988, Estatuto del Extranjero y Ley de Migración), sometido a la técnica de análisis de contenido. Se parte del contexto de la complejización de las migraciones internacionales y la elaboración de políticas migratorias basadas en la funcionalidad. Se destaca la importancia de los movimientos sociales en la reivindicación y construcción de nuevos derechos, en la búsqueda de la emancipación de los migrantes como grupo minoritario en una Sociedad compleja y en el proceso de renegociación del contrato social. Considerando el escenario de las políticas migratorias en el Estado brasileño y los modelos establecidos por el Estatuto del Extranjero (Ley nº 6.815/1980) y por la Ley de Migración (Ley nº 13.445/2017), se entiende que el último diploma legal marca un contexto de políticas migratorias basadas en una lógica contrahegemónica de derechos humanos, estableciendo derechos y garantías que permitan la emancipación de los migrantes como sujetos de derecho. La Ley de Migración, como resultado del trabajo conjunto de especialistas en el tema y de grupos y movimientos sociales que defienden los derechos de los migrantes, garantiza un proceso de legitimación

democrática, generando además la posibilidad de participación de los migrantes en la renegociación y reelaboración de políticas migratorias.

**Palabras clave:** Migraciones. Movimientos sociales. Políticas migratorias. Derechos humanos. Legitimación democrática.

## 1 Introduction

People's relationship with mobility, occupation of space, and belonging constitute a range of biological, social, and political phenomena intimately connected to the condition, historicity, and development of human civilization. The constant movement in search of the new, the unexplored, and, above all, better living conditions populates a constellation of oral, written, and artistic records in different media and cultures as well as academic and literary works.

It also constitutes a conditioning dynamic of the political organization of human society, influencing the forms of occupation and relationship with the territory. Crossing the predominant sedentary logic - with a closed and delimited relationship of individuals with their respective territories - as well as the nomadic/semi-nomadic models - with a more territorially open relationship -, the discussion about human mobility is essential for the delimitation and understanding from the moment(s) of the establishment of founding pacts (initially with society and later with the State), until the subsequent institution and governmentalization of borders and the flow of people between political bodies.

In its contemporary configuration, the international migration process is largely complex and is constantly becoming more complex. Given its relationship with the free transit of goods, capital, ideas, services, and people (dynamic characteristics of globalization); from the relationship with natural disasters (including those resulting from exacerbated capitalist exploitation), with the constant armed and political conflicts, as well as with economic crises and acts of terrorism, the migratory process is reflected and creates new demands from migrant people in all structures of a complex society.

In addition, to the questions provoked by the international mobility of people, the current global scenario totemizes the migrant from its functionality to society, projecting uncertainties, insecurities, and manifestations of hatred and fear in relation to the other. The suffering resulting from this coexistence with the subject who does not belong to the community and the functionality attributed to it triggers a dynamic of creating walls, physical and legal barriers in the reception and integration of migrants in new spaces and societies.

Considering this context of exclusion of the other, the non-belonging, social movements place themselves as spaces for collective action of paramount importance for the claim and materialization of new rights, aligning the State itself as a great social movement in response to new demands of minority groups.

In this sense, considering the new dynamics of migratory flows that arrive in Brazil and, consequently, new demands and challenges to the integration and protection of migrants, the question is: what is the importance of social movements in the construction of a new framework of migratory policies counter-hegemonic and legitimately democratic in the Brazilian State?

Aiming to go through the cartography of the scenario briefly narrated in the introduction, as well as to present answers to the research problem, this article is carried out with an input of the dialectical method. This method of approach was used given the need to analyze the dimensions of historicity, totality, the interaction of phenomena, conflicts of interest, and contradictions and transformations present in life in society, enabling a contextualized interpretation with greater dynamics of social reality (ARENHART et al, 2021).

Considering the classification proposed by Livio Osvaldo Arenhart et al (2021), concerning methodological procedures, as actions that intend to account for the obtaining and elaboration of information relevant to the research problem, the following were used: a) bibliographic research, with the contribution of theoretical references pertinent to the themes of migration, social movements, migratory policies, human rights and democratic legitimation; and b) documentary research, with the analysis of Brazilian legislation (Constitution of the Federative Republic of Brazil of 1988, the revoked Foreigner Statute, and the Migration Law).

Following the theoretical construction of Laurence Bardin (1979), such procedures were explored using the technique of content analysis, with the organization of the material collected (pre-analysis), the study of the theoretical references collected (analytical description), and the relationship between referential material with the variables, totality, and context of the analyzed themes (referential interpretation).

To work on the presented problem and answer the highlighted research objective, the work is organized into two chapters.

At first, the international mobility of people is contextualized as a phenomenon in constant complexification (in a complex society), to be treated, in the conception of Stephen Castles, Hein de Haas, and Mark J. Miller (2020), as a migratory process. This phenomenon is managed by migratory policies that, according to Lelio Mármora (2004), are based on the functionality of migrations and migrants to receiving societies. Functionality attributes to migrants a space of instability of (materialization of) rights, generally falling into exclusionary treatments from an order of securitization of migrations. In this sense, according to Alberto Melucci (2001) and Maria da Glória Gohn (1997 and 2018), the importance of social movements as actors and spaces in the search for the claim, expansion, and materialization of new rights of minority groups such as migrants, and possible potentializers, as elaborated by Boaventura de Sousa Santos (1999), of the dynamics of renegotiation of the State's social contract, with the insertion of new demands from social groups.

