HEALTH AND SAFETY AT WORK:
A COMPARATIVE ANALYSIS OF THE
BRAZILIAN ENFORCEMENT FRAMEWORK

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DEDICATION

To my parents, Maria Isabel (in memoriam) and Jose Mariano for they love, guiding, friendship, freedom of choice and above all for believing I could achieve my dreams;

To Laércio who has been with me during this entire journey, in a different country and different culture, and who has given his unconditional support, love and friendship.
STATEMENT OF AUTHORSHIP

Except where explicit reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis by which I have qualified for or been awarded another degree or diploma. No other person's work has been relied upon or used without due acknowledgement in the main text and bibliography of the thesis.
LIST OF ABBREVIATION

ACP – Ação Civil Pública – Public Civil Action
CDC – Código de Defesa do Consumidor – Costumer Protection Code
CIPA – Internal Commission for Accident’s Prevention
CP – Código Penal – Penal Code
CPS – Crown Prosecute Service
CUT – Central Única dos Trabalhadores – National Trade Union Centre
FC – Federal Constitution
HSC – Health and Safety Commission
HSE – Health and Safety Executive
HSWA – The Health and Safety at Work Act 1974
IBGE – Brazilian Bureau Census
ILO – International Labour Organization
MHSWR – Management of Health and Safety of Work Regulations, 1999
MP – Ministério Público - Public Ministry
MPT – Ministério Público do Trabalho – Employment Public Ministry
MTE – Ministério do Trabalho e Emprego – Work and Employment Ministry
NGO – Non Governmental Organizations
NHS – National Health System
NR – Normas Regulamentadoras – Regulatory Norms
PCMSO – Medical Programme for Occupational Health
PPRA – Programme for Prevention of Environmental Risk
SESMET – Specialized Service of Engineering for Health and Safety at Work
SINAT – The National Trade Union of Labour Inspectors
STF – Supremo Tribunal Federal – Supreme Federal Court
TUC – Trade Union Congress

ABSTRACT
The rate of workplace accidents and consequential workplace fatalities in Brazil is very high. This thesis intends to analyse whether a structured enforcement body with clear policies, regulations, standards and guidance is necessary to improve working conditions and to provide a safe work environment in Brazil.

Central to this study is the Brazilian Enforcement Framework. This thesis will focus on enforcement powers and the forms of punishments that are provided to cover breaches of health and safety legislation. It will also focus on the structure of the Enforcement Body.

An assessment will be made of the Brazilian Judiciary System, Health and Safety at Work Legislation and the political, social and economic issues. This will be done in order to identify if improvements alone to enforcement will be sufficient to reduce the high level of workplace accidents.

The study concluded that Brazil lacks clear and specific health and safety at work legislation which takes into account the circumstances today such as the working environment, the work force, working relationships and what is necessary to provide protection to the general public. The conclusion also claims that the political, social and economic reality in Brazil does not include a perspective that contributes to promoting a health and safety culture generally.

Therefore this thesis does not recommend that a newly structured enforcement body be constructed, it goes far beyond that and recommends that a whole new model of Health and Safety at Work should be created. The recommendation follows the conclusion that a newly structured enforcement body will not be enough to reduce the level of accidents at work to a more acceptable level. The recommendation takes into account Brazil’s reality today and a genuine commitment towards health and safety at work on all levels.
HEALTH AND SAFETY AT WORK:
A COMPARATIVE ANALYSIS OF THE BRAZILIAN
ENFORCEMENT FRAMEWORK

INTRODUCTION

The World Health Organization (WHO) and International Labour Organization (ILO) in a joint news release\(^1\) stated that estimative shows that 'the number of job-related accidents and illnesses, which annually claim more than 2 million lives, appears to be rising because of rapid industrialization in some developing countries.' It also states that accidents in the workplace have decreased in developed countries and increased in countries where there is a rapid process of development. This includes Brazil which is one of the countries in Latin America where the numbers of fatal accidents...
increased from 1998 to 2001. It is in this context that the Brazilian health and safety at work framework will be assessed.

The objective of this work is to outline the enforcement policies present in Brazil, which is a country in development and draw a comparative analysis with England, which is an industrialised country, and take any potential developments to improve Brazilian enforcement policy and strategy. An enforcement strategy and approach is primordial to protect peoples’ integrity at work and to safeguard the general public. The Health and Safety Commission (HSC) have stated that “our approach has stood the test of time very well, and is admired and imitated around the world”\(^2\). It is for this reason that there lies the hypothetical idea to transfer a strong model of enforcement like the English body that is the Health and Safety Executive (HSE), with its clearly structured enforcement policies, regulations, standards and guidance, to the Brazilian reality and thus examine the possibility of “improvement” in health and safety at work.

Following this idea, the hypothesis is:

England has an admirable approach to health and safety at work and has successfully reduced incidents of accidents at work. This approach could influence the Brazilian Health and Safety Authorities to issue legislation with similarities to the English system. This may lead to bureaucratic, artificial, and antagonistic legislation and policy that does not consider the reality of Brazil’s judicial system, work environment and work force. It may also be unable to adjust to the reality of Brazilian enforcement bodies.

Therefore the central question to be addressed is:

Could a strong body as the English HSE with clear structured enforcement policies, regulations, standards and guidance improve health and safety at work in Brazil?

To answer this question it is necessary to analyse all the links that encompass enforcement. This will involve looking at the Brazilian judicial system and how the courts deal with cases of health and safety at work and its competences. It is evident that health and safety legislation and other related legislation must be looked at with the aim of establishing whether it is sufficient to prevent work place accidents and to protect workers and the general public. Therefore, the current Enforcement Framework in Brazil must be assessed as to its capability of reducing the number of accidents at work. Another important consideration necessary to answer the question relates to the socio-political and economic situation in Brazil and its relationship to the level of workplace accidents and to the lack of a health and safety culture in the country. Once the connections necessary to answer the central question are established one further question must be asked, that is, 'what is necessary in Brazil to reduce the number of accidents and provide a healthy and safe work environment: is it a new model of health and safety policy or a new structure of enforcement bodies?'

To answer the questions the research methodology adopted is qualitative focusing on information gathering by literary reviews, of law research, statutes, legal and policy documents, professional and academic journals, also documental and bibliographical searches to permit an examination of the social factors that influence law and its practice. Another important resource is the World Wide Web however it is known that there is a large amount of information available through the internet that is neither credible nor authentic. With that in mind the information gathered was carefully verified and the websites used were from acknowledged, well-reputed sources.

Note: In Brazil, by law Regulamento dos Benefícios da Previdência Social, Decree nº 2.172, 05/03/1997, Articles 131 and 132, incs. I and II, accidents that occur in the course of work and work-related disease/occupational disease have the equitable status of a typical accident at work, meaning that all work-related health problems will receive the same guarantees in law.
and/or official organisations. This is a valuable resource for obtaining up-to-date news and databases.

Thus, this study has been structured as follows:

The Health and Safety at Work etc Act 1974

Chapter 1 To be possible to provide a basis for subsequent comparison between Brazilian and English approach to health and safety this chapter will deal, in a short analysis, with the provisions, operation and enforcement of the English Health and Safety at Work etc Act 1974 (HSWA) and its subordinate legislation.

The Legal System: Judicial Chart and Legislation

Chapter 2 'Courts and Tribunals'. A journey is made through the legal systems and health and safety legislation in Brazil comparing with the respective subjects in England. All relevant points related to this work will be highlighted. Chapter 1 will examine court structures and the courts competency to deal with cases of health and safety at work and interesting differences between the two countries.

In Brazil, following many years of academic discussion about the practice of law, legislation changed. A constitutional amendment came into place in 2004 - EC 45/04 which brought together under the competence of the Employment Tribunal to process and sentence all cases related to accidents at work, occupational disease and the working environment so as to safeguard health and safety at work. However, the new juridical ordainment has raised debate about its interpretation and the Supreme Tribunal has pronounced about it in a non-progressive way. The transition is new in Brazil and deserves a full analysis in a specific study nevertheless it will be examined

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1 Constitutional Amendment n° 45, 30/12/2004, new text added a clause 114 of the Federal Constitution
in a particular context in Chapter 1 to demonstrate the differences between the two legal systems.

Chapter 3 – Legislation. This chapter will present the Brazilian Federal Constitution and Labour Code as the statutory provision in Brazil and the foundation to health and safety which should be analysed and compared to the English Health and Safety at Work Act 1974 (HSWA) and the Management of Health and Safety at Work Regulations (MHSR). Brazil’s Regulatory Norms (Normas Regulamentadoras, 1978 - NR's) for health and safety and other related laws and presidential decrees concerning health and safety will also be assessed. It is also necessary to consider the possibility of applying the National Environmental Policy Law in cases of the working environment to protect workers’ health and safety. The principles of prevention present in each piece of legislation should be examined to facilitate an understanding of what each represents, particularly when compared to the conflict that exists in the system in Brazil of ‘monetarization’ of risk.

This chapter will expose the Brazilian enforcement system through the different types of court procedures that involve prosecutions. In England in keeping with the legal system a breach of duty under statute and/or regulations generates a criminal procedure which is ruled by a Criminal Court. In Brazil there are very few prosecutions in cases of accidents at work and the level of penalties do not carry out their necessary function of punish, educated and create a new culture of compliance to the law, avoiding new accidents. There still exists opposition to the possibility of prosecution using the grounds of environmental law. Nevertheless, a glance at the legislation regarding prosecution and forms of punishment will be present in this chapter and other chapters and will be assessed more deeply in a specific chapter on Enforcement.

Note: ‘Monetarization’ of Risks (Monetização dos Riscos), it is an academic term used in Brazil to defined the nature of 2 additions (insalubridade and periculosidade) which are paid to workers exposed to risks in their work.
Enforcement Framework

Enforcement is primordial to promote a healthy and safe environment at work as is an Enforcement body.

The Law cannot enforce itself. Some human agency must be charged with that responsibility: some official of government has to initiate the proceedings by which the law will be applied. If the discharge of the responsibility is lax, tainted with favouritism, or perverted by corruption, then the law is, in effect modified and re-written in the process of being applied.6

Lon L. Fuller

The HSE policies and strategy are often quoted in Brazil’s studies by academics and the Ministry of Work and Employment (Ministério do Trabalho e do Emprego)7, because England has made progress in reducing the number of accidents and still pursuing high targets and expectations. Fatal accidents have fallen considerably from 651 employee fatalities in 1974 to 159 fatal injuries in 2004/05 – a decrease of 76% and the numbers of non-fatal injuries has also decreased from 336,701 in 1974 to 111,982 in 2004/058. More recently the HSE published a report on data collected by the European Union on the rates of fatal injuries in 2003 and the equivalent rate in Great Britain was the lowest among the EU member states.

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6 Anatomy of Law, Penguin Books, p.31
7 Note: Ministério do Trabalho e do Emprego (MTE) a government body which is responsible for Brazilian H&S policy and strategy, equivalent to Great Britain’s Secretary of State; and it edited articles in the collection Caminhos da Análise de Acidentes do Trabalho – Brasilia – 2003, where the HSE accident investigation policy is explained and analysed as an example of good practice.
In Brazil there are more than 300,000 accidents at work each year and nearly 3,000 lives lost. These figures come from government statistics, however these only account for legally employed workers, which is those make up the Brazilian ‘formal’ economy. It is impossible to obtain reliable figures for accidents amongst the ‘informal’ workforce. The number of accidents shown above only accounts for the number of workers in the ‘formal’ sector which is around 35% of the whole economically active population. This data reveals the extent of problems faced in Brazil.

Chapter 4 – Enforcement is central to this analysis and this chapter sets out to find out how structured the enforcement policies are in Brazil and how effective they are when compared to the English HSE. It is also necessary to identify the differences between the two systems in order to explain the differential in the number of incidents. To answer this question the enforcement theories applied in England and Brazil will be analysed and compared together with respective enforcement frameworks and powers of enforcement in its forms of inspection, improvement and prohibition notices, investigations, prosecutions and punishments. The structure of the enforcement bodies play an important role and will be analysed in this chapter.

Reference to Enforcement in this thesis is exclusively related to health and safety in working relations and does not include the rights of customers. In Brazil the quality of services, hygiene, standards of health etc are the responsibility of Sanitation Vigilance which is the state/council secretary’s duty to enforce.

Social Aspects that influence the Law and its Enforcement

Brazil Statistical Data

Note: Informal in this context has a particular meaning, such as, not legally established, without papers, without tax payments, some without a fixed address.
Chapter 5 - Brazil is a country with continental dimensions whose territory is the 5th largest in the world with an expanse of 8,547,403.5 km$^2$ divided into 27 member-states with 5,507 cities. The economy of Brazil is the 9th highest in the world with an Internal Gross Product of US$ 799,416,000$^{10}$. The Brazilian population is estimated to be 188,713,534$^{11}$, with an economically active population of 92.3 million$^{12}$. However, just over 44 million workers are officially employed and there is a high rate of unemployment - 10.1%. The remainder of the Brazilian workforce are unregistered or so-called ‘workers in the informal labour market’. It is not an easily defined reality.

Could the HSE model of enforcement be introduced in Brazil? To answer this question the economic, political, social and cultural context will be considered in Chapter 5. The findings of Enforcement best practice, even in a theoretical way, are important as is a model for a health and safety agency. How operative and active the enforcement bodies are makes difference, as is the amount of funding it obtains and personnel it employs, and also of significance is the independence of the body and its members. The commitment of the government and employers to health and safety issues has a huge influence and has its pillar calqued in the social context. Another influential factor is the level of literacy and knowledge of the workforce and the rate of employment. The role played by trade unions is very important and shall be addressed. In Brazil, for instance, workers’ representative (union’s leadership) are permitted to accompany the inspection at the workplace$^{13}$, and trade unions are guaranteed to act as a ‘supporting body of enforcement’, initiating Public Civil Procedures$^{14}$ in court. However it is unusual to witness the commitment of the leadership members and any commitment is generally limited and/or lacking in engagement. There are social and historical factors behind this as illustrated in the Appendix.

$^{10}$ Fonte: IBGE – Instituto Brasileiro de Geografia e Estatistica - Census Bureau 2005
$^{11}$ Fonte: IBGE - Census Bureau 2007 – Estimativas (IBGE)
$^{12}$ Fonte: IBGE - Census Bureau 2004 (IBGE)
$^{13}$ Normative Precedent nº 38
$^{14}$ Ação Civil Pública (Public Civil Procedure) is a Procedure guaranteed in the Federal Constitution (article nº 5º, LXXIII). It is a collective procedure which gives legitimacy among others institutions for Trade Unions to be the active part (author) of litigation (article nº 5º, LXXIII combined to article 8º, III of the same Constitutional Diploma).
The Objectives - Conclusion

The purpose of analysing the hypothesis to bring the HSE enforcement model to Brazil is to visualise a possible change in the health and safety at work reality to improve working conditions. Initially the author believed that in studying the dichotomy between the two systems of enforcement would allow the taking of good practices and experience that would improve the health and safety of the workforce and general public. However, the Brazilian judicial system, the juridical orders for health and safety at work, the effective application of the law and its commitment to enforcement policies differ in many ways from those in England. Added to that is the reality of a Brazilian society, workforce, history and economy that is so remote from that of England that it makes the simple transposition of the HSE Enforcement model to Brazil utopia with no connection to reality whatsoever.

The conclusion will be provided in Chapter 6. This chapter will synthesise all the aims to answer the question, ‘Can a strong body as England’s HSE with clear structured enforcement policy, regulations, standards and guidance improve health and safety at work in Brazil?’ Ideally Brazil should find its own formula on how to enforce the law, finding the best practices that can be applied successfully and/or developing new formulas to the enforcement policy model according to its reality, and making improvements when necessary. However this would be a palliative measure which could reduce the number of accidents but not in the way they should be decreased. The outcomes are deeper and suggest a whole new model for health and safety at work in Brazil should be proposed.
HEALTH AND SAFETY AT WORK ETC ACT 1974

Correlative Legislation and its Enforcement

1 - HEALTH AND SAFETY AT WORK ETC ACT 1974 (HSWA)

The Health and Safety at Work etc Act 1974, came into force in 1975, aimed to ensure that all workers in all occupations were protected by health and safety legislation.

