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Collective bargaining as a fundamental right*

Negociação coletiva de trabalho como direito fundamental

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Abstract

This article has the purpose of analyzing collective bargaining as a fundamental right. This article starts from a conceptual analysis of collective labor conflicts, followed by a study of collective bargaining as a fundamental right, based on the 1988 Federative Republic of Brazil Constitutions, the International Labor Organization conventions ratified by Brazil on the matter and the domestic law on the topic, such as the recently approved Law no. 13,467 dated July 13th 2017, which shall enter into force 120 days after the publication thereof. The new sections 611-A and 611-B of the Consolidation of Labor Laws propose that collective bargaining be legally binding, excluding the cases that are part of the list of fundamental social labor rights set forth in section 7 of the Federal Constitution which cannot be subject to negotiation.

Keywords: collective labour negotiation; social rights; fundamental rights; labor reform; collective bargaining.

Resumo

O presente artigo tem como objetivo analisar a negociação coletiva de trabalho como um direito fundamental. Este artigo parte da analise conceitual do conflitos coletivos de trabalho, seguido pelo estudo da negociação coletiva de trabalho como direito fundamental, com fundamento na Constituição da República Federativa do Brasil de 1988, nas convenções da Organização Internacional do Trabalho ratificadas pelo Brasil sobre a matéria e na legislação nacional sobre o tema, com a recentemente aprovada Lei nº 13.467, de 13 de julho de 2017 que, com a vacatio legis, entrará em vigor 120 dias após a sua publicação. Os novos artigos 611-A e 611-B da Consolidação das Leis do Trabalho propõem força de lei para a negociação coletiva de trabalho, afastando as hipóteses que fazem parte do rol dos direitos fundamentais sociais trabalhistas previstos no artigo 7º da Constituição Federal e que não podem ser objeto de negociação.

***Palavras-chave**: conflitos coletivos de trabalho; negociação coletiva de trabalho; direitos sociais; direitos fundamentais; reforma trabalhista.*

Contents

1. Introduction

This text has the purpose of analyzing the resolution of “Collective Labor Conflicts” with emphasis on resolution by the parties themselves.

Collective bargaining, which is encouraged both in domestic and international law, is the path to be pursued.

The Constitution of the Federative Republic of Brazil recognizes collective labor agreements and collective bargaining agreements in section 7, subdivision XXVI and section 8, subdivision 8, i.e., in the scope of fundamental rights.

The fact that Brazil, a signatory of the International Labor Organization, has ratified the conventions 90 and 154, which deal with collective bargaining, is part of the context, even though it has not incorporated Convention 87, which deals with freedom of association.

Thus, on the basis of the aforementioned legal grounds, the purpose of this text is to examine Law 13,467/2017, published on July 13, which deals with Labor Reform.

In order to delimit the topic, it is important to mention that the analysis concerns section 611-A and 611-B, included in the Consolidation of Labor Laws. The language of section 611-A establishes that collective labor agreements and collective bargaining agreements shall prevail over the law when they deal with certain matters. On the other hand, section 611-B deals with the opposite, i.e., it list matters (rights) that cannot be reduced or excluded as they are part of fundamental social labor rights, being considered unchangeable provisions of the 1988 Constitution.

The text ends with conclusions taking into consideration the current political, legal and social scenario of Brazil. It is also relevant to note that the analysis covers a law recently approved without vetoes, but still going through a one hundred and twenty day-period before entering into force.

2. Collective labor conflicts

According to Jean-Claude Javillier (1988, p. 213 e 231) “collective labor conflicts and collective bargaining are inseparable”. For him, collective bargaining is the means by which employers and employees, the latter represented by trade unions, establish rules about individual labor relationships, being the only means capable of incorporating the consideration of employed workers' interests in their employment contracts (JAVILLIER, 1988).

Spanish Olea (1994, p. 206) sees collective bargaining as the settlement of a conflict situation as, according to him, it is through collective bargaining that opposing interests can be adjusted. The settlement, which

arises autonomously between workers' and companies' organizations, can be easily achieved by collective entities or be preceded by demonstrations of force, such as strike and lockout.