In the second stage, considering the history of the regulation of migration policies in the Brazilian State and, more precisely, the contrast between the paradigms materialized by the extinct Foreigner Statute (Law nº 6.815/1980) and those inaugurated by the Migration Law (Law nº 13.445 /2017), there is a possible insertion of the new migration legislation in a counter-hegemonic logic of human rights, according to the theoretical proposal of Boaventura de Sousa Santos and Marilena Chauí (2017). Still, based on the theoretical references of Jürgen Habermas (1989, 1992, 1995, 1999, and 2020), considering the social movements and agents involved in the context of the legislative process, the occurrence of democratic legitimation in the elaboration of the Migration Law is analyzed, with the opening of

the possibility of participation of migrants in the process of re-discussion and re-elaboration of the migratory policies by which they are affected. Finally, considering the post-Migration Law scenario, the potentialities and possibilities of protection of migrants are discussed as subjects of law duly integrated into the political body of Brazilian society along the lines of Arendtian citizenship.

## **2 Social movements, collective action and the fight for new rights in a complex society: the hope of overcoming the logic of migrant functionality in elaborating migration policies?**

As an important dynamic in the development of human civilization, migrations acquire greater relevance to academic discussion from the passage<sup>1</sup> from itinerant/nomadic/semi-nomadic (hunter-gatherer) models of relationship with space to agrarian models, with the predominance of a sedentary and closed relationship with territoriality (DELEUZE and GUATARRI, 2005; CASTLES, DE HAAS and MILLER, 2020) – based on properties, walls, and borders. It is this sedentary relationship that builds, throughout the history of human civilization, the main forms of organizations, such as the city, the fiefdom, and the state (ROTTA, 2018, p. 29) and that inserts international migrations as a theme of fundamental discussion and interest for the structures of normatization of the international society.

This is because, with the Peace of Westphalia, in 1648, which established the sovereign nation-state as the main political actor in international relations, the migratory dynamics (previously dependent on agreements, alliances, and personal financial conditions) entered a scenario of imposition of mechanisms migration control policies, as an exercise of the sovereign power of each state (MOSES, 2013; ROTTA, 2018, p. 11).

The migratory phenomenon gained new and peculiar characteristics from the First and Second World Wars (1914-1918 and 1939-1945). On the one hand, there was a growing number of people in a situation of forced or voluntary displacement escaping the devastation caused by the war or the loss of connection with their respective nation-states (and consequently of their rights). On the other hand, a structure to limit human mobility was developed, based on the securitization of migratory policies (ROTTA, 2018).

As a result of this new dynamic, the migration scenario is going through a stage of complexity, with expressive contingents of refugees and stateless people emerging (ROTTA, 2018). Without a certain destination or in search of better living conditions, such people gravitate across state borders without the effective possibility of being integrated into any political body. They were thus relegated to a state of nature.

Paradoxically, even after the creation of the United Nations (UN) in 1945, and the moral commitment solidified in a framework of international protection of human rights – with the Universal Declaration of Human Rights in 1948, followed by other international treaties, as well as the materialization of criminal courts and regional courts to punish crimes that violate and harm human rights -, the scenario of

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<sup>1</sup> This passage occurs around 12,500-10,000 years ago, in several regions including Mesopotamia, Ethiopia, West Africa, Mesoamerica and New Guinea (CASTLES, DE HAAS and MILLER, 2020, p. 23).

exclusion of “foreigners” and the securitization of human mobility remains. The fear of the foreigner, the other as a cause of insecurity and suffering (FREUD, 2021) remains.

As a legacy of the two great wars and ideological polarization, the Cold War marks a new stage in migration control policies. These are now guided by a scheme of national security and ideological protection, considering “foreigners” as beings subversive to the political integrity and national interests of nation-states. (ROTTA, 2018, p. 12).

With the end of the Cold War, in 1991, the political restructuring, especially of the former Soviet Union and East and West Germany, opens the possibility of escape from totalitarian regimes. Thus, there is a new stage of complexification of international mobility, with a new and massive flow of migrants, refugees, and stateless persons (ROTTA, 2018).

The transition from the 20th century to the 21st century, in turn, sees another moment of complexification of migrations. International migration acquires a global character, constituting an intrinsic dynamic of globalization processes, being in infinite complexity from the emergence of new trends: a) the globalization of migrations; b) the change of direction of the dominant migratory flows; c) the differentiation of migration (heterogeneity and simultaneity in the reasons for human mobility); d) the proliferation of the migratory transition; e) the feminization of migrations; and f) the increasing politicization and securitization of migrations (CASTLES, DE HAAS and MILLER, 2020, p. 09-11).

As a direct result of these new trends, there is the intercession and cohabitation of people from different cultural contexts (CASTLES, DE HAAS, and MILLER, 2020, p. 365) and the creation of a “super-diversity” (VERTOVEC apud SANTOS and LUCAS, 2019). Society now presents a set of different cultural crossings, or intercultural clashes, promoted by the new technologies of communication and movement and, logically, by the crossing of the borders of the nation-state.

Such is the complexity of international human mobility in its current facets that, faced with the need for new theoretical approaches to understanding it, Stephen Castles, Hein de Haas, and Mark J. Miller (2020) develop the concept of the migratory process. This concept portrays the complex set of non-isolated phenomena, “of factors and interactions that lead to migration and influence its course”, with variation in time and space, which accompany the entire life of the migrant (and future generations), as well as the people around him (CASTLES, DE HAAS and MILLER, 2020, p. 42-45). It is an experience, a collective action that originated in social change that also affects the whole of society, for an indefinite period, whether in the spaces where people leave or in the places that welcome migrants (CASTLES, DE HAAS, and MILLER, 2020).

Such an understanding of the migratory process as a complex set of phenomena is feasible within the logic of viewing society from the lens of its complexity or, more precisely, of thinking about it as a complex society.