The HSWA has the Health and Safety Commission (HSC) with the responsibility for the control and development of occupational safety and health and the Health and Safety Executive (HSE) which is the enforcement arm of HSC. The HSC ceased to exist with the effect from 1st April 2008 when it merged with the HSE.

The HSWA is written in a very general terms and the words “as far as is reasonably practicable” qualify the duties on employers that mean the employers has to do all possible to reduce the risks. The HSWA is divided into Sections that places general duties on employers to ensure the safety, health and welfare at work of their employees, including that employers must provide and maintain plant and systems at
work; make arrangements for ensuring the safe use, handling, storage, and transport of articles and substances; provide health and safety information, instruction, training and supervision; maintain the place of work are safe and without risks to health, as well its access and exit; provide and maintain a safe working environment and adequate welfare facilities. Also the employers have to have written statement of health and safety policy if employs more than five workers. The statement has to be up-to-date and set out the organization and arrangements to ensure a safe and healthy place of work. The statement should be brought into attention of employees. The employers should consult the safety representatives and where requested set up a safety committee.

The Section of the Act places duties on employers, self-employers, on employees and on everyone who are involved with safety and health. The duties are general duty on employers and the self-employed to ensure their activities do not endanger anybody and to provide information to the public about any potential hazards to health and safety; duty on anybody responsible for places of work to ensure the premises themselves, the plant and machinery in them, do not endanger people using them; duties on employers to preventing harmful emissions and duties to ensure the safe installation of plant and to ensure that articles or substances supplied for work are safe when used correctly; duties on employees to take reasonable care to ensure that they do not endanger themselves or anyone else who may be affected by their work activities; duties on everyone not to intentionally or recklessly interfere with, or misuse, anything provided for health an safety purposes; among others. Also, the Act requires that HSE inspectors to supply information on health, safety and welfare matters including enforcement action to employees or their representatives.

The Act provides a broad framework able to regulate health and safety, through one comprehensive, integrated system of law. For instance, Health and Safety Regulations, Approved Codes of Practice (ACOPS), Guidance, the Common Law, and others laws involving health and safety at work, within be seen further.
2 - THE COMMON LAW

The most important common law is the duty of care which developed through legal cases when the employers have a duty to take reasonable care to protect their employees and their family from the risk of foreseeable injury, disease or death at work. It can be important where there is no particular statutory law.

3 - THE MANAGEMENT OF HEALTH AND SAFETY AT WORK REGULATIONS (1999)

It is important to clarify how employers must comply with their duties as laid out in the HSWA. It is done through its Regulations:

The Management Regulations set out about Risk Assessment (RA) and how RA should be "suitable and sufficient": identifying the hazards, determine the likelihood of injury or harm arising, identify legal duties, remain valid for a period of time, take appropriate control measures.

Preventive and Protective Measures has to be taken following principles of avoiding risks, evaluating risks that cannot be avoided, combating risks at source, adapting the work to the individual (workplace design, the choice of work equipment and working and production methods, with a view to alleviating monotonous work and work at a predetermined work-rate), adapting to technical progress, replacing the dangerous with safe or safer alternatives, developing prevention policy (technology, work organizations, working conditions, social relationships and working environment), giving priority to collective over individual protective measures, giving appropriate instruction to employees.

Health and Safety Arrangements requires employers ensure that adequate arrangements are in place regarding effective planning, organizations, control, monitoring and review of protective and preventive measures.
The other Regulations concern to Health surveillance, Appointment of safety specialists, Procedures for serious and imminent risk, Information and training to employees with specific comprehensive and relevant information, Co-operation and co-ordination on safety measures and inform all employees and contractors, New and expectant mothers, Young workers, also there are legislations covering children and disabled workers.

The broad framework included law covering safety reps and safety committees. It is important to make a point that if the employers failed to comply with the law and the rights of representatives the inspectors may intervene. Also there are the Health and Safety (Consultation with Employees) Regulations 1996 that the employers must consult employees, The Workplace (Health, Safety and Welfare) Regulations 1992, covering the minimum standards for the workplace as maintenance, ventilation, temperature, cleanliness, space, workstation and seating, floors, falls or falling objects, transparent surfaces, windows, skylights and ventilators, organizations and traffic routs, doors and gates, escalators and moving walkways, sanitary, washing and drinking facilities, clothing and changing, rest and eating facilities, smoking at work.

4 - SPECIF LAWS

5 - THE ENFORCEMENT OF HEALTH AND SAFETY LAW

The enforcement depends on the type of workplace and it is set out in the Health and Safety (Enforcing Authority) Regulation 1998, however the most cases it can be divided into the responsibility of HSE and local authority environmental health. Also, in case of Fire Safety Law it is enforced by fire authority. The HSE inspects industrial sectors – factories, mines, quarries, nuclear installations, agriculture, explosives, railways and offshore installations. Local authority officers inspects offices, shops, warehouses, leisure centers and entertainment places.

There are three main system of enforcement: improvement notices, prohibition notices, fines and imprisonment. **Improvement Notices** is served when an employer is required to take action to put things right, the notice settle time to it be done. **Prohibition Notice** is served when employer failed to comply it the improvement notice, and the prohibition notice may stop the operation which bring hazard or risk of immediate danger. Inspectors can issue prohibition notice to come into force immediately if there is imminent risk of serious personal injury. If the employers do not comply with the notices it is an offence and could lead to a fine or up to an imprisonment sentence.

The breaches on comply with health and safety law is an offence, is a criminal offense, and the companies and individuals convicted will have their names in an annual report published by HSE. To possibility to bring companies into account for health and safety crimes, the companies have to appoint a health and safety director or responsible person of similar status. Also there are a special offence of corporate killing.
CHAPTER II

THE CHART OF THE JUDICIAL SYSTEM IN BRAZIL

The Way it Deal With Health And Safety at Work Cases

I COURTS AND TRIBUNALS

England's court and tribunal structures have some similarities to those in Brazil. Both systems are based on the institute of double degree of jurisdiction. They are composed of low level courts which are able to process and sentence in the first instance and of higher courts which review sentences at the level of appeal.

In Brazil the judicial system has some complexity which is due to the system of government. Brazil is a federative republic composed of 26 states and one federal district. The North American federative model of judiciary **uno** and the distinction between federal justice and justice of member-states is present in the Brazilian model. The federative member-states have the power to create their own constitution, laws and justice. However, different to the United States of America, the Brazilian Federal
Constitution lines up member-state tribunals and judges as its judiciary body, providing a national form to the whole of the judiciary and the status of state power. The Federal Constitution gives directives to the judiciary system and has tools to impose its authority and uniformity on the whole of the national territory leaving little autonomy to member-states in the field.

The judiciary in Brazil is divided into “Justiça Comum” (Common Justice or State Justice) and “Justiça Federal” (Federal Justice). The difference between with the two comparative systems begins here. State justice is provided by judges/courts and tribunals organised in each member-state of Brazil’s Federative Republic. Each state organises their judicial system which is defined by their own state constitution. However, a priori is correctly to point that there are very few differences between the state’s constitution and consequentially in the judicial systems. State Justice is responsible for all matters that do not concern the Federal Justice. Nevertheless, the codes Civil, Civil Procedure, Criminal, Criminal Procedure, Tax, Commercial, Statutes and others and all Federal Law are mandatory in all Member-States.

The Judiciary is one of the state powers and the current constitution has brought about measures that ensure the Judiciary maintains independence and neutrality from the Executive and Legislative Powers.

1.1 Member-State Justice (Common Justice)

The State Judiciary is composed of 1\textsuperscript{st} Instance Courts or judges and the State Justice Tribunal (Tribunal de Justiça do Estado) as 2\textsuperscript{nd} Instance. Depending on the size of the

\footnote{Brazilian Federal Constitution, 1988, Article 2°}
city it may have courts divided into civil and criminal court(s), however some small cities may have a single judge responsible for dealing with all cases criminal or civil.

All the cases are processed and decided/sentenced in the 1st Instance of the civil or criminal court which is the equivalent of the English County and Magistrates' Court, respectively. For instance, in England the magistrates' court will process and sentence less serious criminal cases. It is also the duty of the magistrates' court to preliminarily examine other criminal cases and decide if they should be tried at a higher court. That is, all criminal cases initially pass through the magistrates' court to decide upon the gravity of the case and whether or not it should be dealt with in a higher court.

In Brazil that does not happen. The 1st Instance of Criminal Judge/Court are the first to deal, process and sentence in all cases and the gravity of the case is not a consideration. In Brazil the 1st Instance of a Criminal Court holds a tribunal where jury trials take place. This demonstrates the power of 1st Instance being the first to deal with all matters and the denomination of a lower court should not be appropriated. The same happens to 1st Instance of Civil Court/Judge which is the first to process and decide in all civil cases regardless of the sums involved or the legal complexity of the litigation, again this is distinctive from the English County Court.

Nevertheless, it is appropriate to mention that there are some exceptions in law where important post holders have special foro (jurisdiction). For instance, if the President of the Republic commits an ordinary crime the proceedings will be held and sentence passed by the Supreme Federal Tribunal and not by a 1st Instance Judge. The same applies to a Vice-President, ministers, members of Congress, the General Republic Procurator, members of Superior Tribunals and Senior Commanders of the Armed Forces, also in cases involving crimes of responsibility to duty. When the offender is

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a State Governor, a member of the Tribunal in 2\textsuperscript{nd} Instance, a member of the Public Minister, etc, the case will be processed by the Superior Tribunal of Justice. These are some of the exceptions. All special 

\textit{foros} are explicit in the Federal Constitution.

Another distinction between the two systems is that in Brazil all appeals resulting from a decision/sentence in the 1\textsuperscript{st} Instance – Civil or Criminal Court/Judge, are heard at the same tribunal, that is the State Tribunal of Justice – 2\textsuperscript{nd} Instance. This occurs because the distinction between the civil and criminal courts is organisational, as stated earlier in some cases the same judge can accumulate the duty to deal with all cases. To reaffirm what has been stated, in the Brazilian Judicial System the Justice Tribunal is equivalent to the English Crown Court and High Court of Justice together, accumulating the duty to deal with all appeals, criminal and civil.

One important point to raise here is that in the Brazilian Judicial System for a person to pursue a career as a judge or magistrate\textsuperscript{17} they must undergo examinations and have a Bachelor in Law. they must also have 3 years of experience of judicial activities.

\textbf{1.2 - Federal Justice}

The Federal Justice has equally 1\textsuperscript{st} Instance who are judges, 2\textsuperscript{nd} Instance which means essentially court of appeals called \textit{Tribunal Regional Federal} (Regional Federal

\textsuperscript{17} Note: In Brazil the denomination of Judge and/or Magistrate is used equally, they are synonymous. The Federal Constitution article 93, 1, established the principles to have one person admitted as Judge/Magistrate and refers to the Statute of Magistrates.
Federal Judiciary is set to deal with federal issues/matters in which one part is the Union (Federal State) or any other federal institution or a case involving Country diplomacy, amongst others. The competence for processing and sentencing such cases are clearly disciplined in the Federal Constitution and the cases can be civil or criminal.

1.3 - Superior Tribunals

As explained earlier, Brazil has State and Federal Judiciary Systems, however the Federal legislation is applied in both. This means that it is necessary to have some form of control to preserve the Constitution and to preserve the authority and interpretative uniformity of the federal law. The two tribunals responsible are the Superior Justice Tribunal (Superior Tribunal de Justiça) and the Federal Supreme Court (Supremo Tribunal de Federal).

The Superior Justice Court is the unification of both Justice State and Federal Judiciary, and is responsible for dealing in the first place with crimes committed by governors and members of the Federal and State Justice, conflict between both jurisdictions, criminal reviews, habeas corpus, habeas data and ‘mandados de segurança’ against authorities at State and Federal levels. The Superior Justice

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18 NOTE: The Regional Federal Court is the 2nd Instance of Federal Justice responsible for dealing with appeals.

19 Note: Mandado de Segurança, it is a petition interposed to protect the legal right of a person or a group of people (collective), when an illegality or breach of authority is committed by a public authority or its agents. Federal Constitution, article 5°, Incise L XIX.
Tribunal is responsible for hearing appeals from Tribunals of Justice when a foreign state is one of the demanding parts and the other part is a council or a person permanently resident in Brazil. The Tribunal hears appeals in *habeas corpus* and *mandados de segurança* decided in the 2\textsuperscript{nd} degree tribunals. The Superior Justice Tribunal is considered the 3\textsuperscript{rd} Instance, which is similar in some cases to the English House of Lords, and the name is justified by the fact that the Superior Tribunal holds the duty to hear appeals in the case of decisions proffered by Regional Tribunals that contradict Treaty or Federal Law, or it is given different law interpretation usually adopted by other tribunals amongst others.

At the top of the Judiciary System and unifying them all is the Supreme Federal Tribunal (*Supremo Tribunal Federal*) which is predominantly a constitutional court. All appeals from all tribunals resulting from constitutional matters which constitute violation or threat to the Magna Charter are decided by the Supreme. The Supreme is responsible to deal at first with penal infraction or crimes of responsibility committed by the President, Vice-President, ministers, members of National Assembly, senior members of Justice and other administrative matters related to them. It is also responsible for dealing with cases involving Foreign States, Brazilian Federative States or Federal District, and has the duty to deal with extraditions solicited by other countries, amongst others attributes.

In Brazil there are also specialised justices nominated as *Justiça Militar* (Military Justice – army, navy and air force) to deal with military matters; *Justiça Eleitoral* (Electoral Justice); and *Justiça do Trabalho* (Employment Justice). All specialized justices follow the same structure of courts and tribunals, with judges/courts in 1\textsuperscript{st} Instance, tribunals in 2\textsuperscript{nd} Instance and superior courts in 3\textsuperscript{rd} Instance.

As demonstrated, the Brazilian Judiciary System is complex and 'heavy' which contributes to the slowness of Justice, a fact that is known by all and easily
recognised by anyone seeking jurisdictional protection. To jurist Moreira Neto\textsuperscript{20} ‘plurality of instances and tribunals’, as has been seen, leads to a ‘deficiency of controls and a lack of sufficient judges of the 1\textsuperscript{st} Instance’. This contributes to a failure of observing time limits, punctuality, etc, and to the ‘partial inaccessibility to the judiciary’, which dissuades many from seeking justice and part of the structural causes for the inadequacy of the system.

![Organizational Chart of Judiciary in Brazil\textsuperscript{21}]

\begin{center}
\begin{tabular}{|c|c|c|c|c|}
\hline
Judiciary & Power &  \\
\hline
State Justice & Federal Justice & Employment & Electoral Justice & Military Justice \\
\hline
1\textsuperscript{st} Instance & 1\textsuperscript{st} Instance & 1\textsuperscript{st} Instance & 1\textsuperscript{st} Instance & 1\textsuperscript{st} Instance \\
\hline
2\textsuperscript{nd} Instance & 2\textsuperscript{nd} Instance & 2\textsuperscript{nd} Instance & 2\textsuperscript{nd} Instance & 2\textsuperscript{nd} Instance \\
Tribunal of Justice - TJ & Federal Regional Tribunal - TRF & Employment Regional Tribunal - TRT & Electoral Regional Tribunal - TRE & Tribunal of Military Justice - TJM \\
\hline
3\textsuperscript{rd} Instance & 3\textsuperscript{rd} Instance & 3\textsuperscript{rd} Instance & 3\textsuperscript{rd} Instance & 3\textsuperscript{rd} Instance \\
Superior Tribunal of Justice - STJ & Employment Supreme Tribunal - TST & Electoral Supreme Tribunal - TSE & Military Supreme Tribunal - STM \\
\hline
\end{tabular}
\end{center}

Supreme Federal Tribunal - STF

matters which constitute violation or threat to the Constitution


\textsuperscript{21} Note: Abstract from http://nev.incubadora.fapesp.br/portal/V.segurancajustica/judiciario/organograma dojudiciario
First, it is essential to explain the nomenclature of the Employment Justice in Brazil. The Employment Justice is a specialised justice which has its own jurisdictional structure. The role of Employment Justice, its judges and courts, and its respective juridical competence are explicit in the Federal Constitution. Employment Justice has the status of a federal justice because it is presented and organised in the whole national territory as the same justice *una*, by the Federal Judiciary Power.