According to Martinez (2016, p. 882-883), collective bargaining is “a procedure by means of which two or more subjects with conflicting interests or the representatives therefor, by means of a number of compromises, relent to the extent that is possible or convenient therefor in order to achieve the intended results”.

In the general view of legal literature, the idea of collective labor conflict is similar to collective bargaining. In practice, the latter is a consequence of the former.

Labor conflicts have a dividing line. It is part of human nature that those who provide their work force to others always seek better working conditions and compensation. On the other hand, those who own the economic activities seek to make a profit. There is no value judgment in either case. It is only a situation arising from human nature itself. As the subordinate worker seeks better working condition and the employer, who owns the business, seeks to make a profit, there is a natural labor conflict of sociological nature. Such conflict is resolved by the contract.[1]

This is the dividing line, as the conflicts happening after the contract are of legal nature, i.e., as a rule they involve violated clauses or diverging interpretations thereof.

Arouca (2016, p. 197), for instance, associates the notion of collective bargaining more to the defense of interests than to the resolution of conflicts. The author considers collective bargaining to be a direct means of defending collective interests by the trade union or the employers' union, stressing that it happens when the unions rely only on their own action. In this regard, a successful outcome would lead to collective labor agreement.

This context includes conflicts of economic nature, as once the initial parameters have been established, the tendency is to always seek the best. For Martins (2004, p. 709) “the collective labor conflicts can be either economic/of interest or legal/of law”.

Economic conflicts are those in which workers demand better working conditions or better wages. Legal conflicts concern only the declaration of

[1] In the case of individual relationship, the employment contract; in the case of collective relationships, the collective rules (collective bargaining agreement, collective labor agreement, normative judgment or arbitral report).

the existence or nonexistence of a disputed legal relationship, such as in a collective labor dispute in which a strike is declared legal or illegal (MARTINS, 2004, p. 709).

For Brito Filho (2015, p. 152) collective bargaining is "the understanding process between employees and employers seeking to harmonize opposing interests for the purpose of establishing working rules and conditions".

Nascimento (2000, p. 253), on the other hand, states that:

> conflict is not only a phenomenon of sociologic dimensions. It is also a juridical fact, structured in conjunction with instruments created by the legal culture of the people, included in society's normative organization systems, essential for the balance of life in society and the relationships between people and groups.

Thus, since labor conflict, and especially the collective labor conflict, is a social and juridical fact, it is certain that it exists because of dissatisfaction, but it is also certain that it exists for the fundamental purpose of seeking social peace, which happens by means of the resolution instruments provided for in the legal system.

3. Collective bargaining as a fundamental right

As seen in the previous section, the collective labor conflict is ultimately similar to collective bargaining. The original, sociologic conflict tends to be resolved by way of negotiation.

The resolution or settlement methods of the collective labor conflicts are basically three, with their subdivisions. Martins (2004, p. 710) mentions self-defense, resolution of the conflict by the parties themselves (MARTINS, 2004, p. 710) and resolution of the conflict by a third party.

The formal sources of Labor Law favor resolution of the conflict by the parties themselves[2]. One such method for resolution of the collective labor conflicts is collective bargaining. The outcome of the negotiation may be the collective labor agreement[3] or the collective bargaining agreement[4].

[2] It is the case of the Federal Constitution in sections 7, XXVI; 8, III and VI; 114, § 2º (BRAZIL, 1988*)*; and Consolidation of Labor Laws (CLT) in sections 611, 611, § 1º and 616 (BRAZIL, 1943).
[3] Section 611, Consolidation of Labor Laws (BRAZIL, 1943).
[4] Section 611, § 1º, Consolidation of Labor Laws (BRAZIL, 1943).

The resolution of the collective labor conflicts by a third party arises when negotiation is unsuccessful and assumes the participation of a third party with the prerogative to impose a resolution for the conflict, to which the parties must submit. Arbitration[5] and jurisdiction[6] are traditional forms of resolution of a conflict by a third party.

It should be noted that there is a position contrary to most legal literature stating that mediation is a form of resolution of the collective labor conflicts by a third party (MARTINS, 2004, p. 710).