In this sense, starting from the modern conception of society, Regina Cele de Andrade Bodstein (2000, p. 63-77) illustrates the complex society as one in which, from the Western European context between the 17th and 18th centuries, she starts to present: a) in the economic order or an “accelerated process of industrialization”, the complex society is expressed in an “increasing division of labor”, with new

production techniques, division, and specialization of the same, as well as heightened growth of production, of the very market and consumption; and b) in a field of “cultural and symbolic values”, it starts to be represented by the “appearance of a set of ideological and symbolic values that transforms the individual, in his singularity, into the center of this society”. Each individual being is an equal subject in terms of rights (but also able to exercise their differentiation based on the demand for new rights in the fight against their exclusion, an important field for the expansion of human rights and fundamental rights), free (free workers from feudal order, religious beliefs, hierarchies, and traditional values) and sovereign, able to conquer and expand their public space of participation in the State. This subject assumes new positions and duties and begins to demand new rights and models for exercising their citizenship.

These new dynamics of the economic order are intrinsically linked to international labor mobility as a dynamic of economic globalization and, in the field of cultural and symbolic values, to the demands for new rights (and their materialization) based on the protection, inclusion, and participation of migrants in state political bodies of the societies that receive them.

Alongside the complex dynamics of the movement (voluntary or forced) of people across borders of nation-states, political interests, and popular reaction, migration policies are structured. Such normative contents comprise ways of “managing migrations” (MÁRMORA, 2004, p. 17), being a “set of measures adopted by a certain State to control the flow of people across its borders, as well as the permanence of the foreigners” (MORAES, 2016, p. 24) and, are structured by each political body based on its sovereign prerogatives<sup>2</sup>.

Focusing on the analysis of migratory policies and power projects of a given State allows us to perceive the functionality employed or constructed by power groups in a given political body in the context of migration and, more directly, on the migrants themselves.

According to Lélío Mármora (2004, p. 49), the process of “demonizing” migrants is functional for fundamentalist groups that need to embody their hatred<sup>3</sup>. In some spaces, the “ghost” of migrants fulfills a double role of “external enemy” – using the logic of suffering in the face of coexistence with the Other, with the unknown or different (FREUD, 2021) – in front of which the members of a group or a nation should unite (join forces for protection) and, at the same time, a “scapegoat” of internal misfortunes that cannot be resolved (MÁRMORA, 2004, p. 49).

Even if it is kept in mind that both strictly optimistic and purely pessimistic views on migration and development (especially in the case of migrations motivated

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<sup>2</sup> Analyzing migration policies is one of the ways to reflect on the country's projects and the models of society that each government and each political and social group with aspirations of power intends to install (NEJAMKIS, 2016, p. 11). It is seeking to understand the State itself and how it perceives and manages its population within a certain sovereign geographic territory (FOUCAULT, 2019).

<sup>3</sup> The functional analysis of migration creates prejudiced or distorted images of migrants that can lead to xenophobic positions, where the immigrant is easily taken as the cause of the ills of a society in crisis; xenophilic, in which the foreigner is seen as the solution to society's problems; xenophobic, when prejudice comes from minority groups and is directed towards global society and, also, endophobic, when prejudice is directed towards the group to which they belong (MÁRMORA, 2004, p. 54).

by the search for jobs, from remittances to countries of origin) can be dangerous (CASTLES, DE HAAS, and MILLER, 2020), it is argued that the demonization of the figure of the migrant, seen in the functionality of migrations (MÁRMORA, 2004), must be vigorously fought. In this sense, it is important to highlight that the convergence between the themes of migration and development, whether as a basis for international policies, a strategy for territorial occupation, or an instrument for the supply of labor is not a new or little-explored trend in migration studies<sup>4</sup> (MÁRMORA, 2004, p. 119).

According to Mármora (2004, p. 119), such a relationship generally does not provide positive solutions or practices for all parties involved: migrants (who are usually the parties negatively affected), receiving or expelling countries, and their social segments. As negative responses, the functionality of migratory policies commonly ends up being guided by the treatment of exclusion and combating the presence of migrants in the face of xenophobic positions already presented (MÁRMORA, 2004). Also, depending on the theoretical matrix used, unfavorable positions regarding international migration and development are offered by pessimistic critics, pointing to the depletion of human and financial resources in the countries of origin (CASTLES, DE HAAS, and MILLER, 2020, p. 331).

In turn, in the convergence with development thinking, as important steps in a global commitment to positive response agreements towards the situation of migrants, it is worth noting: a) the adoption of the Global Compact for Safe, Orderly and Regular Migration (approved by UN Member States at the General Assembly in July 2018 and adopted in December of the same year), to better address the challenges of international migration and strengthen the rights of migrants, contributing to sustainable development (UN NEWS, 2018). ); and b) The Sustainable Development Goals of the UN 2030 Agenda, which aim to seek a better analysis of the convergence between migration and development, recognizing the need to reduce inequalities between countries, the implementation of governance of cooperative migration policies, for the safe, orderly and regular migration, underpinning the positive contribution of migrants to inclusive and sustainable development (IOM, 2018).

However, there is a process of massification of state propaganda or passionate speeches by populist political leaders in which prejudiced and exclusionary forms of migrants' "purpose" (and implementation of exclusionary migratory policies) converge to maintain and popularize political platforms of government that divert attention from the other misfortunes and insecurities of modernity to the election of a common enemy: the migrant (MÁRMORA, 2004; BAUMAN, 2017a and 2017b).

The dreams of integration and cosmopolitanism are abruptly shattered. The humane treatment of the international migration process and migrants is highly harmed in the face of the resumption of a delusional nostalgia, of a return to the safety of the womb, to the first love of the fortified and closed nation-state, called by

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<sup>4</sup> For the author (MÁRMORA, 2004, p. 120), this relationship varies between the vision of development as an immediate cause, as a consequence, as a desired product, as a conditioning mark, or as a process affected by migratory movements, depending on the application of the different theories or explanatory categories about migration.



Zygmunt Bauman retrotopia (BAUMAN, 2017b). Nation-states return to the ideas of communities closed in on themselves, which places the migrant as an enemy to be fought.