The Employment Justice presents the same organisational structures as the State and Federal Justices, with courts/judges in 1st Instance, Regional Tribunals in 2nd Instance and the Employment Superior Tribunal as 3rd Instance, and the Supreme Court for constitutional matters.

**1.4.1 – The History**

A brief history of Employment Justice and legislation in Brazil is necessary to make this study understandable.

In Brazil the Employment Justice is called *Justiça do Trabalho* and it was enacted on 'May Day' 1941 with the objective of solving conflicts that originated in working relationships between employees and employers. The process of creating the Employment Justice was lengthy and began at the beginning of 20th Century. With the abolition of slavery the use of a salaried work-force was intensified. There were other important external factors which also contributed to the process, for example,
the 1\textsuperscript{st} World War and the Russian Revolution, the Versailles Treaty (Brazil is a signatory) and consequently the creation of International Labour Organization (ILO).

For more then 2 decades some sparse laws were created however there was no uniform progress. To Grott\textsuperscript{22}, the first Norms began before the end of the last century with Decree \textsuperscript{n} 1.313, in 1891. This regulated young workers and was followed by a law regarding affiliation to a rural trade union in 1907. Then there came the creation of the National Department of Employment in 1917 and in 1922 São Paulo State Law \textsuperscript{n} 1.869 created the Rural Tribunal. In 1930 the Ministry of Employment, Industry and Commerce was created and the government intervened in key social problems which contributed to new employment laws initiating some workers’ rights. The employment legislation was strongly influenced by the Mexican Constitution of 1917\textsuperscript{23}. In 1943 all employment legislation was compiled and more were created resulting in the current \textit{Consolidação das Leis do Trabalho} (Code of Labour Law). The model followed was the Italian, \textit{Carta Del Lavoro} – 1927, which could be described as a corporate-fascist system.

1.4.2 – The Structure

As explained earlier, the Employment Justice has the same structure as State Justice and Federal Justice. It is a specialised justice and has Federal status. It is composed of 1\textsuperscript{st} Instance Judges or \textit{Varas do Trabalho} (Employment Forums), 2\textsuperscript{nd} Instance Regional Employment Courts and 3\textsuperscript{rd} Instance Employment Superior Court. Judges are able to process and sentence all individual and collective disputes. The Regional Tribunal has the duty to deal with appeals and the Superior Tribunal deals with

\textsuperscript{22} Grott, J. M., \textit{Meio Ambiente do Trabalho: Prevenção – A Salvaguarda do Trabalhador}, Curitiba: Jurua, 2003, p. 54

\textsuperscript{23} Mexican Constitution, 1917, materialised in some of its articles the principles of protection of workers exposed by Pope XIII in his 1891 encyclical \textit{Rerum Novarum}.
special and extraordinary appeals. All cases involving constitutional matters originating from any of its Instances will be dealt with by the Supreme Federal Court. All jurisdiction cases are explicit in the Charter. Quite a few changes have been produced since the advent of the Labour Code nevertheless the most important are the changes resulting from the promulgation of the current Federal Constitution (FC) 1988\textsuperscript{24} and subsequent constitutional amendments.

The Brazilian Employment Justice once had a similar structure to the Industrial Tribunal in England where the tribunal is composed of a legally qualified chairperson and 2 lay members, one appointed by employers’ organisations and the other appointed by the trade unions\textsuperscript{25}. However, with the advent of Constitutional Amendment (CA) (\textit{Emenda Constitucional}) n° 24, from 09/12/1999, the class representatives were withheld from the Employment and \textit{Varas do Trabalho} (Employment Forums) were instituted. Since 2000, the jurisdiction of Employment Justice in the 1\textsuperscript{st} Instance has been held by a single judge coming from the board of judges with professional law qualifications.

Some justifications for the removal of class representatives were that the lay members did not have any academic or legal qualifications and did not have juridical knowledge about technical procedure. The knowledge of legal procedures is imperative once it precedes material matters. To justify their decisions the lay members usually had to rely on their assistants\textsuperscript{26}. Other arguments used in favour of the removal of class representatives, which are referred to in an article by Professor Ives Gandra da Silva Martins\textsuperscript{27}, is that many representatives only became assistants to the Tribunal. This occurred because in the beginning representatives theoretically knew about the working environment, its reality and production nuances, however in

\textsuperscript{24} NOTE: Federal Constitution, 5\textsuperscript{th} October 1988. It is the current Constitution of the Republic of Brazil.

\textsuperscript{25} SLAPPER, G. and KELLY, D., \textit{The English Legal System}, Cavendish Publishing Limited, 6\textsuperscript{th} Edition, 2003, pp. 328


\textsuperscript{27} Supra
the past decades the work activity became fragmented with many different production processes. In this context the lay members did not know any more than an experienced toged judge and in the majority of cases they knew only about their own work environment. To make things worse some employees’ representatives were not members of genuine and ‘combative’ Trade Unions and were opposed to employees’ rights. Another argument put forward for suppressing lay members was financial. It was argued that they incurred a very high cost which came from public funds, this was due to the high salaries, high benefits and pensions received compared to the few hours of work they undertook. A social consensus exists over the removal of the class’ representatives.

1.4.3 - Material Competence

In December 2004 Constitutional Amendment nº 45 with alteration Article 114 of FC, was promulgated and gave Employment Justice the power to process and sentence all matters that originated from the working relationship. Before the CA nº 45 the Employment had the power to deal with individual litigation (one or more employees and a company) and collective litigation (involving a whole professional category of employees or employers). The competence of Employment Justice set subjective criteria to the relationship between the employee and the employer and the execution of a subordinated working relationship. With the advent of CA nº 45 the competence of Employment Justice went from a subjective criteria (employee-employer) to an objective criteria related to the material type of litigation (originated from the working relationship).²⁸

Other new changes are Employment Justice having a duty to deal with litigations which have originated from the working relationship where Federal Administration, Federative States and Councils are the employers. Earlier the competence to deal with litigations involving public agents was held by the State Justice or Federal Justice dependent on the employer being a State or Federal agent. This procedure placed employees in a very different position and provoked inconsistent decisions and consequently incongruous rights at times to the same group of workers.

The Constitutional Legislator in writing the new article 114 FC determined that Employment Justice has the competence to settle conflicts which are not stipulated in the above article which could be disciplined in ordinary law (Legislation) amplifying its material competence.

2 PUBLIC MINISTER\(^2\)

The Federative Republic of Brazil is organised by the Legislative, the Executive and the Judiciary, with each of these three powers well established in the Constitution Title IV - The Organization of the Power, Chapters I, II and III, respectively.

Title IV - The Organization of the Power establishes the three Powers of the State, nevertheless it is followed by a fourth chapter, "The Essential Functions of Justice".\(^3\) which introduces the role of organisms that deal with and promote the interests that

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\(^2\) Public Minister has similarities to Public Prosecution Service, however because of its extended field in this thesis it will follow the exact translation from the Portuguese language and it will be referred as Public Minister

\(^3\) Brazilian Federal Constitution, Chapter IV
are judicially protected by the judicial order\textsuperscript{31}, that is the Public Minister, Public Advocacy\textsuperscript{32}, Advocacy and Public Defence.

It is no surprise that the Public Minister (\textit{Ministério Público}) is called the ‘fourth power’ because of its independent face of the State, its power to make a wide range of interventions and by what its represents to the whole of society. The Public Minister in Brazil resembles the Crown Prosecution Service (CPS) in England. However it operates in all courts and tribunals and its function does not restrict prosecutions. The function of the MP is governed in Article 127 of the Constitution. It is a permanent institution which is essential to the jurisdictional function of Estate-Union and its duty is the defence of juridical order of the democratic regime and the defence of the social and individual unavailable interests.

This is different to what happens in England where a breach of health and safety duty can result in criminal proceedings by the CPS or an HSE inspector. In Brazil the MP holds the power of prosecution privately in every judicial field. The Public Minister holds both the ‘\textit{dominus litis}\textsuperscript{33}’ and ‘\textit{jus puniendi}\textsuperscript{34}’. The MP also has the social function of winning public respect for the Public Services; promoting Civil Inquiries and Public Civil Actions to protect public and social patrimony, environment and other collective and diffuse interests; promote proceedings in cases which need intervention by the Federative States or the Federal Government; to judicially defend the rights and interests of the indigenous population; to request any information and documents to be used in administrative or judicial proceedings; to promote the external control of police activities; to request investigatory actions and police inquires; and other functions appropriate to its purpose.

\textsuperscript{31} Supra n° 22 at p 33
\textsuperscript{32} PUBLIC ADVOCACY, Federal Constitution Article 131 and 132, legally represent/defend the interests of the Executive (Federal Government, Member- State and Councils).
\textsuperscript{33} Note: \textit{Dominus litis} from Latin translated as the right of one who brings an action on behalf of himself and others.
\textsuperscript{34} Note: \textit{Jus Puniendi} from Latin translated as the right to punish.
As can be seen above the MP is an agent and promoter of Social Justice acting as the defending counsel of the public interest. The Public Minister is *uno*, indivisible and independent. Nevertheless, it has the same organizational structures as the judicial system: MP Federal, MP of Employment, MP Military, MP of Federal District and Territories, and MP of Federative Member-States. The difference between the CPS and the MP may lay in the fact that the MP functions are expanded to cover all juridical fields where the public interest or a group of people is involved or where one section needs to be under the protection of Estate-Union.

2.1 - Employment Public Minister (*Ministério Público do Trabalho*) - MPT

The Employment Public Minister holds all the power as illustrated above and can also promote conciliatory meetings between employers’ and workers’ representatives where the term of agreement has the same power as a judicial decision. The MP can hold investigations and order the proceedings. Also, every court decision which reflects the public interest must be analysed by the MP and produced a statement.

An interesting point is that the Magna Charter gave power to MPs to promote Civil Inquiries and Public Civil Actions to protect the environment. However it took some time for the word ‘environment’ to include the work environment in its interpretation. Additionally the protection of collectives and diffuse interests meant that the Employment MP has the super-power of enforcement in health, safety and environment at work as will be seen in the next chapter.
3- THE COURTS COMPETENCE TO DEAL WITH CASES OF HEALTH AND SAFETY AT WORK

After a brief explanation of the courts and tribunal structures it is necessary to look at the court’s ability to deal with cases of health and safety at work. In Brazil it is very new and sensitive area.

In December 2004 with the advent of the Constitutional Amendment (CA) nº 45 what happened in Brazil can be called the conclusion of Employment Justice Makeover. CA nº 45 has rewritten constitutional article nº 114, which ‘should’ stepped forward in the competence of courts deciding on cases regarding health and safety at work, however this was not fully implemented. Article 114 transferred the power to deal with “all” cases originating in working relationships to the Employment Justice, as seen:

Art. 114. It competes to the Employment Tribunal to process and to judge:

I - the cases arising from working relationships (...);\(^{35}\)

II to V – (...);

VI - the claiming of compensation for moral or patrimonial damage originating from working relationships;

VII - the cases related to the administrative penalties imposed on employers by the inspection authority;

VIII – (...);

\(^{35}\) Note: All working relationships, including private business and all the public sector, Federal, States, Federal District and of the Councils;
The new article, which was long overdue, was seen as the solution to solving in a better way cases related to health and safety at work. In part, this occurred because the understanding was that the Employment Tribunal is more familiar to the issues involved in the world of working relationships and the workplace. The Employment Justice is familiar with Employment Legislation and health and safety legislation, also it is more familiar with the Collective Employment Agreement and Collective Employment Disputes and its nuances. In part this is because of the systematic actions of the Employment Public Minister in defence of workers rights concerning health and safety in the work environment, and one of the reasons to include is the possibility of involving the trade unions.

Almost all work related litigation has been brought under the umbrella of the Employment Tribunal, however in practice this is not what has happened. After nearly four years of its existence Article 114 is producing passionate debate about its extended field of action, because of how the Supreme Court has interpreted the new-article in maintaining that cases claiming compensation, moral or patrimonial damages, resulting from an accident at work or an occupational disease should remain in the competence of the Civil Court based on article 109, incise I, CF. This is a reaction of the Brazilian Judiciary System which remains very 'processualista' rather than constitutionalist.

3.1 - Competence Prior to the Constitutional Amendment n° 45

Note: 'Processualista', means that Justice in Brazil gives more emphasis to technicality of a lawsuit rather than to the law itself.
In Brazil prior to the rewriting of Article 114 by CA n° 45, there were many different subjects related to health and safety at work which were dealt with by different courts.

For instance the same accident at work could result in cases:

i) At civil court (State Court) claiming compensation, moral or patrimonial loses; ii) The same Civil Court could deal with a case seeking welfare benefits to be recognized by the Welfare Institute; iii) Criminal court (State Court) would deal with the criminal case if the accident was a result of some criminal offence; iv) If the employee, who was the victim of an accident or occupational disease, was dismissed it could implicate a case for provisional stability in the workplace or for reintegration at work which should be decided by the Employment Tribunal (Specialized Justice); v) Whenever the Social Welfare Institute is involved in granting benefits to employee victims of accidents or occupational disease because of the negligence of the employer, then jurisdiction of the case is considered to be the Federal Court.

The above Article should have amended it so that all cases should be dealt with under the same Justice – Employment Justice, but as stated, this did not happen because of the strong technicality that exists in the Judiciary System, with the Supreme Court deciding how the law should be applied and in this case, against the wish of the National Congress which debated and voted for the Constitutional Amendment.

3.2 – The Courts Competence to Deal with Cases of Work Related Criminal Offences
The writing of article 114 of the Brazilian Labour Code send under the Labour Court all "cases originating from the working relationship". However the doctrinal and jurisprudential understanding is that criminal cases are still an exemption, the comprehension of the Court is the same, meaning that the competence to deal with all criminal cases which have direct involvement in working relationships or not remain under the jurisdiction of State Justice or Federal Justice. Nevertheless, there are strong feelings amongst members of MPT that some classified crimes in the Penal Code (CP) which have a direct relationship to work and for its economic subordination should come under the jurisdiction of the Employment Tribunal. For instance, crimes against the work organization (Articles 197 to 207 CP) and cases which could be more directly related to health and safety at work: expose the life and health of a person to danger or imminent risk (article 132, CP), subject a person to slave-like conditions (article 149 CP), sexual harassment in the work place (article 216 CP)\(^\text{37}\), among others.

In England the Magistrates Court has the responsibility for dealing with cases of breaching of HSWA 1974, where those cases are classed as a criminal offence with predictable punishments of imprisonment and/or fines. In Brazil the health and safety legislation does not class its breach as a criminal offence. However, an accident at work or an occupational disease, for instance, have legal provision by the Penal Code to result in a criminal case where it is categorised as bodily harm (Article 129, § 6º, CP) or manslaughter (Article 121, § 3º, CP). All criminal investigations will seek to find the person responsible for the offence. Unfortunately when an accident at work is investigated it is treated like any other crime and the reasons for the accident are analysed under the prism of culpability: intentional or involuntary, as result of imprudence, inability or negligence. It is therefore common for criminal proceedings not to continue because of a lack of evidence against the employer or manager, as in a penal case the consequence must have been desired or have been predictable. On the other hand it is common to find the absurd situation where an investigation finds the

employee/victim guilty for not using the necessary equipment or for lack of attention, knowledge, or expertise in executing an activity safely.

3.3 Court Competence to Deal with Civil Liability Cases – Compensation

Before CA n°45 the competence to deal with cases of civil liability seeking compensation for losses originating from the working relationship came under the Civil Courts (State or Federal). With the advent of article 114, incise VI, the competence to deal with such cases went to the Employment Tribunal – “claiming of compensation for moral or patrimonial damage, originating in the working relationship”. All cases claiming compensation should come under the jurisdiction of Employment Justice. This happened but there was an exception: cases claiming compensation which resulted from accidents at work and/or occupational disease.