In this context, mediation is understood as a hybrid form of resolution of the conflict by the parties themselves and by a third party. In this case, a third party (as a rule, a regional authority of the Ministry of Labor) does participate, but the resolution presented by the mediator is not binding upon the parties, such as in arbitration and jurisdiction.

Finally, self-defense is a method by which the parties themselves defend their interests (MARTINS, 2004, p. 710). It is divided between strike [7] and lockout [8].

The resolution methods for collective labor conflicts are carried out by legal means seeking the so-called normative purpose[9]. It has already been mentioned that, in resolution of the conflict by the parties themselves, the method used is collective bargaining. For Nascimento (2000, p. 267), collective bargaining is a feature of the *plural normativism* of Law, as the outcome thereof (collective labor agreement) is legally binding upon the parties.

The 1988 Constitution, the seventh in Brazil, the sixth in republican Brazil and the fifth to include social labor law, was the first in Brazilian constitutional history to include them in the scope of fundamental rights and guarantees (BRASIL, 1988).

[5] Section 114, §2º, Federal Constitution (BRAZIL, 1988); BRAZIL, 1996.

[6] Section 114, §2º, Federal Constitution (BRAZIL, 1988); Section 856 - 875, of the Consolidation of Labor Laws (BRAZIL, 1943); BRAZIL, *1993*. It provides for equal procedures in collective labor disputes of economical nature in the scope of Labor Law.

[7] According to section 2 of Law no. 7,783/1989, "a strike is the collective, temporary and peaceful, full or partial, suspension of a personal provision of services to the employer" (BRAZIL, 1989).

[8] "Discontinuance of activities at the employer's initiative, for the purpose of frustrating negotiations or making it difficult to meet the demands of the respective employees" (Section 17, Law 7,783/1989). Lockout is forbidden in Brazil.

[9] The collective rules (collective labor agreements, collective bargaining agreements, normative judgments and arbitral reports) are legally binding between the parties.

Title II deals with fundamental rights and guarantees. Under this title, Chapter II deals with social rights, and labor social rights are found in section 7 (STÜRMER, 2014, p. 27). Urban and rural workers' rights include, among others seeking to improve their social conditions, the recognition of collective labor agreements and collective bargaining agreements, i.e., the recognition of collective bargaining.[10]

According to Mendes e Branco (2011, p. 671), the 1988 Brazilian constitution has assigned a unique meaning to fundamental rights:

> The placement of fundamental rights at the beginning of the Constitution denotes the Constitution writer's intention to give them special meaning. The amplitude given to the text, which is broken down in seventy-eight subdivisions and four paragraphs (section 5) reinforces the impression about the prominent position that the Constitution writer intended to give to these rights. The idea that individual rights must be immediately effective stresses the direct connection of state entities to these bodies and their duties to observe them in a strict manner.
>
> The Constitution writer further acknowledged that fundamental rights are integral elements of the Constitution's *identity* and *continuity*, thus considering any constitutional reform intended to suppress them as illegitimate (section 60, § 4º).

This is what Mendes and Branco say specifically about fundamental social labor rights, which are already recognized as unchangeable provisions, as stated above (2011, p. 683):

> The Constitution encompasses a quite unique array of rules concerning the so-called workers' social rights. Quite a few provisions regulate the bases for the contractual relationship and establish the basic regulation for the employment relationship, highlighting special situations.
>
> It is clear that the Constitution tried to set limits to forming power of the legislator and the parties themselves in the formation of the employment contract. In this regard, the guarantees set forth in section 7.

As for collective bargaining, these authors consider that, in the case of recognition of collective labor agreements and collective bargaining

[10] Art. 7º, XXVI, Federal Constitution (BRAZIL, 1988).

agreements, the Constitution writer intended to express a general protection duty on the legislator's part. They state that this rule, just like others, contains guidelines primarily targeted at the legislator, or to both the legislator and the Government, for the purpose of ensuring the necessary protection to the worker in order to create a normative discipline capable of recognizing and applying collective labor agreements and collective bargaining agreements. They further stress that:

> (…) this is not a subjective right in view of the employer, but more accurately, protection rights that must be observed and implemented by the legislator and by the Government. It is possible that such rights will continually demand organization and procedural rules" (MENDES; BRANCO, 2011, p. 684-685).