These daydreams are typical of a vicious circle seen in the forms of security administration<sup>5</sup> of the migratory process and in the resumption of the popularity of populist and conservative policies, which institutionalize fear of foreigners. Still, they perform the last role of uniting everyone – in a collective and delirious passion for the charismatic figure of a populist leader (LACLAU, 2013) –, from the materialization of hatred, exclusion, and violence against minorities, to those who do not belong.

In this sandy soil, in a climate devoid of hope of abundant rains, social movements, based on collective or social actions, place themselves as the few entities or actors able to sow the seeds and cultivate the possibilities of new rights in favor of the protection of minority groups such as migrants.

From the resumption of classics of social science, Melucci understands social action as a set of practices that involves, at the same time, a certain number of individuals or groups with similar morphological characteristics in contiguity of time and space, implying a field of social relationships and the ability to make sense of what they are doing (GOHN, 1997, p. 153-163). He, therefore, emphasizes collective identity, from a psychosocial approach (GOHN, 1997, p. 153-163).

D According to Alberto Melucci (2001, p. 33-36), the emergence of collective actions is historically associated with crises in the system or some of its aspects, being seen as a social pathology. Collective action is typical of a space of disequilibrium, of discomfort. This is what is observed in the international scenario concerning the treatment of migrants, where pro-migrant movements are viewed with disdain.

A collective action results from “goals, resources, and limits”, from a finalized orientation that is built through social relations within a field of opportunities and bonds (MELUCCI, 2001, p. 46). Such collective action combines orders of action in three interdependent and tensioned vectors: a) concerning the ends of the action (the meaning that the action has for the actor); b) means (possibilities and limits of action); and c) relations with the environment (field in which the action takes place) (MELUCCI, 2001, p. 46)<sup>6</sup>.

For Melucci (2001, p 33-36), when collective action mobilizes a collective actor, defined by specific solidarity, which fights against an opponent for the appropriation

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<sup>5</sup> The securitization policies presented by some governments, especially after the attacks that took place on September 11, 2001, in the USA, portray migration as a fundamental threat to the security and integrity of the culture of the nations that receive migrants (CASTLES, DE HAAS and MILLER, 2020). The securitization model is also a theoretical-practical form of managing differences and diversities, “to criminalize and penalize differences, to control the other, the other-different, the vulnerable-other-different”, representing the migrant, not being restricted to a purely criminal or police problem (SANTOS, LUCAS, 2019, p. 197).

<sup>6</sup> Also considering the new dynamics of communication within social movements based on information technologies or, more precisely, social networks in virtual space (CASTELLS, 2017), it is worth noting that the structuring of social migration networks in the spaces of departure, passage, and arrival, analyzed by network theory in migration studies, is also enhanced by globalized communication technologies (in formal channels or more informal networks), especially from the use of the internet (CASTLES; DE HAAS; and MILLER, 2020).

and control of resources valued by both, there is a social movement<sup>7</sup>. This is manifested by the rupture of the limits of compatibility of the system within which the action itself is situated<sup>8</sup> (MELUCCI, 2001, p 33-36).

From the concepts developed by Alberto Melucci (2001, p. 41-42), analyzing the behaviors presented in the social movements headed by migrants, as well as those pro-migrants, carried out by civil society (such as those that came to lead to the elaboration of the Migration Law, which will be analyzed in the next chapter), it can be said that these are demanding movements. This is because the conflict and rupture of rules occur within an organizational system, characterized by roles and functions, more precisely within the legal systems of nation-states. Still, they are political movements, as they express a need to break the limits of the current political system, a struggle to expand the possibility for migrants to participate in society's decision-making, colliding against the imbalance of the political game that always privileges certain interests over others (MELUCCI, 2001, p. 41-42)<sup>9</sup>.

From the collective action and spaces of struggle and demands of social movements, it is imperative to rethink the State, with the consequent transformation of the social contract. In a commitment that precedes the structuring of a counter-hegemonic dynamics of human rights - directly reflected in the projects of people's emancipation and construction of citizenship - analyzed later, the idealization of a transnational conception or that requires the complete withdrawal of the state (ROTTA, 2018, p. 119).

Rather, the aim is to re-elaborate the votes of the social contract, colonized by an individualist liberal contractualization, shaped in the resemblance of the civil law contract between individuals, and not in the idea of the social contract between collective aggregations of divergent social interests (SANTOS, 1999, p. 44). This “new form of contract” does not present conflict and struggle as structural elements and imposes the passivity of contracting parties to “supposedly universal conditions” (SANTOS, 1999, p. 44).

The “crisis of contractualization” is observed in the structural predominance of exclusion processes over inclusion processes, in contradictory ways, namely: a) post-contractualism, a process by which social groups and interests hitherto included in the social contract they are excluded from it without any prospect of return; and b) pre-contractualism, which consists of blocking access to citizenship by social groups that previously considered themselves candidates for citizenship and had a well-founded expectation of accessing it (SANTOS, 1999, p. 45).

Within the analysis of the “illusion of anti-statism”, professors Boaventura de Sousa Santos and Marilena Chauí (2017) invite us to reflect on the state structure itself as an agent of positive and not simply negative action, as well as a supervisory

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<sup>7</sup> When talking about Melucci, Maria da Gloria Gohn (1997, p. 155) states that social movement is an analytical construction and not an empirical object or an observable phenomenon.

<sup>8</sup> However, it is important to mention that for a collective action to be considered a social movement, the mere existence of a conflict or rupture of the limits of compatibility of the reference system does not characterize the existence of a social movement (MELUCCI, 2001, p. 33-36).

<sup>9</sup> The third category elaborated by Melucci (2001, p. 42) is that of antagonistic movement, which is a collective action that carries a conflict that affects the production of resources in a society and that fights not only against how resources are produced but call into question the goals of social production and the direction of development.

instance of the social pact enacted. This is because, from the moment that private interests overlap public ones, using the state machine and its sovereign prerogatives to massify, homogenizing the new social demands arising from the difference, from minorities (preventing the renewal itself), there is a need for the reconstruction of the social pact to be placed on the agenda.