This happened following much theoretical discussion which continues today. In putting into practice the new jurisdiction of the Employment Tribunal, when provoked into unifying the diverse understandings the Supreme Federal Tribunal stepped back and decided that cases claiming compensation for moral and patrimonial damages resulting from accidents at work should remained the competence of the State Court and not the Employment Court. This is similar to the County Court in England where cases that breach a management regulation or statutory duty are dealt with as civil liability and the main objective is reparation of the damages caused by the breach of law by the individual in charge.

38STF: Extraordinary Appeal n° 438.639-9. WWW.stf.gov.br
3.4 - The Competence of the Employment Justice

Firstly, article 114 gave the Employment Tribunal the duty to process and sentence "all proceedings originating in the working relationship" and that includes cases involving employers, employees, domestic workers, trainees, the self-employed and sub-contractors. This is a significant step forward as prior to AC n°45, the Employment Tribunal was able to process and sentence only litigations between employee(s) and employer(s), classic or subjugates. The dismissal of employees and any other workers under the economic subordination of their employer and who are a victim of an accident at work or an occupational disease, are dealt with by the Employment Tribunal.

The tribunal will also deal with cases originating from administrative fines which have been imposed by health and safety inspectors. Previously these had to be challenged in a Civil or Federal Court according to the jurisdiction of the authority that imposed the fine. There is a similarity here with the English Industrial Tribunal, in a case where an employer does not agree with a Notice that has been imposed by the authority they have the right to appeal to the Employment Tribunal. However in England if an improvement or prohibition notice is contravened this constitutes an offence and the case is sent to the Magistrates Court.

As can be seen from the Judiciary System chart, it is an intrinsic web with many instances of Justices and Courts, with a delicate form to establish the courts competence and where the procedure weighs more than the facts which makes the Judiciary a very complex system to understand by an ordinary citizen even in simple
cases. This contributes to the difficulties that workers face in accessing justice and which places them at the mercy of others\textsuperscript{39}.

\textsuperscript{39} Note: Others in this context mean people who have a better understanding of the Judiciary and the Law, for example: the trade union leadership, lawyers and members of the Public Ministry.
CHAPTER III

HEALTH AND SAFETY AT WORK LEGISLATION

The history of health and safety at work regulations in England goes back over 150 years\textsuperscript{40}. In Brazil the history is more recent with the first health and safety regulation introduced in 1919 with the Legislative Decree n° 3.724. This conceptualized an accident at work and created occupational health services and inspections of the workplace. However, effectively the health and safety legislation was only introduced in the late 1970's, as will be seen.

1 - THE CONSTITUTIONAL FUNDAMENTAL RIGHTS

\textsuperscript{40} HSC The Health and Safety system in England, HSE Books, 3\textsuperscript{rd} Edition, 2002
The right to have an "ecologically stable environment to be enjoyed by all and that is essential to a healthy quality of life" is guaranteed in the Brazilian Federal Constitution, article 225, and it is the duty of the public power and all society to protect the environment. Professor José Afonso da Silva claims that the right to life is a fundamental human right and it is that right which drives the protection of the environment. He argues for the protection of the environment saying, "what is protected is the big value: the quality of human life". Through basic general protection of the environment, a preoccupation with the life and wellbeing of workers inside the pollutant factories' wall began to be raised.

This provoked a series of doctrinal debate which resulted in building a thesis consistent to the Brazilian Constitution "Chapter VI – Environment" and Article nº 225. referring to the environment in general and including the 'work environment'. The idea was built combining Article nº 225 with Article 200, incise VIII, from the same legal code which confers to the Public Health System (similar to English NHS) a collaboration to protect the environment, including, literally the work-environment. The protection of the work environment is not the only constitutional commandment in the field of health and safety at work. The protection of workers' health itself also has its basis in the Magna Charter. and is based on the fundamental right to 'life with dignity', article 1st, III; the fundamental meaning of the Estate is to "promote the well-being", 3rd, IV and amongst the rights of urban and rural workers, 'the reduction of the risk inherent to the work, through Norms of health, hygiene and safety', article 7th, XXII.

To Oliveira some important steps were taken in the 1988 Federal Constitution of. To him it was the first time that the constitutional legislator proclaimed to lower the risk through the Norms of Health, also that it "should not relegate to second place the importance of the concept of health, which comprises of the physical, mental and social wellbeing". Safety is responsible for the physical integrity of workers and

hygiene for control of the chemical and biological agents in the work environment. By extending the meaning of health to include safety and hygiene, the same author concludes that "the worker has the right to a reduction of all risks (physical, chemical, biological, physiological and psychological) which affect his/her health in the work environment." 43

Nevertheless, Article 7º, incise XXII begins by admitting that work in Brazil is unsafe, unhealthy and unhygienic by proclaiming a "reduction" of the risks. Trying to counterbalance the known risks taken by Brazilian workers, the Constituent stipulated an additional remuneration for those who work on insalubrious, dangerous or difficult activities, thus creating a 'monetarization of risk'. By placing a monetary value on the risk that a worker is exposed to, or more correctly described as creating a mercantile risk, contradicts the other articles that claim to protect workers in their work environment making them incompatible.

England's HSWA was introduced in 1974 and was proposed by the Robens Report 44. One of the recommendations made by the Robens Committee was:

469. Chapter 5 – The form and content of new legislation. (...) The new Act should contain a clear statement of the basic principles of safety responsibility... 45 (underlined by the author)

Following the above recommendation the HSWA was issued in a form of simple statements, giving general commandments. Differently to Brazil the Act calls for the health, safety and welfare of employees and for a safe work environment, without

43 Supra, n° 44 at p 117
44 The Robens Report on "Safety and Health at Work" was published in June 1972, by Lord Robens, and forms the basis of much of the modern health and safety legislation
risks to health. By proclaiming health and safety at work, the HSWA has a better and positive approach to the issue. However, this does not mean that work in England is without risk, but it can be made as safe and healthy as possible.

HSWA begins with a broad but subjective, statement:

Section 2(1) of HSWA  It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees. (underlined by the author)

The expression 'so far as is reasonably practicable' is the subject of academic debate, and is a point of discussion in legal demands. The intention is not to examine the context of the expression however it is correct to note a point of disagreement raised by the European Commission (EC) over the use of the term. The EC argue that, "The UK's legislation ... permits an employer to escape responsibility if he can prove that the sacrifice involved in taking further measures, whether in time or money, would be disproportionate to the risk." Nevertheless the HSE do not agree and use in its favour the argument that the Act has been in force for three decades and fatalities in that time have been reduced by 70 percent. The differences between the legal requirements in Brazil and England are huge although this may not be apparent by just reading the legislation but it will be demonstrated through this analysis.

Many authors agree that the constitutional principle of health and safety of the work environment in Brazil is based on a principle of prevention and is calqued in the above mentioned articles and in other parts of the constitution. It is also present in the infra-constitutional legislation which will be examined below.

\[46\] The Safety & Health Practitioner, Jan 2006 v24 i1 p 6(1) – Thomson Gale.
\[47\] Supra. n°48 at p 6
2 - THE BRAZILIAN LABOUR CODE (Health and Safety at Work Chapter)

As explained earlier the Labour Code was introduced in 1943, however when it was introduced its content did not have any legal dispositions about health and safety at work. In the early 1970s Brazil was a country with the highest number of work related incidents recorded.\textsuperscript{48} In 1977 a specific chapter about health and safety at work was introduced to the Code\textsuperscript{49}.

Since then the Code has included a range of measures related to health and safety, such as the duty for companies to maintain a specialised service in safety and medicine at work (Article 162) and to establish an Internal Commission to Prevent Accidents (CIPA) which is compulsory for employees to participate in (Articles 163 to 165); to give employees Personal Protective Equipment (PPE) (Articles 166/167); and to establish preventive measures (Articles 168/169) such as medical checks on admission and dismissal, and periodic checks throughout the course of employment; the Code also compels the notification of occupational diseases to the competent authority. Other dispositions in the Code concern welfare, maintenance of plants and systems of work: building specifications (Article 170 to 174); illumination (Article 175); ventilation (Article 176 to 178); power stations (Article 179 to 181); manual handlings (Article 182/183); machinery (Article 184 to 186); heat work (Article 187/188); dangerous and insalubrious activities (Article 189 to 197); prevention of fatigue (Article 198/199) with reference to complementary legislation about work in construction, confined spaces, ionizing and non-ionizing substances, noise and vibration, safety signals, inflammable and explosives substances, sanitation, and fire (Articles 200 and incises). The duties of companies (the Labour Code refers to the


\textsuperscript{49} Note: Chapter V, Title II, articles from 154 to 201, established by Law nº 6,514/77.
company not employers) are stipulated in the Code, Article 157): to obey and enforce the Norms of safety and health at work; inform employees about precautions to be taken to avoid accidents at work and occupational disease; put in place the policies determined by the competent authority; and to facilitate the work of inspectors. 50

In a superficial analysis of Brazilian and English legislation they appear similar, however a range of 'equivocques' can be easily identified in Brazilian legislation. For example, the Labour Code rules on prevention of fatigue envisage one maximum load irrespective of the different bio-types amongst workers. In the UK the maximum load is determined as a third of the body weight thus setting a clear limit. The Code does not ensure that employers secure the health and safety of workers and work environment as set out in the HSWA (1974) and Management Regulations (MHSWR). The Code almost ignores collective measures of prevention and emphasises individual protective measures such as calling for the issue and use of PPE which could eliminate or neutralise the risk 51 and prevent the occurrence of accidents. The Code should call for the elimination, control and management of risks present in the work place. In saying that, the mistakes of Brazilian health and safety legislation have to be brought to light to corroborate the statement, once The Labour Code foresaw the infamous addition of insalubridade 52 and periculosidade 53 for those who work in insalubrious or dangerous activities. Both produce nothing more than the possibility of the employer 'buying' the health and safety of their employees cheaply. As said earlier, the Brazilian Constitution follows the same path and produces the same mistake. In practice it means that if an employee works in insalubrious conditions or is at risk he/she will receive an additional derisory payment.

51 Labour Code, article 191.
52 Labour Code, article 192. The Insalubrity’s Additional should be paid to those who work in insalubrious conditions above the tolerance limits established by the Minister in the respective amount of 40%, 20% and 10% of the regional minimum wage for conditions classified in a maximum, medium and minimal degree. The current national minimum wage is R$380,00 (three hundred and eighty reals), less than £100 (one hundred starlings) per month.
53 Labour Code, article 193 - Adicional de Periculosidade. It should be paid as of 30% of worker salary for those who work in danger activities or danger operations, having permanent contact with inflamed liquids or explosives in conditions of accentuated risk.
In England the duties of employers are imposed by the Act and Management Regulations with a strict disposition. Regulations demand that employers consider risk in the work environment and place an obligation on employers to ensure the health and safety of their employees and others. The HSWA is legislates for a wide number of people to be involved in the working process as well as people who are unfamiliar with it, for example, the HSWA issues duties on employers and the self-employed for people other than their employees and the Act affords the same duty to occupiers of premises in relation to persons other than their employees (Sections 3 and 4). The Brazilian Labour Code does not place duties on employers towards persons other than their employees. With recurrent changes in the working relationship where companies use more contractors and sub-contractors it makes a huge difference and does not place any duties in relation to the public. Another significant dichotomy is that the Brazilian Code does not place any duties on manufacturers, suppliers or the self-employed as the HSWA does (Section 6 and 3, respectively). Every time an accident occurs which involves persons other than employees (employed in conformity with the law) there follows the commencement of a court ‘battle’ which in some cases comes under civil law for claiming compensation; or in other cases under employment law for recognition of the employment contract or, according to employee’s status, regarding the employment rights on the possibility the worker being eligible for payments, benefits or compensation.

The duties of employees are present in the Labour Code, Article 158, and consist of observing and obeying the Norms of safety and health at work; the instructions given by employers; and to collaborate with the company regarding health and safety. But, here lies a distinctive approach with both countries. In Brazil an employee who does not comply with the duties imposed can be punished because this constitutes a fault by the Code.
It must be recognised that the Code applies only to employees contracted through the CLT regime\(^{54}\). That does not include Civil Servants because the majority are contracted under the rules of a specific Statute and the Code does not apply to them. This difference creates divisions and this implies that a great number of workers have different health and safety at work legislation, working conditions and enforcement regulations. The difference causes confusion amongst workers when many share the same workplace but have different rules, rights and duties.

3 - REGULATORY NORMS

In Brazil, Regulatory Norms (*Normas Regulamentadoras – NR‘*s) were introduced in 1978\(^{55}\) and have provided the concept of occupational health. Regulatory Norms are technical Norms constituted by definitions, objectives and duties. However it issues minimum standards on health and safety in the work environment. Regulatory Norms have legal status and its requirements are used by inspectors when inspecting a workplace.

Regulatory Norms are about specific working conditions, workplaces, or sectors of activity. There are also Regulatory Norms governing inspections in the workplace (NR-2), the Internal Commission for Accident Prevention (NR-5), Medical Programme for Occupational Health (NR-7), Construction (NR-8), Programme for Prevention of Environmental Risk (NR-9), Electricity (NR-10), Manual Handling (NR-11), Explosives (NR-19), Fire (NR-23), Working in Mines (NR-22) and Ports (NR-29), etc. Brazil has 32 Regulatory Norms for urban workers and 5 for rural workers. It can be compared with the UK Regulations. In Brazil as in the UK

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\(^{54}\) Note: CLT Regime: workers contracted under the Labour Code rules

\(^{55}\) Note: Regulator Norms are introduced in 1978 by Portaria nº 3.214.
regulations are supported by a Guidance on Regulations which is issued by a competent authority and are very detailed, explanatory and informative.

Putting the particularity of each Regulatory Norm aside four of them are very important in considering collective forms of prevention as will be seen below.

NR2 - Previous Inspection

These Regulatory Norms compel every new workplace to apply to the Regional Employment Office for an inspection before it begins its operation to ensure that the new workplace is in compliance with the law and is free from risk of accidents and/or occupational disease. Without an inspection declaration from the Regional Employment Office the new workplace cannot operate.

NR5 - Internal Commission for Accident Prevention – CIPA

The CIPA is composed of an equal number of members who represent the employer and the employees. Employers appoint their representatives and employees’ representatives are elected amongst the workers. The chairperson of the Commission is appointed by the employer from its members. Employees’ representatives have some protection for taking part in the Commission such as guaranteed employment during their mandate and for a further 12 months. The number of safety representatives is determined by Regulation Annex 2, according to the type of activity of the company and the number of employees. One difference to highlight is that in Brazil unions cannot intervene in the process of employees’ representation. The representatives are elected by workers independent of any association with a union or not, however an active or 'combative' Union will give its support to a distinctive candidate during the election process. The role of the Trade Union in Brazil will be addressed in the next Chapter Enforcement – Roles of the Trade Union, where trade
union members have similar rights/powers as Safety Representatives under Safety Committee Regulations - SRSCR 1977 in England.

The CIPA has a broad role and even though it is composed of lay persons it has the potential to consult and can be supported by the Specialized Service of Engineering for health and safety at work – SESMET. The CIPA itself could be compared to the ‘permanent’ model of a Safety Committee in England because CIPA is responsible for developing the ‘Map of Risks’, which is the reference for every aspect of safety inside the workplace, and every other role up to the Safety Committee. In practice the function of CIPA is entirely in the employers’ hands and in many cases employees’ representatives face opposition from management and fear for their job, where stability of employment is provisional. In many cases the employees’ representatives do not know how to take action and ignore the law or they behave more like they are a representative of the employer. It is important to remember that health and safety law does not go far in Brazil and a culture of health and safety has yet to be promoted.

NR 9 – Programme for Prevention of Environment Risk - PPRA

Regulation n° 9 aims to preserve the health and safety of workers in the workplace. It is a collective measure of prevention that anticipates, recognises, evaluates and controls the occurrence of risk physical, chemical and biological, which exists or may exist in the workplace.

This Regulation is extensive and brings some dispositions which are covered in England by the Management Regulations such as the Assessment of Risks; Arrangements – organizing, planning (strategy and methodology of action), monitoring, recording and disseminating data; Principles of Control – based on measures of elimination, reduction, isolation or control. If the above measures are not possible other measures include administrative or organisational and the use of
Personal Protective Equipment (PPE); Health and Safety Assistance; Information to Employees about the risks; and Training.