This is one of the dynamics of struggle and demand observed in the new social movements in the era of internet social networks. Even not necessarily converting into political parties, properly speaking, they are born, autonomously, in networks that are both local and global, occupying public spaces from indignation with the putrefaction of democracies in national states and the superlativation of private interests or large economic groups (CASTELLS, 2017).

In this sense, within the concept of “the illusion of anti-statism”, the state must be rethought as a “brand new social movement” (SANTOS, 1999, p. 66-74), enabling the inclusion of new demands presented by social minorities, among which the demands of foreigners and migrants are located. It is understood that this dynamic remains capable of enhancing and expanding the spectrum of citizen inclusion in the molds defended by Hannah Arendt (2012), as a great right to have rights from the inclusion of a certain political body.

### **3 The migration law as a counter-hegemonic instrument of human rights: in search of the democratic legitimation of Brazilian migration policies**

The process of construction and formation of the Brazilian State “as a 'discovered' and colonized country, has rooted in its history and population constitution the participation of different migratory flows of 'foreigners'”, with sometimes expressive inflows, sometimes incipient, of migrants in the integration of its political body (ROTTA, 2018, p. 122).

The changes in national interests and political views of the dominant groups, as well as the respective alteration of different models of administration of the migratory phenomenon (in line with the international scenario) present phases of: a) colonization, “with the creation of policies and programs of encouraging the entry and occupation of territory by migrants (forced and 'free')”; b) restriction, “with strong eugenic tendencies, of the entry of people aiming at the construction of a republic endowed with a culturally homogeneous nation”, which is later combined with the national interests of “security policies (National Security Doctrine), dealing with the phenomenon and the migrant person within the criminal spectrum”; and c) “after a period of redemocratization of the Brazilian State (CRFB/1988) and the maintenance of a misalignment of the migratory legislation with the precepts of that one”, the efforts of social and governmental mobilization “are in the creation of a legal diploma aligned with the new migratory context and based on the current human rights framework (Migration Law)” (ROTTA and NUNES, 2019: 169-170).

Breaking with the crimigratory treatment of migrations (MORAES, 2016), the sanction of Law 13,445, from May 24, 2017 (Migration Law), inaugurates “a new model of 'functionality' for migrants, shaping the administration of the migratory phenomenon. from the logic of the international structure of human rights and the Democratic State of Law” (ROTTA, 2018; ROTTA; ROTTA and SANTOS, 2019, p.11).

The security treatment previously established by Law 6,815/1980 is formally superseded. Article 1, Article 2, and Article 3 of the Foreigner Statute determined that, even in times of peace, the entry and permanence of the foreigner in Brazil (as well as the granting, extension, and transformation of the visa) were conditioned to the legislation and the protection of national interests, with the necessary attention to “national security, institutional organization, political, socio-economic and cultural interests of Brazil, as well as the defense of the worker”. In its turn, the Migration Law, in Article 3, items III and VI, establishes as principles and guidelines of Brazilian migration policy the “non-criminalization of migration” and “humanitarian reception”.

The term “foreigner”, a legal nomenclature adopted in the Foreigner Statute, is replaced by the legal figures of “immigrant”, “emigrant”, “border resident”, “visitor” and “stateless person” (Article 1, items II, III, IV, V and VI of the Migration Law), without prejudice to the application of internal and international rules on “refugees, asylees, agents and diplomatic or consular personnel, employees of international organizations and their families” (Article 2 of the Migration Law).

It should be noted that, contrary to the repealed legislation, the Migration Law establishes a series of principles and rights to the administration of migrations (Article 3 and items) and a set of rights and guarantees for migrants (Article 4) (ROTTA, 2018; ROTTA; ROTTA E SANTOS, 2019, p.11). For illustration purposes, the following stand out: the principles of universality, indivisibility and interdependence of human rights, repudiation and prevention of xenophobia, racism and other forms of discrimination, non-criminalization of migration, humanitarian reception, equal treatment and of opportunity for migrants and their families, and equal and free access for migrants to services, programs, social benefits, public goods, education, legal assistance, work, housing, banking and social security (Article 3, items I, II, III, VI, IX, and XI) and the guarantee, in the national territory, on an equal basis with nationals, of the inviolability of the right to life, liberty, equality, security and property, as well as the rights and freedoms civil, social, cultural and economic rights and freedom of movement within the national territory, to be exercised in compliance with constitutional provisions, regardless of the migratory situation (Article 4, caput and items I and II and § 1).

The aforementioned load of principles and guidelines, objectives, rights, and guarantees of the Migration Law promotes the alignment of Brazilian immigration legislation and policy with the normative content established in the Constitution of the Federative Republic of Brazil of 1988. It also harmonizes the new legislation with rights treaties of which Brazil is a signatory, fulfilling the objective implemented by the Committee of Experts responsible for preparing the Preliminary Bill.

It is understood that this panorama of integration and guarantee of rights reflects the conception of citizenship formulated by Hannah Arendt (2012). For the author, citizenship is the “only” or “the great right”, since it is from the belonging/integration to the social pact in a given space, community, or political structure that the human person will have the possibility of enjoying the rights legally. fixed and extended to the parties. Thus, the constant state of exception, of legal anomie, characteristic of Law 6,815/1980 (Foreigner Statute) would be removed.

Additionally, it is understood that the Migration Law meets a post-abysal, counter-hegemonic logic of human rights.

It can be said that the logic of the liberal state, which guided the French Revolution and which permeates the paradigm of Human Rights, formed “a structure that sought the independence of some, but not the equality of a totality of people” (ROTTA, 2018, p. 116). In this sense, Hannah Arendt (1965) argues that, with the dismantling of absolutist sovereign power in the French Revolution, the nation-state put on the monarch's shoes, leaving the social pact focused solely on the liberation of the insurgent bourgeois class, not having been given attention to the creation of a structure of equality of all before the law.