NR 7 – Medical Programme for Occupational Health - PCMSO

The objective of this Regulatory Norm is to promote and maintain the health of all workers as a group. It is a measure of collective prevention with a clinical-epidemiological approach (medical) under the relationships of health and work. It is important to have an early diagnosis of cause linked to the work processes which aggravates the health of workers or forms to identify the existence of an occupational disease. The employer, depending on the classification of the level of risk and the number of employees, will have a Medic specialised in labour medicine. Also, the Norm compels the company to organize medical examinations upon admission, periodically, when the employee is returning to work following an absence of more than 30 days or more for health reasons, when an employee changes activities, and in cases of dismissal. NR 7 determines that workplaces must have a First Aid box and a trained person to provide first aid.

4 – NATIONAL ENVIRONMENT POLICY LAW – n° 6.938, 31/08/1981

Brazil introduced the National Policy for the Environment in 1981. Environmental Law was the propeller of the Magna Charter in 1988 by recognising the work-environment as an integral part of the Environment.

The Environmental Law has provided an extended legal definition to ‘Environment’ as “conglomerate of conditions, laws, influences and interactions of all types.”
physical, chemical and biological, that permit, cover and rule life in all its forms".\textsuperscript{56}

The academics in Brazil have no doubt that the work-environment is included in the above definition. The same interpretation is confirmed by the definition given to pollution in the same law which is, the degradation of environmental quality resulting directly or indirectly from activities that damage the health, safety and well-being of the population (Article 3\textsuperscript{rd}, III, ‘a’) or affect the aesthetics or sanitary conditions of the environment (Article 3\textsuperscript{rd}, III, ‘d’). Another important step provided by the law refers to the fact that the polluting agent may be a person or a corporation that is responsible directly or indirectly for activities which cause environmental degradation. The interpretation of this law leads to a range of possibilities that can provide protection to workers in their working environment. Where the work environment is considered to be polluted, employers should be made responsible to provide sufficient and efficient systems of prevention. They should also pay compensation to employees in cases where they have been affected by the pollution in their work place.\textsuperscript{57}

As in other cases of environmental degradation the Environmental Law has opened the possibility of holding the employer/corporation responsible for prevention in the work environment and recuperation of the environment in cases of degradation. Also employers/corporations can be punished through criminal sanctions, administrative fines and civil liability.\textsuperscript{58} The objective liability present in the Environmental Law means that the polluter has the responsibility to compensate once the existence of damage and its causal nexus has been demonstrated. Padilha\textsuperscript{59} says that, ‘It is applicable to the polluter in the working environment’, not being necessary the existence of culpability or fraud. Aspects related to penalties and punishment will be examined below.

\textsuperscript{56} Law 6.938, 31.08.1981, Article 3\textsuperscript{rd}, 1. – Lei de Política Nacional do Meio Ambiente
\textsuperscript{57} PADILHA, N. S., Meio Ambiente do Trabalho Equilibrado, São Paulo, L1r, 2002, p. 66/67
\textsuperscript{58} Federal Constitution, Brazil 1988, Article 225, Paragraph 3\textsuperscript{rd}.
\textsuperscript{59} Supra, n° 59 at p 67
Unfortunately the theoretical arguments are far from the reality of the Brazilian working class and the applicability of juridical ordainment. If each health and safety regulation in England and Brazil are compared there are not great differences in terms of text but it has in its interpretation, and if the number of accidents and occupational diseases are compared then there is a big difference. Differences in the systems of enforcement and its bodies will be assessed in the following Chapter.

5 - PENALTIES IMPOSED BY HEALTH AND SAFETY LEGISLATION

The Brazilian Federal Constitution contains fundamental rights and guarantees that "there is no crime without a previous definition in law and there is no punishment without being previously legally typified". This principle in the Brazilian Legal System is historic and is the first article of Penal Code.

Departing from the above principle, it is correct to affirm that in Brazil there are no typified crimes without punishment, however in Health and Safety Legislation there are not the punishment of imprisonment sentences. Fines are the only penalties imposed regarding breaches of health and safety legislation. In Brazil’s Labour Code Section XVI – The Penalties (Das Penalidades) have just one Article n° 201 and Paragraph 1° which is specific to health and safety at work that imposes fines as the only punishment for breaches. The fines imposed are administrative fines and are set by inspectors who are members of the Executive Power or more specifically members of the administrative authority. The Labour Code governs the whole process of Administrative Fines and how to inspect, sue and impose fines. There is also a Regulatory Norm for Inspection and Penalties (NR-28) which specifies how fines should be calculated. The Employment Tribunal may also be able to impose fines for

50 Brazil Federal Constitution. Artigo 5°, Inciso XXXIX. 1988
60 Brazil Labour Code, Título VII Do Processo de Multas Administrativas. Capítulo I Da Fiscalização, Da Autuação e da Imposição de Multas
breach of health and safety legislation. Law n° 8.213 (1991) Plan of Social Benefits is an important piece of legislation related to social benefits in the case of accidents at work. In its Article 19 the law describes the meanings of accident at work and, also, typifies as a penal contravention of an employer who does not comply with health and safety regulations. However, even in this case the same article imposes the penalty of fines for such a contravention.

Nevertheless, there is a possibility that some cases involving health and safety at work will be investigated and prosecuted on the grounds of Criminal Law. If the Penal Code typifies an act as an offence, then it will be dealt with as a criminal case and the punishment may be imprisonment. However, it has to be reaffirmed that there is no penalty of imprisonment typified in Brazilian health and safety legislation. Nevertheless, Environmental Law n° 9.605/98 could be used utilising the extended interpretation as possible in the Federal Constitution, as considered above, and it can covers the work-environment. This opens the possibility to apply the sanction predictable to protect the environment in the cases of Health and Safety at Work (or work-environment), because in that cases the sanctions are civil, administrative and criminal with imprisonment penalties. But, as said earlier it is not clear and/or unanimously agreed in Brazilian courts, it is a possibility with a remote probability.

In the cases appreciated by the Employment Court it can impose a penal punishment for those who do not comply with the judicial order, and the Employment Public Minister can give a verbal imprisonment order, on the grounds of criminal law, for a flagrant breach of health and safety at the work place, for instance if a employee is exposed to danger or imminent risk. As explained earlier the Penal Code has one section in it to classify crimes against the work organisation (Titulo IV Articles 197 to 207 CP) and there are other articles in the Penal Code that can be used to prosecute specific cases related to health and safety at work where imprisonment can be imposed.

Note: Regulamento dos Beneficios da Previdência Social, Decree n° 2.172, 05/03/1997, Articles 131 and 132, incs I and II. In this presidential decree, work-related disease and occupational disease are given the equitable status of accident at work.
On the other hand, the HSWA 1974 brings in its content Section 33 which classifies a breach of duty under the Act as an offence, stipulating penalties of fines and/or imprisonment. The important point here is that the punishment by fine and/or imprisonment has to be imposed by the Court. Also the Act foresees in Section 37 (1) and (2) the possibility of prosecuting directors, managers or secretaries of corporate bodies if found negligent. The right to prosecute on the basis of Health and Safety Law is held by the Crown Prosecute Service (CPS), also Section 38 and 39 of the Act which grants the power of prosecution to health and safety inspectors. The decision for a prosecution always takes into account of the Code of the CPS which requires sufficient evidence with the possibility of conviction, also the prosecution must be in the public interest. Section 33 and followings of the HSWA are responsible for the big difference between the Brazilian and English enforcement system which could be the reason of observed disparities in the number of accidents at work in both countries.
CHAPTER IV

ENFORCEMENT

1 – THEORETICAL ISSUES

One of the functions of the juridical Norm is to regulate and legitimise the established order. The juridical Norm can be seen in at least three different ways: validity (philosophic, sociologic or political) under the competence of who elaborates the law; effectiveness which concerns essentially the social efficiency (influence or control) of the Norm; and the law in action, concerned to the real effect of the law, it is the success of the law.

1.1 - STYLES OF ENFORCEMENT

The aim of enforcement is to ensure observation of the law so as to increase a willingness to obey the law and to obtain a conscious commitment to the law. To calques obedience to the Norm there are different styles of enforcement. Deterrence and compliance styles and their nuances will be assessed below.
Deterrence Approaches is a penal approach and uses prosecution and punishment to inhibit future infractions or criminal behaviour. The central characteristic is punitive and the effect is punishment of the individual. The threat of punishment in cases of violation of the law sends a message to the rest of society and this may prevent other undesired situations$^{63}$. Another influence of a deterrence approach might be moral, that is when society visualises the wrong doing in determined conduct against the law. The proclamation of unacceptable conduct which has social disapproval can generate social pressure to comply.

The aspects and effectiveness of a deterrence approach, as so the reasons and arguments against this strict style of enforcement monopolises theories of criminal law and extends the discussion beyond the arena of criminal law. It is said that a deterrent style of enforcement is 'highly effective in changing corporate cultures so as to produce improved standards of behaviour, and management systems that reduce risks of infringement$^{64}$, by adjusting its conduct in prioritising compliance with the law. However those against this style of approach argue that it is inflexible, that imposes unnecessary uniform requirements, that no makes exceptions when they are necessary or may be more effective, and that a punitive system can cause resentment, hostility and a lack of cooperation$^{65}$. A tough system could de-motivate companies and provoke their closure resulting in unemployment. In general the high cost of prosecution (in time and money) must also be considered.

Compliance Approach is more informal and invests in education, advice, persuasion and negotiation. This style is based on an educative perspective, explaining the law, its importance and reasons to obey. However if this approach does not give the desired effect some pressure will gradually be put on it to achieve obedience to the

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$^{62}$ ANDENES, J, Punishment and Deterrence, The University of Michigan, 1974, p.34 ss.
$^{64}$ Supra n° 66 at p 99
law. The compliance approach aims to build the consciousness of the offender for the future responding to risks and doing the right thing and/or avoiding the wrong way in a preventive manner submitting to the law. This style is proclaimed to be efficient and economic (cheaper than prosecution) with the facility to adjust to the reality of each case. The down side of this point is that the close personal or social relationship between enforcers and potential compliers might inhibit routine prosecution also it lacks an enforcement resource.

The possibility of a hybrid style

As considered earlier it seems reasonable that a style of enforcement could bring together points of consideration in both deterrence and compliance approaches. The possibility of a hybrid style is considered by Hutter which has been analysed, structured and balanced and could make a significant difference in places intending to impose both styles.

Cultural differences may produce different styles of enforcement in the same way that different bodies of enforcement produce different styles of enforcement regarding its legal system, socio-economic and political factors and internal leadership. In Brazil, the enforcement framework for health and safety at work is very specific. Some laws bring dispositions that allow prosecution and imprisonment as punishment in cases regarding health and safety at work but this does not happen in practice. The health and safety at work legislation itself does impose punishment for breaches, however the sanctions come as an administrative act, materialised in fines rather than penal punishments. Enforcement by the inspectors have a compliance approach which is present in the criteria of a double visit, conciliatory meetings, advice, recommendations, notices and as a last resort the imposition of a fine and/or closure of the business. Even with the summit of inspectorates this approach does not hold a

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66 Supra n° 66 at p 100
68 Supra n° 66 at p 99
classic form of deterrence because it involves no prosecution, even though prosecution is possible on the grounds of criminal law. However the reality is that the inspectors have too much to deal with and their priority is not health and safety at work, as will be seen. The same happens with prosecutors who have other priorities, leaving to the Employment Public Minister and Trade Unions a huge responsibility in safe-guarding workers safety and health.

2 – ENFORCEMENT FRAMEWORK

As assessed earlier, in Brazil there is no specific health and safety legislation in the form of an Act or Code. The Labour Code contains a chapter related to health and safety. Apart from the Labour Code, the Brazilian legal disposition for enforcement regarding health and safety relies on interdisciplinary ‘sections’ of law, for example from Constitutional Law, Employment Law, Criminal Law, Civil Law, Environment Law, Welfare Benefit Law, Administrative Law, member-states constitutions and laws, and/or other various subsidiary legislation. The way it is organised, or more correctly, disorganised, makes it very difficult for anyone who does not have a deep knowledge of health and safety ‘laws’ to understand. Even amongst those familiar with the subject the framework provokes passionate debate on the legitimacy and applicability of the law and its form of enforcement in every case of health and safety.

2.1 – STRATEGIES OF ENFORCEMENT
2.1.1 - TYPES OF ENFORCEMENT

The Brazilian System could be considered as having three ‘possible’ methods of enforcement of health and safety legislation: Penal – through sentencing; Civil – through a court decision in proceedings seeking the duty of ‘doing’ or ‘not doing’; and Administrative – where the Public Body (State) uses its police powers to impose fines and close businesses.

PENAL OR CRIMINAL

The Brazilian Penal Code lists three forms of punishment for breaches: imprisonment or confinement called privation of liberty, which can impose a long term custodial sentence, a proportionate and progressive regime sentence, or a semi-open regime where the detainee is free to work during the day and is held in a detention centre at night and weekends, which is similar to curfew orders in England. There are also suspended sentences and other forms of punishment which restrict rights, in England the equivalent is community rehabilitation orders. Other penalties include community punishment orders, confiscation orders, and also, restriction at weekends and pecuniary orders, with a payment made to the victim, dependants or social organisation. The third form of punishment listed by the Code is a fine. All forms of sentencing do not differ a great deal from that in England, however in Brazil judges have to follow a very strict procedure explicit in the Code and do not have the same discretionary powers of sentencing present in the English Courts.

As explained earlier, the Brazilian Labour Code chapter on health and safety at work does not classify any breach as a criminal offence. This is different to the HSWA 1974 section 33, where a breach of duty under the Act is an offence and stipulates penalties of imprisonment and/or fines. Section 33 highlights a difference between Brazilian and English legislation and enforcement.
Furthermore, the Labour Code chapter on health and safety stipulates administrative fines as the only form of punishment for a breach (Article 201). Nevertheless, in a case of disrespect of a Prohibition Notice\(^\text{69}\) (Article 161, Paragraph 4\(^\circ\)) and where the consequence may result in damage, harm or injury to a third party, those responsible for the disrespect shall be prosecuted. In cases of disobedience the offender will not receive a custodial sentence because if the punishment imposed is detention from 15 days to 6 months and/or fine\(^\text{70}\) it will be a suspended sentence. Thus a breach of legislation is not deemed to be a criminal offence.

**Provisions in law that permit prosecution**

There are penal types in the Criminal Code that permit prosecution, which can be associated with cases involving health and safety at work, for instance, to place in danger or imminent risk the life and health of a person (art. 132); to treat a person in slave-like conditions (art. 149) which may cause fatigue; sexual harassment in the workplace (article 216)\(^\text{71}\) causing stress etc; criminal cases typified as bodily harm (art. 129, § 6\(^\circ\)) or manslaughter (art. 121, § 3\(^\circ\)), crimes against public safety and its unintentional modality as to provoke fire (art. 250, Paragraph 2\(^\circ\)), explosion (art. 251), intoxication by gas (art. 252), and collapse (article 256). However all are treated as common (comum) crimes. In a more direct relationship with the workplace, crimes against the work organization (Articles 197 to 207 CP).

If the theoretical possibility of applying the legislation concerning the environment to cases of health and safety at work was accepted a point should be made about the penal punishment that exists in Environmental Police Law\(^\text{72}\). This defines a crime as the conduct of a polluter who exposes danger to the safety of a human being, animal or

\(^{69}\) The legal term used in Brazil to refer to what in England is Prohibition Notice is 'Embargo' – seizure and 'Interdição' – injunction.

\(^{70}\) Penal Code, Article 330 – Disobedience.


\(^{72}\) Law n. 6.938, 1981 – Lei de Política Nacional do Meio Ambiente
plant or by their action contributes to aggravate an already existing dangerous situation. In fact, Environmental Law defines forms of punishment: penal, by way of imprisonment, detention and/or fines and, also administrative punishments which are described later in this chapter. In the same way the law of Environmental Crimes stipulates administrative sanctions, civil and criminal, for those individual(s) or corporations who breach the law. For example, in a case of pollution that results in or could result in damage, harm or injury to human health the punishment is imprisonment.

Other differences with the English system are related to Penal Corporate Responsibility and Corporate Manslaughter. For many years a debate has ensued over the right to prosecute a corporate body. In cases of crimes against the environment Environmental Law clearly expresses that possibility in Article 3° with three requirements: to exist as a corporate body; the offence committed is the decision of legal or contractual representative (director, chairman, person in charge) or is a decision of the directors board; and that the offence that has taken place is of ‘benefit’ or interest to the corporate body. This type of crime admits the modality of ‘acting with intention’. It is not possible for an involuntary action to bring about a prosecution to the corporate body. In Brazil a corporate manslaughter charge is not possible under any legislation. The possibility to prosecute on the grounds of health and safety at work using Environmental Law exists however the result remains improbable.

Welfare and Benefits Law is important legislation in Brazil as it establishes the Benefits Plan, including benefits related to cases of accident at work that cause death or incapacity to work. This law typifies as a penal contravention the non observance

73 Law n. 9.605, 1998, Article 15 – Lei dos Crimes Ambientais
74 Note: The word environment is generic and includes the work environment, as explained earlier. The Environment Law nº 9.605/98 will be used when concerning issues related to the working environment.
of health and safety Norms\textsuperscript{75} and can be used to prosecute a case, however the punishment is once more restricted to a fine.

CIVIL

To consider a civil form of enforcement of health and safety law does not appear correct or precise, however it is possible to use Civil Proceedings seeking an action on someone or a corporation, or to compel them to avoid or refrain from an action. Regarding health and safety at work the best method to achieve the desired result is taking Public Civil Action (ACP) as will be seen ACP is an active 'weapon' to enforce health and safety at work legislation.

Public Civil Action ACP

The ACP was instituted through Law n° 7.347/1985 with the purpose of establishing responsibility for damages caused against the (i) environment; (ii) customers; (iii) properties of artistic value, aesthetic, historic and scenic (landscape)\textsuperscript{76}. With the advent of the Customer Rights Code (CDC) ACP legislation includes an objective to protect 'any other diffuse or collective interest'\textsuperscript{77}. The CDC sets down that a collective defence should be used in cases of interests and rights being diffuse, collective or individual homogeneous. Diffuse interests and rights transcend a person, they are trans-individual and indivisible, the titular of the rights are impossible to determine, however they must be connected to the circumstances of the fact. Collective rights and interests have a similar characteristic with diffuse - trans-individual and indivisible, although the titular are indeterminate they can be determined because they are part of a group, category or class of people connected to them or connected to another part through the same juridical relation. Individual homogeneous interests and rights refer to those individuals that have the same origin.

\textsuperscript{75} Welfare and Benefits Law n° 8.213, 1991, Article 19, Paragraph 2\textsuperscript{o}.
\textsuperscript{76} Law n° 7.347/85, article 1\textsuperscript{o}, incises from I to V.
and when time or circumstances are strictly determined, it gives collective treatment to individual rights.

The ACP has an objective to solve cases of collective interest, also called *meta-individuals*, which is different to classic proceedings where the objective is to solve individual cases. The ACP is a collective proceeding and when combined with article 225 of the Federal Constitution it shall be properly used to protect the rights of the workers seeking health and safety at work. As explained by Norma Padilha\(^78\) the ACP aim to obtain specific protection when the meta-individual interest is violated or threatened and the protection aimed for is materialised in the decisions of a ‘duty to do’ or a ‘duty not do’. The pecuniary condemnation is not an aim of the ACP, however it can happen and the money will go to a specific fund.

In England, the closest to the institution of ACP is Public Nuisance. Public Nuisance is more restrictive and is a criminal proceeding, while ACP is a civil proceeding which provides greater scope. With Public Nuisance a person can be found guilty if an act is not warranted by law or they omit to discharge a legal duty. It is an interference with the public’s right to property, including public health, safety, peace or convenience. The act must endanger life, property, morals, comfort or obstructs enjoyment and it must affect a considerable number of people to constitute a class of the public. It is well defined by Lord Justice Denning, "...*that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.*"\(^79\) Public Nuisance is proposed by the General Attorney. The Brazilian Federal Constitution assigns to the Public Minister its institutional functions to promote Civil Public Action to protect the social and public patrimony, the environment and any other collective and diffuse interests\(^80\), similarly the National

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\(^78\) Supra n° 59 at p.84

\(^79\) *Attorney General v PYA Quarries Ltd.* (1957) 2 QB 169, Judgment of ROMER LJ, concluded at p 184, agreed by DENNING at p 191.

\(^80\) Brazilian Federal Constitution, article 129, incise III.
Organic Law of Public Minister (Law nº 8.625/93). The other interesting point of the ACP is its legitimacy 'ad causa' which includes the Public Minister and the Union State, State-Members, Council, and all forms of constituted public juridical bodies and associations. In this work the relevant point of legitimacy is that regarded to the Public Minister and the association. The Trade Union is an unequivocal form of association and has its legitimacy to propose ACPs guaranteed and recognised. Nevertheless both Public Minister and Trade Unions can act as litisconsorte for the other. For instance, if the Public Minister initiates a lawsuit and a Trade Union has an interest in the proceedings because it involves its associates, the Trade Union can take an active part in the ACP, and vice versa. Another important fact about the ACP is that it allows Tutela Antecipada (Anticipated Guarantee) which is a provisional decision at the beginning of each case which has the potential to guarantee the protection of workers integrity until a final decision is made. All investigative processes give rise to evidence and proof (documental, hearings and etc) to be conducted by the Public Minister in a similar way as a criminal inquiry in England and is called a Public Civil Inquiry.

The Employment Public Civil Action

A Public Civil Action can be interposed in the Employment Court and is called an Employment Public Civil Action. Its aim is to protect the interest of workers regarding the protection of the work environment. In 1999 the Supreme Federal Tribunal decided on case RE-206220/MG – Min. Marco Aurélio recognised the competence of the Employment Justice to proceed and decide on the ACP concerning conditions at work regarding the protection of the work environment. The decision was very important to protect the work environment, preventing accidents and occupational diseases and was important to make employers comply with the Norms of health and safety at work and any other measure necessary to protect workers integrity. It is becoming common to use ACP in the Employment Court regarding issues on health and safety proposed by the Employment Public Minister and/or

81 Note: Law – A person who, in conjunction with another person, is a demander part in a lawsuit.
82 Note: Anticipated Guarantee is a form of anticipated decision or provisional decision which is given at the beginning of the case and aims to avoid irreparable damages or damages that could be difficult to be reparable if it had to wait for a final decision.
Trade Unions. During the investigative process or Inquiry the Public Minister can settle a deal with the employer, known as a Conduct Adjustment Term, in which the employer compromises to make the necessary corrections to comply to the law, thus the Public Minister will not begin a Public Civil Action. However, the Conduct Adjustment Term usually imposes fines in cases not enforced by the employer and if this happens the Term is executed in the same form as a court decision.

ADMINISTRATIVE

The State uses the supremacy of the public or collective interest above that of individual or private interest in order to impose its police powers which allow the Public Administration to impose conditions, limits and/or restrictions for the use of property, activities and rights. According to Medauar, "in Brazil, the police power is, above all, an administrative activity, because it includes the appreciation of concrete cases, inspections and the imposition of sanctions." Invested with the police powers the Executive (Government) can impose sanctions or punishments in the form of fines and/or loss of rights. In cases of health and safety at work inspections the administrative police powers can impose limits and can discipline the employers by restricting their liberty and subordinating their actions and interests in order to ensure the employees right to a healthy and safe work place and it is in the public’s interest to apply the law.

Among the attributes of police powers is 'auto-executoriedade' which comprises of two principles: the power of demand, meaning that the administration has the power to take its own decisions without demanding legal action; and the power of execution, which means that once the administration makes a decision it has the power to

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enforce it using, when necessary, the public force (police). If the administrative (person or enterprise) does not agree they will have to resort to legal action. The principle to demand is common in the public administration and easy to understand, for example, in the same way as a charge notice for irregular parking and a consequent fine in England. Although auto-execution is not present in every administrative measure in order to apply it, it must be expressed in law or through an urgent measure of greater damage to the public interest or harm to individuals.

Regarding all specific health and safety at work Legislation (Labour Code, Regulatory Norms and Welfare and Benefit Law) the only punishment for their breach is an administrative fine enforced through administrative bodies.

The level of fines and imprisonment

In Brazil the level of fines are exposed in Regulation Norm (NR) n° 28 – Inspection and Punishment. Every regulation has a gradation of fines to each item of the Norm. The gradation takes into consideration the number of employees in the company and the safety risks and risks to health. The level of fines is fixed unitarily and is multiplied by the number of employees. Also the level of fine rises to the maximum in cases of repeated offences, or if the employer causes difficulty or resistance to an inspection.

In cases of breach of safety regulations (Article 154 to 200 CLT), the minimum fine per employee is R$670.89 (£165.86) and the maximum fine to a company with more than 1,000 employee is R$6,708.99 (£1,658.62). For breach of working conditions (Articles 224 to 350 CLT) the minimum fine is R$ 402.53 (£99.51) and the maximum is R$ 4,025.32 (£995.16). The value of the British pound is more than 4 times the value of the Brazilian Real so it is easy to realise that the fines represent 4

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84 Note: Currency Converter by Reuters UK. Brazilian Real into British Pound in 25/04/2007, 1 British Pound Sterling is 4.04 Brazilian Real.
times more than expressed above in Pounds. Comparisons should also be made to include the minimum wage per month, which in Brazil amounts to R$ 380.00 or £94.06. This provides an illustration of the level of fines which is so low that it may be more profitable to breach the law, especially with small and medium sized enterprises considering the low risk of being inspected. As even when renouncing the appeal and paying the fine within 10 days there is a 50% reduction. However, large companies generally have a Juridical Department and in many cases they appeal administratively, then they appeal judicially, thus the cases drags on for so many years that it eventually lapses.

The Brazilian Level of fines cannot be compared to the English system as it uses the judicial system which involves aggravating and mitigating circumstances, as in any criminal case. In England, prosecutions on the grounds of health and safety at work have some particularities. Cases dealt in the Magistrate Court (Summary conviction) for breach of HSWA limit the fine to £20,000 and/or 6 months imprisonment, for a breach of the Regulations the limit of fine is £5,000. For cases held in the Crown Court (on indictment) the level of fine is unlimited and/or 2 years of imprisonment\textsuperscript{85}.

Nevertheless, sustaining the argument that it is possible to prosecute on the grounds of criminal law in cases of accident at work, it is important to demonstrate one of the few cases possible. For instance, a Company's Engineering Partner and the person responsible for a construction site were convicted of manslaughter for the death of an employee resulting from a fall. At the time of the accident the employee was not using protective equipment. Both were sentenced to 1 year and 4 months imprisonment which was then converted to Community Service for an equal period of time. The company's partner was also ordered to pay to the victims' partner and parents a minimum of 200 months wages (currently equivalent to R$ 76,000) and the person responsible for the site had to pay a minimum of 20 months wages (R$7,600). The grounds for the prosecution and sentence was a breach of care, aggravated by the fact that both condemned men were professionals with specialized knowledge in

\textsuperscript{85} SELWYN, N, The Law of Health & Safety at Work, 9th Ed. 2000/01, Croner@CCH, p. 120/121

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2.1.2 – POWERS OF ENFORCEMENT

ENFORCEMENT BODIES

As explained earlier, inspection in Brazil is one of the attributes of the Executive and is delegated to administrative bodies. One of the bodies of the Ministry of Work and Employment is the Secretary of Working Inspections, which is the ‘thinking and organisational’ body for enforcement which has similarities to the English Health and Safety Commission. Enforcement itself is the responsibility of the Working Regional Office (Delegacia Regional do Trabalho), which is similar to the HSE in England.

The definition by the Secretary Internal Regiment is that inspection of work (including workplace, working conditions and employment rights) is subordinate technically to the Secretary of Working Inspections and administratively to the Working Regional Office.

The inspectors are federal civil servants from the Ministry of Work and Employment and are called Auditor-Fiscal of Employment. The title alone explains the extensive role of Brazilian Inspectors. Differently to England where the Health and Safety Inspector has the key responsibility to influence employers to take responsibility for

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86 Processo Crime nº 114.01.1999.079264-0, 11ª Câmara Criminal - Campinas /SP; Apelação Criminal nº 821.983.3/2-0000-000, Relator: Silveira Lima, 22/02/06 – V.U. – Voto nº 9.539
87 Note: Decree nº 5.063, 03/05/2004 - Annexe VI: Internal Regime of the Secretary for Work Inspections, article 4°.
88 Note: Auditor-Fiscal is the new denomination for the inspectors who are responsible for health and safety at work inspections, earlier they were called ‘Agente de Inspeção’ (Agent of Inspection), the name has changed to adapt to the ‘real’ inspectors role.
improving health and safety performances, investigate accidents and complaints about poor health and safety, take enforcement actions and inspect workplaces to evaluate the control of risks and assess compliance with health and safety law. In Brazil the role of the inspector goes further than in England. An inspector in Brazil has many duties and roles that result in an over-load of work which is practically impossible to manage and impossible to guarantee a healthy and safe working environment.

The roles referred to are: to inspect compliance with all Employment Law and the Collective Employment Contract, which is a very extensive area to cover involving all workers rights (tax and benefits, legal working times, over-time, holidays, trade union contributions, legal quotas to workers with disabilities, interdiction of machinery, to issue improvement and prohibition notices, etc). The inspector's role is to also analyse occupational risk (in a more prophylactic sense), to promote public orientation and provide educational support to employers and employees, to mediate in conflicts between employer(s) and employee(s) and the necessary meetings, and apply punitive measures when legislation is breached. The inspectors can provide information to assist the development of health and safety working programmes, strategies and Norms. But, unfortunately it is not everything as inspectors are the only form of enforcement to compel unscrupulous employers to avoid employing children. The brutality of child labour and the different forms of slavery are a priority for inspectors at the moment, leaving health and safety in the background, as will be described in the next chapter. The next chapter also looks at the work of inspectors in trying to bring as many workers as possible into the legitimate sector with full rights. In Brazil there are many workers without employment contracts, without benefits and pension, and that are not under the protection of any law and they are considered illegal workers.

In Brazil the inspectors (Fiscal-Auditors) only have a duty to inspect workers who come under the system (meaning regulations) of the Labour Code. This means that the majority of workers employed by Local Authorities, who are designated as 'civil servants' and follow the rules of a specific Local Statute (Statute of Civil Servants of
a particular locality). As said earlier, this happens because the only legislation regarding health and safety at work comes from the Labour Code and only employees under it are protected by its regulations. This means that civil servants rely on their local statutes and in the authority having some minimal regulation to protect them in the work place.

Enforcement Powers by Inspectors

The Regional Working Office, through its Inspectors who are the enforcement agents, should inspect the work place before it begins operations and should suggest modifications if necessary. Nevertheless, the enforcement is materialised in two actions: imposing notices and/or fines\(^{89}\) (administrative fines). If a workplace does not comply with the law then the inspectors may impose notices (similar to what happens in England). In cases of serious and imminent risk that could cause accident or occupational disease resulting in serious bodily harm, the Inspector can, based on the technical report, propose an injunction notice (interdição) to the Regional Officer which will bring the workplace or a section of the workplace to a standstill, that may be a piece of machinery or equipment. Alternatively they can issue an impediment notice (embargo) with the intention of paralysing, totally or partially, the work site\(^{90}\). In practice both are similar to prohibition notices in England. The Regional Officer’s decision, based on detailed technical reports, can propose the closure of businesses by sending a report to the competent bodies. The fines follow the rules and the amount is governed in the Regulation Norm nº 28. Disagreement to a penalty can be challenged in the Employment Justice.

\(^{89}\) Labour Code, Article 156, incises I, II and III combine to 201 of same legal diploma.