Despite being an “initial moment for the stage of internationalization of human rights”, the establishment of the Universal Declaration of Human Rights, of 1948, also maintains firm the “hegemonic logic of rights based on equality and liberal individualization, homogenizing the differences” (ROTTA, 2018, p. 115-116).

For Santos and Chauí (2014), this statement demonstrates the ambivalence and difference in treatment when talking about human rights, presented: a) at a broader level (from which the idea of human rights comes), a collectivity that is more inclusive of humanity, but which guarantees only a possible minimum; and b) in the face of the erosion of rights and their effectiveness in the previous situation, a more restricted, localized and internal level, a denser collectivity of citizens of a given State, to which a certain set of rights is attributed. In the same sense, Seyla Benhabib (2005, p 674) argues that the UDHR is silent regarding the obligations of states to guarantee the entry of immigrants, grant asylum, and allow citizenship to "foreigners" residing and non-citizens, still maintaining strong degrees of discretion to the nation-state from the use of its sovereignty.

At the same time that this model of human rights established the model of citizenship in international society, thus creating a “human being, subject of rights”, it also perpetuated “a sub-humanity, the subject without rights, which is mirrored in the nation-state in the figure of the sub-citizen/non-citizen/'denizen'/alien/'foreigner'” (ROTTA, 2018, p. 116). Such a subject is stripped of any legal protection or belonging or relegated to the broader level, which is in complete erosion and ineffectiveness.

Thus, “the system of rights itself and, consequently, of human rights guarantee the continuity of radical exclusions” since they are designed “only to be in force on the side of the 'abyssal line' occupied by metropolitan societies” and their respective citizens (ROTTA, 2018, p. 116).

Bearing in mind the imperative to analyze and (re)think the hegemony of human rights from a “hermeneutic of suspicion”, Santos and Chauí (2014, p. 42-53) argue that the critical analysis of the human rights paradigm, from a “counter-hegemonic” conception, can be constructed through the overcoming of common sense. This state of thought to be broken is founded on five illusions: a) the “teleological illusion”, which only observes the unconditionally good part of human rights, blocking the analysis of spatio-temporal contingencies, given that “the same actions that, seen from the perspective of other conceptions of human dignity, they were actions of oppression or domination, they were reconfigured as emancipatory and liberating actions” when carried under the banner of human rights; b) “triumphalism”, sustained by the previous illusion, and which brings the idea that the “victory of human rights is an unconditional human good” and that “all other grammars of human dignity that competed with that of human rights were inherently

inferior in ethical and political terms”, in a true logic of social Darwinism; c) “decontextualization”, an illusion from which it is forgotten that, many times, human rights were used “as a discourse and as a political weapon, in very different contexts and with contradictory objectives”, having been “subsumed under the law of the State”, incorporated by the institutions, thus losing their original revolutionary character, which is why it is not known whether they “have behind them a revolutionary energy of emancipation or a counter-revolutionary energy”; d) as a fourth illusion, “monolithism”, from which the tensions and internal contradictions of human rights theories are denied or minimized; and e) the illusion of “anti-statism”, from which, even though human rights were a project of insurgency against the powers, the authors advocate the need for the State to remain at the center, as a provider subject (positive activity as a translation of citizens rights) – but duly reconfigured and protected from economic power, from the great holders of capital, which dilute the political power of the State and compose projects of massive destruction and violation of human rights.

In addition to identifying these illusions, a fundamental step for the construction of a counter-hegemonic conception and practice of human rights takes place from the political work of “social movements and organizations that fight for a fairer and more dignified society”, in a way to define, with greater success, a grammar of human rights based on an alternative construction, which eliminates the still existing ambiguities that sustain hegemony based on the common being (SANTOS and CHAUI, 2014, p. 49).

In this sense, it is argued that the Migration Law establishes a normative structure rooted in a “hermeneutic of suspicion”, imposing criticism on its materialization, rescuing humanity as an identifying element and the emancipation of people (migrants, refugees, asylum seekers, and stateless persons) as a fundamental factor (SANTOS and CHAUI, 2017; SANTOS, 1999).

Thus, in the wake of the discussion already presented at the end of the previous subchapter, it is guaranteed power to discuss and rethink the social pact itself from the necessary transformations in human rights, the imperative attention to be given to the new demands presented by social minorities (SANTOS and CHAUI, 2017; SANTOS, 1999).

From the alignment of Brazilian immigration legislation to the anti-hegemonic/counter-hegemonic position, the passage of migrants as “subhumans”, simple “objects of human rights discourses”, to subjects of rights, able to integrate as citizens in a particular political body (SANTOS and CHAUI, 2017; ARENDT, 2012).

In addition to the counter-hegemonic character, it is understood that the Migration Law enjoys a process of democratic legitimation (which could even be understood as a double process), both in the set of acts of its elaboration and in its implementation and its possible re-discussion. /re-elaboration (by the migrants themselves as affected subjects) in the legal system.

Who provides clues for such understanding is the German thinker Jürgen Habermas (1997), who presents a new way of understanding the rule of law and its democratic relations in a complex contemporary society. Taking elements from liberal and republican conceptions of democracy and law, discourse theory carries out a conceptual integration in the idea of an “ideal procedure for deliberation and decision-making” (HABERMAS, 1995).

In this theoretical model, the law represents the medium structure (environment) between the “world of facts/world of life” and the “world of systems”, having to regulate and control the expectations of power relations and maintain social order, from a normative set created in a space of democracy based on communicative action (HABERMAS, 1997).