\(^{90}\) Labour Code, Articles 160/161, Regulator Norm nº 3 and Regulator Norm nº 28.
To promote inspections the inspectors have the freedom to go inside the workplace or site at any time without previous notice to employers, or if called by a worker, union, or if there is any suspicion of breach of Employment Law. Inspectors have the right of access to any document related to the employees' working contract and/or health and safety at workplace forms and information. All the powers exercised by the inspectors in Brazil do not differ to the powers issued in HSWA 1974, Section 20 in England. However unlike in England (Sect 33 of HSW Act 1974), inspectors in Brazil cannot prosecute. All prosecutions are proposed and processed by the Public Minister (Public Prosecutor), similar to CPS in England, in cases where an action is classed as a criminal offence, as explained above.

In Brazil the inspectors also organise 'Mesas de Entendimento' (Conciliatory Meeting) with the employers and can invite trade unions or a worker's organisation to the meetings. In the conciliatory meetings the inspectors have some freedom on how to conduct the meeting which in the end can compel employers to correct irregularities which are not easy to solve during the inspection before any other preventive or enforceable measure is taken. However, the inspectors do not have the power to enforce the agreement taken at the conciliatory meeting. This is a compliance approach.

**Enforcement Power by Employment Public Minister** (proceedings in Employment Court)

The Employment Public Minister, in the person of the Employment Procurator, has all the powers of the inspectors, as stated above. However, in addition it has the power to make exigencies to improve the workplace and to investigate, to request all

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91 *Mesa de Entendimento*: Normative Instruction n°23, 23/05/1991 is based in the Article 17, II of the Convention n° 81 of International Labour Organization.
manner of documents and evidence, to hold meetings to speak with witnesses to clarify its convictions, in order to conduct its inquiry. When convinced of the irregularities and where a deal is not agreed by the employer or company, the Procurator can propose legal measures, for example, Public Civil Action in the Employment Court. The punishment can be a judicial fine, an order to do something or an order to abstain from doing something. Also, the Employment Procurator can hand over its findings to the Federal or State Prosecutor and suggest that a criminal prosecution should be initiated.

**Enforcement Power by the State or Federal Public Minister (cases of a criminal offence)**

As explained earlier, in Brazil there are some cases where the competence to deal with depends of the defendant person. The power of enforcement by the Public Ministers are the same, it does not matter if the case is held in the State Court where the prosecutor is the State Public Minister or in the Federal Court where the prosecutor is the Federal Public Minister. In cases of a criminal offence, for example to place the life of others at risk or in cases of death in the workplace, the Public Minister has the power to request diligences, an investigation, a prosecution etc. These functions are similar to the CPS in England.

In Brazil there is a great deal of academic debate about the character of the Penal Proceedings, however the fact is that Penal Proceedings are divided into Public Proceedings and Private Proceedings. This study cannot address the discussion about Private Proceedings which are only used in cases of criminal offences where the offended person (victim) has decided to initiate the court case. The important point here is that Article 5° LIX of the Federal Constitution authorises a particular person (victim or relative) other than the Public Minister to initiate public criminal
proceedings if the Public Minister does not initiate them within the legal time limit. This opportunity opens the door of the courts to the offended person who is seeking justice in cases where the Public Minister does not act.

The Role of the Trade Union in collaborating with enforcement

The trade unions have an important role to play in guaranteeing the health and safety of workers. In Brazil, the unions have the right to request inspections and to accompany inspectors on inspections and they have the right to request a Conciliation meeting. Also many Collective Work Agreements introduce the context of the right for a trade union to visit a workplace and have access to health and safety documents, such as the reports from CIPA meetings, PPRA, PCMSO, etc. As explained earlier, trade unions can propose a Public Civil Action which aims to improve the workplace and to protect the workers' integrity. Many trade unions in Brazil have a Law Department where lawyers give advice and are the patrons of lawsuits without charge. Another characteristic that remains common in unions (referring to the vocal, active and reputed unions) in Brazil is to exercise the right to demonstrate. Generally this method effectively informs workers of their rights and consequently the whole community learns about a company/employer that has refused to comply with the law which will affect the 'image' of the company and its products. In Brazil, the unions act as a fiscal of employment law when an employee is dismissed because by law the union can provide the homologation in the Term of Rescind of Work Agreement and on many occasions the union discovers irregularities and unsafe working conditions. In any circumstance trade unions have the right to inform inspectors and/or the Public Minister, and investigate the case itself, taking necessary actions, juridical and/or political, as described above.

CHAPTER V

BRAZIL’S SOCIO-POLITICAL AND ECONOMIC ISSUES

Social, political, economic and historic-cultural issues are important to be addressed when considering the idea of transporting a model of enforcement from one country to another, in this case from England to Brazil. To Servais\textsuperscript{93} the process of comparative law is not only about juridical articles but also about the solutions found for certain problems and the reasons why those choices are made. Choices are connected to the history of the country, its political, economic, social, and cultural context and the different forces of groups of employers and trade unions. Hence, the reality of Brazil shall be considered.

\textsuperscript{93} SERVAIS, Jean-Michel, \textit{Elementos de Direito Internacional e Comparado do Trabalho} – São Paulo: LTr, 2001, p.20
Health and safety legislation came into force in the 1970’s when Brazil was ruled by a military dictatorship and when any kind of demonstration was considered as being an expression of opposition to the regime and those daring to demonstrate suffered the consequences[^4]. Thus Health and Safety Law came into force without a full debate taking place in the working class or Brazilian society. The late 1970’s and early 1980’s was marked by an extended process of civil reorganization with many sections of society expressing publicly its indignation and making exigencies for democracy and change. In this period workers” strikes began to gain strength and demonstrations took place over demands for better pay, the right to organise workers, the right to free expression and for democracy in Brazil. In August 1983, the national trade union centre was created as a United Workers’ Central CUT. The CUT is currently the largest workers’ centre in Latin America. It is evident that the development of workers’ organisation has helped improve working conditions. Nevertheless there is a great deal more that needs to be done that does not necessarily depend on workers or their leaderships.

I. The reality of a work-force facing unemployment and/or being unregistered

As demonstrated above, one of biggest problems in Brazil is the high level of unemployment and ‘informal’ working. The necessity of a place in the ‘formal’ workplace is huge, with workers accepting any kind of working conditions and pay. Nowadays even the structured trade unions ‘fight’ to maintain employment rights that were won in the past and/or for do not lose many rights. In this context the priority is to overcome the difficulties faced by workers in gaining employment.

The transition over the decades has contributed to the high level of unemployment in recent years. The recession of 1990/1992 and the subsequent opening of commerce summoned by globalisation, has brought voracity to the market and competition between countries which has had an impact on the domestic economy and affects the

[^4]: Note: The period of the military dictatorship was marked by human rights abuses with political prisoners being tortured and killed in Brazilian prisons.
level of employment. For instance, the arrival of external technology has contributed to reducing the necessity for a workforce and has introduced new forms of working contracts. With the new technology has come the necessity for a more qualified workforce and consequentially less qualified workers have been substituted by qualified workers. In this process of globalisation the imposition of privatization of state companies has also contributed to reducing the number of workers. Added to the above stated facts is the growth of the Brazilian population which has become essentially urban. More than 80% of the population live in cities which are reflected in the large contingent of the work force. This transformation occurred rapidly with the Brazilian population transforming from a predominantly rural population at the beginning of the twentieth century, reducing to about 50% in 60s and to less than 20% in 2000. This has provoked a ‘bubble’ in the urban centres and allied to a rising number of the workers has to be considered.

It is always important to remember that the unemployed and the ‘informal’ workforce do not contribute to the Social and Welfare Benefits Scheme which has a huge impact on social and health services, benefits and pensions. In Brazil the payment of tax and insurance should be done mainly by the employers. Employers using ‘informal’ workers save money and increase their profits and are unlikely to be discovered through inspections. Consequently they are not punished and this situation contributes to the high level of accidents at work.

2. Millions of workers with No Education

In Brazil the population aged over 15 years and who are illiterate is more than 16 million. However if the definition of ‘illiterate’ includes those who have received less than four years education then that number rises to more than 33 million.

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15 IBGE, Dados Históricos dos Censos – www.ibge.gov.br
17 Note: Meaning of literate: Census Bureau considers a person literate if him/she can, at least, write and read a simple message in the idiom they know.
18 Mapa do Analfabetismo no Brasil – Ministério da Educação – INEP, Tabela 1C, pp. 17 (Fonte: IBGE, Pnad 2001)
Illiteracy is a serious problem and creates an obstacle to workers getting the information they need. It influences how workers are informed and their ability to understand and assimilate information regarding their rights at work and consequentially if the law is being obeyed. Also, the number of illiterate workers influences the qualifications and training of the workforce thus driving those who are illiterate to marginal working with no opportunity to improve their lives.

3. The official, but not real, Number of Accidents

In Brazil legally the accidents that occur in the course to work and work-related disease/occupational disease are equitable to the legal definition of an accident at work typical.\(^{99}\)

The number of accidents occurring at work has increased. Statistics show that in Brazil in 2003 there were 399,077 accidents at work, in 2004 were 465,700 and the latest statistics for 2005 are 491,711 accidents.\(^{100}\) The statistics for 2005 show that 80.1% of accidents were considered typical accidents, 13.7% in the course of work and 6.2% work-related or occupational disease. The number of workers killed at work was 2,708 which is very high when compared to England where there were 212 fatal injuries in 2005/2006.\(^{101}\) In Brazil the statistics do not show the numbers of accidents by seriousness, however if the figures for 2005 are analysed it is possible to conclude that the number of accidents causing temporary incapacity to work of more than 15 days was very high, almost 160,000 accidents per year with 13,500 per year that caused permanent incapacity to work. Also, the majority of all accidents that occurred in the workforce were contained in the 20 to 29 age group, which is the 'new' workforce. In 2005, just 19.63% of fatal accidents were investigated and the justification given by the Government was that the Work Regional Offices have

\(^{99}\) Supra n° 64
\(^{100}\) Anuário Estatístico da Previdência Social 2005, Seção IV – Acidentes do Trabalho, pp. 505
\(^{101}\) HSE - Statistics of Fatal Injuries 2005/06 Summary
difficulty in obtaining information about accidents in reasonable time to conduct an investigation\textsuperscript{102}.

It is important to stress that the numbers above are only related to registered accidents and do not reflect the total number of accidents and the deaths at work. As explained earlier, this is because of the high level of unemployment a large number of workers have been driven into the ‘informal’ economy where there is no registry of workers thus consequentially there is no record of accidents that occur. Another problem that conceals the real number of accidents being recorded is that many workers hide minor accidents, the symptoms of work-related and occupational disease for fear of losing their job. Workers fear of losing their job upon reporting accidents/illness is understandable reaction because this is happens frequently. Not all health problems related to work are recognised by the Social and Welfare Benefit as accidents, for example physical and mental stress, and in many cases workers have to resort to Justice.

4. Slowness of the Judiciary

Cases of accidents at work resulting in fatal and serious injury are frequent in Brazil. This also has an impact on the wider population who have to deal with the consequential trauma of an accident, to have a relative involved or are a victim themselves. However, the trauma of never knowing the cause of an accident, why it was not prevented and being ignored by the system contributes to reinforce a sense of impunity. Many people in Brazil still believe in the Judiciary System and its capability to provide justice but the slowness of the Judiciary and the length of time spent waiting for justice creates distrust and disbelief in the system by the majority of population. Thus the sense of impunity is very strong.

Workers know that employers never give anything to them if they do not ‘fight’ for it. The Employment Justice is over-loaded with cases of workers claiming payments that

their employers have failed to make, for example: for overtime work, holiday pay, commission, the 13th salary, equality payments for equal work, the dismissal fund deposit guarantee and other monetary claims which are the basic and undeniable rights of every worker. Unfortunately in the majority of the cases employers know that if they do not pay on time, workers will have to claim it on Court (many do not) and the possibilities then are that a settlement will be made in around 60% of the claim or the worker will have to wait a further 5 years until the case finish before they receive any payment. Nevertheless Employment Justice is less slow than others. The Civil and Criminal Court is also over-loaded. In Sao Paulo State Justice statistics show that each Judge of the 1st Instance had on average of 2,400 new cases in 2005 with a congestion rate of approximately 85%. This added to the technicality of proceedings and the possibility of many appeals result in cases lasting many years. The worst case is with the Federal Justice which deals with Benefits and Pensions where one lawsuit can take up to 15 years or more. Allied to the slowness of Judiciary System which in itself is a case of impunity, there are other factors that bring about a sense of impunity to the heart of population. This is a lack of punishment for those who have a duty of care, such as employers and company directors, and who neglect the legislation to make profit at the cost of workers' lives. Taking the figures provided by the Trade Union of Workers in Oil Refineries (SindPetro) in the last 3 years 93 oil workers have lost their lives at work and 67 of these were employed by sub-contractors. The reality is that employees of sub-contractors suffer greater risk of an accident due to inadequate training, poor safety equipment, a poor safety system, working long hours, low pay, a lack of interest in health and safety by the sub-contractor, and because there is no direct trade union involvement.

There have been accidents in Brazil which were considered to be major accidents involving chemicals which cost the lives of workers and the population:

REDC/RJ (1972) – An accident in an oil refinery, an explosion of a GLP tank – 39 workers killed; POJUCA/BA (1983) - Accident with a cargo tank train – derailment –

Note: 13th Salary or Christmas Gratification is granted by the Federal Constitution. Workers in Brazil are paid monthly, which means 12 payments during the calendar year, however the workers are entitled to a 13th payment as gratification, which should be made in December up to 5 days earlier Christmas.


http://www.sindipetro.org.br/saude/preserve-sua-vida.htm
43 people killed; VILA SOCÓ/CUBATÃO (1984) – breakage of oil pipe and explosion across a shantytown - officially 93 residents killed however other sources state that many more children were killed as many bodies were never recovered; PLATAFORMA DA BACIA DE CAMPOS, Enchova (1984) – explosion and fire 37 workers killed; PLATAFORMA P-36 (2001) – leaking of gas and explosion 11 workers killed. In all these cases workers, the public and the environment suffered. The causes of these accidents were listed as being a problem of the project, a poor work safety system, poor control and monitoring of risk, poor maintenance of the workplace or equipment, lack of training or not being prepared for emergencies. Nobody has been brought account and all the above accidents involved public or semi-public companies where the directors of the companies were the political choice of the government in power and they were not considered responsible for the accidents. To the public, if any person is brought to account for their acts or omissions, there is no point to believe that health and safety issues have been taken seriously by Brazilian Government over all these years.

5. The Precarious Structure of Enforcement

Unfortunately, it is not possible to measure the number of administrative fines that are related to health and safety alone. The numbers shown by the Work and Employment Ministry (MTE) are absolute and refer to all inspections of workplaces, involving all sorts of disrespect to legislation (Employment, Fiscal, Benefits, Health and Safety, and Collective Agreement). On the website of MTE (www.mte.org.br) it is possible to understand the above because there is an icon to access ‘Inspeção do Trabalho’ and then, ‘Fiscalização do Trabalho’ which brings the overall ‘Estatísticas’ (Statistics), however the icon ‘Segurança e Saúde no Trabalho’ (Health and Safety at Work) does not show statistics. Equally, the number of prosecutions and Public Civil Actions in cases of health and safety at work is unknown. This conclusion was made by searching the Judiciary System and the Public Minister Websites. E-mails enquiries were made to these institutions requesting the data but all failed to respond. Telephone enquiries were also made to MPT and the response received was that there is no database that can provide the number of ACPs specifically related to health and safety at work. The MTE did reveal the data on the number of fines applied in
that is a total of 115,000, which reflects approximately 31 million workers inspected, also the action of inspectors at workplaces in the last 10 years led to more than 5 million workers being registered.

It is known by many in Brazil that a large company with a Juridical Department will not pay the fines imposed. Usually, companies appeal until the last juridical remedy has been exhausted and in the case of an eventual execution of an order to recover the fine after many years, it will have lapsed. That is another aspect of things being unpunished and is better described as a failure of the system.

The National Trade Union of Work Inspectors (SINAT) estimates that Brazil should have around 6,000 inspectors to satisfy the criteria of efficiency as expressed in ILO Convention 81. However the SINAT reveals that the number of inspectors in the whole national territory is 3,062 inspectors with 838 of them specifically dealing with health and safety at work. In England the official figure is 1,530 inspectors in 2005 as stated in data provided by the TUC, but the unions argue that only 900 carry out inspections. Even comparing the territorial size of Brazil and England, their populations, workforce and social problems, the number of inspectors in Brazil is less than satisfactory generating problems and a deficiency of the system.

With so many problems and the low level of inspectors, inspections in Brazil are conducted through a lottery system decided by a draw system or 'denounce'. The draw system operates after a sector of an industry is chosen and a draw is held among the companies in that sector. Here, the first problem revealed is that only registered (legal) companies are placed into the draw system, however the majority and worst cases of disrespect of health and safety legislation happens with unregistered workers. ‘Denounce’ can occur at any time and can be done by workers, trade unions, non-governmental organisations (NGO) and officials. Usually trade unions will ‘denounce’ formally which means that it should be investigated and have a strong

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106 Resultados da Fiscalização do Trabalho, Janeiro a Dezembro de 2006
109 TUC Briefing – HSE Funding – www.workstress.net
possibility of being inspected. However once more the un-registered workers lack any protection because they do not have a union to rely upon, and workers generally fear for their job in case the inspectors discover them, close the workplace and then they lose their employment. Once more the high level of unemployment forces workers into the position where they 'accept' the conditions offered to them.

The low number of inspectors is not the only problem. A Report of the Evaluation of the Biannual Plan\textsuperscript{110} from the Ministry of Work and Employment recognises the precarious situation of the Work Regional Office and the problems faced with infrastructure and material resources mainly points out the lack of electronic equipment ('especially printers') and proper vehicles to conduct inspections in the rural zone (dirty roads). The lack of structure of Fundacentro\textsuperscript{111} and its necessity to up-date its production department and laboratories, and comes with the disappointing conclusion that it will be 'extremely' difficult to solve the problems due to high costs. Also, a well known fact included in the Report is the shortage of technical personnel (inspectors) and operational personnel, even in the management line in the Regional Offices and Fundacentro.

As explained earlier inspectors are federal public servants and they have independence and autonomy. However the Regional Officer is a political choice made by the Secretary of Inspections and it is the Regional Officer who applies fines and decides on prohibition and improvement notices, thus making the decisions political at times.

6. The Federal Government Priorities

The Federal government through the Work and Employment Ministry has set a target to tackle and eradicate slave like working conditions and child labour. The inspections are concentrated on farms where workers are treated in slave like conditions.

\textsuperscript{110} Supra n° 104 at p59
\textsuperscript{111} Note: Fundacentro: Fundação Jorge Duprat Figueiredo de Segurança e Medicina do Trabalho develops technical and scientific research in to health and safety at work. It is a Foundation linked to the Ministry of Work and Employment and is administrated by a tripartite Curator Council composed of government, representatives of employers and employees.
conditions. The figures show that between 2005 and April 2007 inspectors have freed 8,899 workers\textsuperscript{112}. Also, the use of illegal child labour continues in Brazil. Children as young as 5 years of age are found working to ‘help’ their families.

These two problems have to be tackled and also the illegal or informal job (job without registration). However, considering the high number of accidents at work, including the high number of occupational diseases, that shows the employers are not complying with the Health and Safety Legislation, should have a clear policy to tackle this problems and it, also, should be a priority. Lots of workers have not capacity to work because of work’s injuries and they are supported by the Social Security, which spend a lot of money paying workers benefits. The Government, through its authorities, is obliging with employers which should pay for not comply with the law, instead loads of people’s money are been spent to covers it.

The Federal budget for the year 2006 was R$800.4 billion (around £200 billion). The budget for health and safety at work in 2005 was around R$37 million (£9.25 million)\textsuperscript{113} and it is known that the budget for the whole Ministry of Work and Employment in 2003 was less than 0.50% of the Federal Union Budget. The figures above show that the Federal Government does not have among its priorities the health and safety at work.

CHAPTER VI

CONCLUSION

The healthy and safe working environment is a fundamental constitutional right. The base of health and safety at work is calqued in the Brazilian Constitution and was achieved after the interpretation of the word 'environment' which in Portuguese means 'all around you' and by consequence 'work environment', shall be included. The guarantee of a healthy and safe environment present in the Constitution is positive although a progressive approach to the field of the work environment stops there. The work environment did not get the same special attention by the legislator that the environment itself got with a specific legislation (National Environment Policy Law) and its special Environment Criminal Law. The argument for a progressive approach becomes irrelevant because the above cited legislation does not apply in cases of work environment and to date is not accepted by the Superior Courts or Tribunals.

The Brazilian Labour Code is the directive for health and safety at work. It dates back to 1943 with a chapter on health and safety which was introduced in 1977. As a directive law it should apply to all Brazilian employees but this does not happen and is the first problem of the system because employees under contract follow the
Labour Code and employees of government institutions follow statutes. Thus one differs from the other. It is undeniable that all Brazilian workers should have the same treatment, work conditions, information, training, guarantees, rights, and duties which would help universalise and strengthen the health and safety framework. Subsequent to that is a lack of a provision to place duties that safeguard the general public and people other than employees, nor to place duties on manufactures, suppliers and the self-employed. Furthermore, the code cannot cope with the new era of workplace situations and does not contemplate the reality of contractors and sub-contractors. However, amongst all the problems that have arisen to date the one that makes a huge impact is the theory of ‘monetarization’ of risk instead of a strong and clear theory of prevention. Workers on low pay are often induced by offers of an extra derisory payment to work in unhealthy and/or unsafe working conditions or workplaces. This also fails to raise the awareness of healthy and safe workplaces. The wide range of Regulatory Norms in Brazil and their subjects are similar to those in England and follow the ILO recommendations, however the Norms do set minimum standards but they are subsequently ignored by employers and are unknown by employees.

With so many lacunas in law enforcement strategies could not address expectations to reduce the number of accidents at work. Professor Sady\textsuperscript{114} believes that there is a chasm between the Norms and compliance. The challenge is to cross it and to provide the conditions that will allow the enforcement body to act and be effective alongside juridical efficiency. There are two major problems with the enforcement framework in Brazil. The first problem is regarding health and safety legislation with principles of prevention disguised in law, the ‘monetarization’ of risks, and lenient punishment measures by way of administrative fines. The imposition of low penalties does not prevent breaches of law nor does it educate. This statement is easy to validate by observing the high number of fines that are issued every year\textsuperscript{115}. The second major problem is the fragile structures of the enforcement bodies in Brazil, which do not have the necessary equipment to deal with inspections and investigations, also do not

\textsuperscript{114} SADY, J J, Article: Repensando o Direito Ambiental do Trabalho, Revista do Advogado – AASP – Ano XXV – Nº 82 – Junho de 2005, p.68

have sufficient personnel and inspectors, and do not have sufficient financial resources or investment from Government. Both problems are connected if a strategical approach to compliance is adopted. But without a strong and well equipped body it is not possible to use a compliance approach, nor any hybrid style of enforcement, because it will not work without time being spent by inspectors to explain or in reinforcing compliance, that is on training and education. As stated earlier, inspectors in Brazil have to prioritise, because of the high level of complaints, certain sectors and/or use the draw system for inspections. This means that inspectors are in the main chasing the problem that is undertaking inspections where a problem already exists.

Another down side of the enforcement framework is that punishment does not include a custodial sentence in health and safety law nor as a last resort. It is possible through criminal law but would require a police investigation and involve a member of State Public Minister (similar to the CPS) to prosecute or not, and considering the amount of problems it creates for the police to deal with in Brazil, cases of health and safety are often disregarded. When a work-related accident is investigated it is solely as a criminal investigation and in such cases the analysis of the accident from the perspective of an accident at work and breach of health and safety legislation is disregarded. Inspectors are invested with powers that allow inspections however in many cases the investigations are compromised by the lack of infra-structure, technical knowledge, scientific personnel and equipment. The same can be said of the Employment Public Minister which is the guardian of Employment Legislation and consequentially health and safety at work legislation. The fact is that the Public Civil Action has become a tool of more collective procedures regarding improvement in working conditions proves the inadequacy of the Labour Code in solving the type of litigation that is present today.

The simply transposition of the English model of enforcement to Brazil would place more pressure on the Judicial System. This statement is easily to understand because the Brazilian courts and tribunals are over-loaded with lawsuits, they do not have enough judges, personnel or functional structure and there are delays in bringing cases to a conclusion. If all penalties regarding health and safety at work went for consideration to the Justice its current structures could not support the massively
increased workload. It is a structure problem present in the whole system, however it is a situation that should not happen. This is just the beginning, by looking at the Brazilian Judiciary System it is evident that more emphasis is placed on procedure, thus enforcement would be relying on a very intrinsic web of formality and legality where notices and/or penalties imposed would be so technical that they would jeopardise cases because of the lack of legal expertise of inspectors. Inspectors in Brazil are not prepared to deal with that amount of legal procedure. The Brazilian Judicial System is considered to be independent and democratic, nevertheless amongst all courts and tribunals the Employment Justice is less ‘formal’ allowing easy access to workers (free access and no emoluments, no necessity for a lawyer, and no strict dress code). However the whole system remains elitist.

Respect for the legislation runs through social, economic and political issues. In Brazil, situations such as economic and work instability, low pay, the obsession with profit by companies and the lack of a health and safety culture, the continuous relocation of workers from small areas or farms to big cities (metropolis), workers’ lack of literacy skills and consequential lack of understanding of the law, and the high level of workers in the informal economy (unregistered), all of this has a huge impact on how the Norms of health and safety are accepted, complied with and enforced.

Could a strong body like the English HSE with clear structured enforcement policies, regulations, standards and guidance improve health and safety at work in Brazil? The answer to this question is dialectic and would depend on having a different reality in Brazil. The current enforcement framework does not play an effective role in reducing the number accidents at work, although the problems are deep in society as well as being structural and conjectural. Would be more appropriate address a question about what is needed to reduce the number of accidents at work and provide a health and safety work environment. Is need a completely new model of health and safety at work or just a new structure of enforcement bodies? Without hesitation the answer is that a new model of health and safety at work is needed.
Returning to England and the Robens Recommendations 1972, analysing of the main recommendations on the nature of health and safety offences proved the necessity for health and safety legislation to provide protection to the public as well as protection to workers, and necessity for sanctions and enforcement, and set up of a new administrative body. All of these recommendations could be recommended to Brazil today 30 years later. However that is not all. The law should be easier to understand by all sections of society and cover the new possibilities and aspects of work, working conditions, workers and employers, and should be specific about possible juridical remedies when necessary. Brazil should avoid dense and complex law about health and safety in order to ‘popularise’ and encourage a health and safety culture.

This study does not aim to created a role new model of Health and Safety at Work in Brazil, however there are three main problems that could be address and reduce the number of accidents in their:

a) reinforce the enforcement bodies, by increasing the numbers and training of inspectors and personnel, giving structure as appropriated installations and equipment, as well having a structured plan of prevention on health and safety at work, contributing to reduced the level of accidents at work;

b) about the penalties – the leniency of penalties applied to who does not comply with the health and safety legislation which should easily have the level of penalties increased, also have the cases in court sentenced in a short time by increasing the numbers of judges and personnel, and having simple rite. Also, in the administrative sphere, the Government should systematically use the current law against the companies to have paid back the money spent to cover workers’ work day in case of accidents at work incapacity; and

c) Courts should apply the objective theory of liability instead of subjective liability (guilt through negligence, imprudence and inability), reasoned into the theory of risks, within companies assume the risks of their activities and if enough has not been done to avoid the risks as far as is reasonable practicable and the accident occurs, the companies through its directors should be brought into account. Also, despite that in practice the imprisonment sentence is not applied in cases of accident at work, in this actual system the Public Prosecutor, should initiate criminal procedure against
directors of companies for the accidents at work, especially when has manslaughter or body harm.

Finally, the Government should pay special attention to social issues as the lack of education and the unemployment, with are important problems to be tackle in every society in a very broad way, inclusive to reduce the number of accidents at work.
Background: Summary of Brazilian Working Class Movement

Understanding the Process in which Employment Legislations were Introduced

Brazil is a relatively new country of 500 years which became independent from Portugal in September 1822 and has gone through many transformations along the years. The first important issue to explain is the origin of the working class in Brazil. Officially the end of slavery was in 1888. The history of the trade union movement began in 1902 which was almost 100 years after the European movement. Until 1888 the whole workforce was enslaved. After the abolition of slavery the state landowners offered the jobs to foreign workers who had emigrated to Brazil in detriment of former slaves. The coffee plantations were soon filled with Italian immigrants, however working conditions remained very poor and in 1902 the first rural trade union was created. In 1907 the first urban trade union came into existence and since that time the history of trade unions in Brazil has suffered ups and downs. The unions from the first period were influenced by anarchists and communists and were independent, autonomous and very active.\(^\text{116}\)

From 1930 to 1945 there was a period of government intervention in the unions when they became agents of class’ collaboration. At this time trade union rules were created allowing only one union per city and one category of workers and they were obliged to register with and obtain approval from the Ministry of Work. They also had to abstain from any ideological propaganda (social, political and religious) and with the

\(^{116}\) Movimento Sindical - Passado, Presente e Futuro, Série ‘Estudos Políticos’ - 2ª Edição, Ano II, Brasília-DF, Junho/2000, DIAP - Departamento Intersindical de Assessoria Parlamentar
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advent of ‘Contribuição Sindical’ union deeds became economically dependent on the Government. The government held back the political awareness of the unions with one hand but with the other hand attended workers’ demands such as the introducing a minimum wage, the creation of the Employment Justice (1941) and placing range Employment laws into the Labour Code (1943).

In 1946 with the end of the ‘New State’ period, in theory, Brazil entered an era of free union association. Nevertheless, the government in power determined to close the trade unions that were led by the Brazilian Communist Party and used other parties (their allies) to give support to government projects. This period ended in 1964 with the military coupe. The period of Military Dictatorship had dismantled the trade union structures and the government intervened in many unions. The vocal and combative union leadership who were critical of the state were declared to be the enemies of the state during this time of political persecution, illegal arrests and torture. A new Strike Law came into force in 1964 which removed the possibility of a legal strike. The dictatorship ended in 1985, however from the late 1970’s the unions began restructuring themselves and organised with the vanguard of the social movements for democracy. Between 1985 and 1988 there was a transitional period with many demonstrations and a breakdown of the old union bureaucracy leadership. Unions were winning back the workers and a strong sense of class struggle existed which culminated in the Workers’ Party (PT) candidate achieving the position of runner-up in the first Brazilian Election following the dictatorship. However the ‘Era of Globalisation’ arrived and has contributed to demobilising the unions which are still active and fighting to maintain the workers’ rights that were defeated many years ago. In Brazil there are different types of trade union, from those that are combative, active and with a class’ consciousness to the assistencialistas that is the class collaborators who are inactive and inoperative. The ideological difference between the unions has created the situation that there are sections of workers that are advanced and make demands for their rights, however there are other sectors of

117 Note: ‘Contribuição Sindical’, also known as ‘Imposto Sindical’, was introduced in 1937 and is a tax imposed on all workers; which represents one days pay per year that goes to the trade union, independent of the workers affiliation or not.

118 Note: ‘Assistencialista’ means the Union which prioritises or just offer to associate worker social assistance and leisure in detriment to class’ struggle and fight for the rights of workers and improvement in their quality of life.
workers that are happy to have a job even if that means that deaths and mutilations will occur, as these workers do not believe that things could be any different.

As described, the connection between the unions and the organised working class, means that making profound changes is very difficult. Nevertheless, is important to mention that in Brazil the union or Central cannot be associated with a political party nor give any money to a political party. This is perceived as interfering with union independence and democracy, nonetheless influence still occurs. In Brazil history demonstrates that change always occurs following demonstrations and after pressure has been exerted by organised groups, trade unions or political parties. In the case of health and safety it is the responsibility of unions to mobilise in order to demonstrate its dissatisfaction over the high level of accidents at work. If pressure is not exerted on the government for a change in the law to improve working conditions, then nothing it is unlikely that there will be any improvement in the current unacceptable situation.
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