The communicative action, “oriented towards mutual understanding” is marked by the following aspects: a) “orientation towards mutual understanding”, in which the “actors try to internally harmonize their action plans and only pursue their respective goals under the condition an existing agreement or to negotiate about the situation and the expected consequences”; b) “mutual understanding as a mechanism for coordinating actions”, from which “the acts of mutual understanding, which link the action plans of different participants and bring together objective-directed actions in an interactive connection, do not need their part be reduced to teleological action; c) existence of an “action situation and speech situation”, in which, from the communicative action, “the agents alternately assume the communicational roles of speakers, addressees and people present”; d) communicative action is a circular process in which the lifeworld provides the context and resources for mutual understanding and is transformed by it, being the initiating agent and product of this dynamic; e) enables the “process of mutual understanding between the world and the world of life”; f) speech acts are marked by statements that are presumably true, correct and sincere; and g) the relationship and interaction between different communicational roles and perspectives of speakers in the process of choice in the face of the objective, social and subjective world (HABERMAS, 1989, p. 164-172).<sup>10</sup>

The theory of communicative action, as a dimension or materialization of democracy, applied to the production and reproduction of law, seeks to assimilate the tensions between facticity and validity, and only through the union of participants/citizens around their speech actions, the verification of dissent and the realization of a process of negotiation of the interests involved (in a kind of “organized self-determination”), the dimensions of rationality and morality that guarantee legitimacy to the produced law are incorporated (HABERMAS, 1997, p. 25, 36, 54, 191, 208). It is the action-oriented toward understanding, and, ultimately, therefore, the very structure of linguistic communication that underlies the validity of the normative content produced (HABERMAS, 1995, p. 46).

Through communicative action, democracy presents itself as a mechanism that will produce legitimate law, a “core of a system of rights”, being, at the same time, in a circular process, constituting legitimate law (and fundamental rights in its code of law) and also the principle of democracy itself (HABERMAS, 2020). For this reason, the legislative process itself, the process of constituting the law, to be legitimate, makes communicative action essential, equitable dialogic participation between the interested parties and affected by the norm so that, from understanding and negotiation, they arrive, from the consideration and discernment of collective ends to a “non-coercive consensus” (HABERMAS, 2020).

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<sup>10</sup> In short, communicative action serves as a point of reference for a reconstruction of the stages of interaction (HABERMAS, 1989, p. 163).

The democratic legitimation of the law guarantees a higher stage, going beyond the simple legitimation achieved by the legislative process provided for in Articles 59 to 69 of the Constitution of the Federative Republic of Brazil of 1988. Given the dialogic participation, and the consensual negotiation of the interested parties and interests involved, there is the possibility of maintaining an environment with a lower level of frustration and greater acceptance and, consequently, greater purification and/or reduction of complexity in the Law subsystem.

In the first instance, the democratic legitimation of the new migratory legislation in its legislative process is evident, with the hearing and representation of the interests of society and, even if indirectly, of the migrants themselves, subject to migratory legislation. In this sense, a point of great importance for the discussion of the aforementioned Bill was the holding of the 1st National Conference on Migration and Refuge (*1ª Conferência Nacional sobre Migrações e Refúgio - COMIGRAR*), between May 30 and June 1, 2014, which included the exchange of knowledge and propositions from members of civil society and NGOs in research and study groups, later recognized by the Committee of Experts (SCHWINN and COSTA, 2015, p. 11). It is also worth noting the World Social Forum on Migration (WSFM) and the I Dialogue on Social Participation held by the National Immigration Council (*Conselho Nacional de Imigração - CNIg*), events that, in their entirety, highlighted the importance of legislation on migration that would maintain harmony with international human rights law (WERMUTH, 2020, p. 103).

As Bill 288/2013 (Federal Senate) and Bill 2,516/2015 (Federal Congress), a Committee of Experts has been formed to prepare the “Draft of Migration and Promotion on the Rights of Migrants in Brazil” (comprised of university professors, members of the Public Ministry, jurists, political scientists, and specialists in human rights, constitutional law, and international law) who carried out studies on the immigration legislation of the country, other countries, and international treaties, as well as listening to other experts, government agencies, and civil society.

Despite a series of changes to the draft text, based on discussions in the legislative process and presidential vetoes, the drafting of the Migration Law provided the space for a series of public hearings to be held with agencies and public servants which deal directly with the phenomenon, academics and researchers in areas related to the migratory process and migratory policies and, above all, with civil society institutions that are activists for the rights of migrants (MORAES, 2016, p. 303).

It is worth mentioning here that the entire process of elaborating spaces for discussion, critical analysis and militancy of the rights of migrants is carried out, at an international level, by institutions such as: the UNHCR (United Nations High Commissioner of Human Rights) responsible for carrying out campaigns raising awareness of the rights of migrants and refugees on social networks; the *Congregazione delle Suore Missionarie di S. Carlo Borromeo Scalabriniane* (Congregation of the Missionary Sisters of Saint Charles Borromeo Scalabriniane), “founded on October 25, 1895 (currently based in Rome/Italy)” and “which carries out missionary activity in twenty-six countries, in four different continents (among which Brazil is included)”; “the NGO Committee on Migration, which constitutes a committee of fifty NGOs supporting migrants, refugees, stateless persons, internally displaced persons and victims of human trafficking”; “Amnesty International,



recognized for its fight/militancy in the construction/defense of Human Rights”; Migrants Rights International (MRI), “NGO that has special consultant status at the United Nations Economic and Social Council” (ROTTA, 2018, p. 100-101). And, in the Brazilian context, *Cáritas Brasileira*, “which is part of the *Caritas Internationalis Network*, and constitutes an organism of the CNBB (National Conference of Bishops of Brazil) acting in the defense of human rights”; and the Center for Human Rights and Immigrant Citizenship (CDHIC), “an organization that aims to 'promote, organize, carry out and articulate actions' for the construction of a migration policy aligned with human rights” (ROTTA, 2018, p. 100-101).

In a second degree, with the repeal of the Foreigner Statute, the rule that prohibited the migrant admitted to the national territory from participating in events or institutions and the exercise of political activities ceases to apply, and also prevented the so-called “foreigner” to take part, directly or indirectly, in public affairs in Brazil (Article 107, caput and items and Article 125, item XI, both of Law 6,815/1980).

Consequently, given the application of the principle of legality, established in Art. 5, items II and XXXIX of the Constitution of the Federative Republic of Brazil of 1988 and in Art. 1 of Act-Law 2,848/1940 (Criminal Code), if the device that typified the aforementioned conduct is not reproduced, political activity on the part of the migrant is decriminalized, giving him the right to integrate and take part in the public spaces for dialogue and decision. Also, from the aforementioned decriminalization process, the scope of the constitutional right of assembly and association to migrants was given, provided that for lawful purposes (Art. 4, items VI and VII, of Law 13,445/2017), within the same conditions offered to Brazilians of original nationality (Article 5, item XVII, of the Constitution of the Federative Republic of Brazil of 1988). Previously, any association of migrants was limited to activities considered “not prohibited” (Art. 108 of the Foreigner Statute).

Although the right to direct participation in the Brazilian democratic political system was not conceived (exercise of active or passive citizenship, according to Art. 14, caput, items and paragraphs of the 1988 Constitution of the Federative Republic of Brazil), the possibility of political qualification of the migrant person as a subject capable of active participation in public spaces of discussion, promoting social dialogue in the formulation, execution, and evaluation of migratory policies and the citizen participation of the migrant (Article 3, item XIII, of the Law of Migration) either through the realization or participation in events and institutions of a political nature, from the constitution of meetings or associations among their peers.

Considering the sociable nature of the human being, which “drags” him to the structures of political association (ARISTOTELES), the participation of migrants in public spaces of dialogic discussion and decision, in spaces of work and action, as well as in the (re)formulation of the social pact, laying bare and shaping its identity in the face of the recognition of its activities by its peers, makes up the human condition of the *Vita Activa* (ARENDR, 1997) and contributes to the process of legitimizing the migratory policies established by the government in its person.

It is this scenario of establishing a greater burden of rights and guarantees for migrants, with the scope or opening of the possibility of participation, of effective agency of the migrant from the integration as a subject of rights (and capable of acting in the decisions of society) in a certain political body that confirms the counter-hegemonic character of the Migration Law. At the same time, it provides

opportunities for the process of legitimizing migratory policies, inserting the migrant as an actor in the very dynamics of social movements, for the renewal and re-discussion of migratory policies and the social contract of receiving societies.

However, especially from 2018 onwards, “the advances made in migration policies and in the resulting legal framework are put at risk from the rise”, to the Brazilian federal government, of an “alliance of forces identified with neoconservative ideas” (ROTTA; ROTTA E SANTOS, 2019, p.11). From that moment on, a series of manifestations by members of the government and its structures signal the break with the search for the protection of the human rights of minorities, including migrants, in the face of the Brazilian withdrawal from the Global Compact for safe, orderly, and regular migration (ROTTA; ROTTA E SANTOS, 2019, p.11).

It should be noted that this new conservative arrangement is composed of an alliance of groups (conservative religious groups, sectors of public security, sectors of financial capital, the “new right” in fractions of the middle class, and traditional conservatives) that, despite being heterogeneous, operate in unison from traditional values (ROTTA; ROTTA and LAGO, 2020).

Among such ideals, the securitization of the State and nationalism should be highlighted, which generate policies of hatred for the different, “which translates into disgust at migrants and refugees” (ROTTA; ROTTA and LAGO, 2020, p. 13). Consequently, the very migration policies born in a post-re-democratization scenario pose themselves as obstacles, obstacles to be overthrown, emphasizing the resumption of thoughts and policies with a “crimigration” bias (ROTTA; ROTTA and LAGO, 2020).

As a practical consequence or direct action of the political and social challenges portrayed above, it should be noted that the impulses to materialize the Migration Law and implement a new model of migratory policies remain impaired. Conflicting interests or the rupture of propositions and struggles originating from pro-migrant groups and social movements (in the re-democratization scenario) are evident since the process of sanctioning the Migration Law, with the attribution of vetoes by the then president (ROTTA, 2018); passing through the subsequent Regulatory Act 9,199/2017, which presents provisions that show the “continuity of an authoritarian perspective in the management of migratory flows” (WERMUTH, 2020, p. 111), to the maintenance of the Federal Police as the main regulatory and management of migration policies (VILLEN and QUINTANILHA, 2020).

#### 4 Conclusion

Therefore, in an international stage of uncertainties and insecurities, as well as the resumption of retrotopic nationalist fundamentalisms and tribalisms, the administration of the migratory process and the condition of the person in a migration situation find themselves trapped in the terrible and extremely volatile dynamics of the functionalist treatment of migration policies of sovereign nation-states.

Aiming for civilization to be guided by the rescue and maintenance of humanity and the humane treatment of migrant people, social movements stand as an important structure for collective action, reflection, and restructuring of the social

pacts of sovereign nation-states for the claim and materialization of new rights for minority groups typically excluded from political bodies.

It is understood that it is precisely this process of reflection and restructuring, potentiated by social movements, that made possible the creation of the Migration Law (Law 13,445/2017). Starting from a counter-hegemonic model of human rights, this legal diploma guarantees power in the process of migrant emancipation, from its insertion as a subject of rights in a given political body. Still, created in a process of democratic legitimation, the Migration Law also opens up possibilities for the participation of migrants in the process of legitimation, discussion, and re-elaboration of migration policies that affect and govern them.

Finally, it should be noted that the materialization or implementation of the Migration Law still offers numerous challenges to the realization of such potentialities and possibilities, given the glimpse of contradictory interests in its application and the establishment of a new order of migratory policies, fed by the recent neoconservative political turn in the Brazilian scenario.

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