Such circumstance indicates that there must be adjustments according to the social need at the moment. Therefore, it is possible to change the rules that regulate the working and employment relationships while preserving the unchangeable nature of the rights listed in section 7 of the Constitution.

Fundamental rights also play an essential role in the context of human dignity, including social labor rights, with emphasis on union association and collective bargaining. Sarlet states as follows (2001, p. 92):

> Also the so-called social, economic and cultural rights, either as defense rights (negative) or in their provisional role (acting as positive rights), amount to demand and materialization of human dignity. The legal and constitutional recognition of the freedom of strike and association, reasonable working hours, right to rest, as well as prohibition of discrimination in labor relationships (just to mention the best-known examples) resulted from the demands of working classes.

In the first half of the 20th Century, Carnelutti (1936, p. 136) wrote about the construction and origin of collective bargaining:

> Il regolamento collettivo, norma o sistema di norme che disciplinano tutti i rapporti di lavoro compresi in uma data categoria, nasce da uno di questi tre fatti: il contratto (colettivo), la ordinanza (corporativa), la sentenza (del magistrato di lavoro). Queste sono pertanto le sue fonti, come la legge (meglio

> forse l´atto legislativo) e la consuetudine sono nell´ordine vigente, le fonti della norma giuridica vera e propria.
> Quando si dice che el regolamento giuridico nasce dal contratto, dalla ordinanza o dalla sentenza e, allo stesso modo, che na norma giuridica nasce dall´attto legislativo o dall´uso, i quali perciò ne constituiscono le fonti, si parla in modo figurato. In realtà il regolamente collettivo no è se non la espressione della efficacia che a questi fatti riconosce l´ordine giuridico, come la norma giuridica è l´espressione della eficacia che altre norme superiori, o, al sommo, la conscienza comune attribniscono agli altri fatti ora ricordati. Com la stessa figura si dice che la luce sorge dalla lampada o l´ombra del corpo opaco. Fonte del regolamento collettivo è dunque il fatto, a cui la legge attribuise la efficacia caratteristica di quel regolamento.

Collective bargaining and the formal source arising therefrom – the collective labor agreement – have a uniform concept basis in international legal literature.

On the other hand, as collective bargaining is a fundamental right in the Brazilian legal system, its structure is molded in Brazil and in other legal system so as to include it in the social, economic and contemporary context of social needs. This, in itself, shows the need for adapting law to social reality.

On the other hand, it is important to stress that, in collective labor relationships set forth in the Brazilian constitutional systems, employees must be represented by the union entity[11]. This fact makes employees stronger in a collective scope. This is understood as a way to apply the protection principle (which is an Employment Law principle) in the scope of Labor Law.

Segadas Vianna (1972, p. 28-29) understood the mission of collective workers' organizations to seek better conditions from employers, but also to fight excessive oppression and injustice and the State and the law's disregard for the workers - which is considered not to happen nowadays.

The Supreme Federal Court has been ruling to this effect about collective bargaining and the collective private autonomy of trade unions. In 2015, in the well-known case of the Resignation Plans, the Supreme Federal Court, in the Extraordinary Appeal no. 590,415, with general repercussion, published on May 29th 2015 (Stated by Justice Roberto Barroso), stressed its

[11] Section 8, VI - unions are required to take part in collective bargaining (BRAZIL, 1988).

meaning intended the social impact of dismissals, giving the employee's resignation under the plan the effect of a full release (BRAZIL, Supreme Federal Court, 2015).

In this same regard, Extraordinary Appeal no. 895,759, the appellate decision was published on 05/23/207 (Stated by Teori Zavascki):

> Collective bargaining agreements between the union and the company on the matter of wage and working hours can prevail over the Consolidation of Labor Laws, provided that what is agreed does not exceed the limits of reasonability. In the case at bar, commuting time was excluded in replacement of other rights. The decision has general repercussion (BRAZIL, Supreme Federal Court, RE 895759).

As a way to appreciate the value of collective bargaining, it should be further noted, in the action against the violation of a constitutional fundamental right no. 323, the Provisional Remedy granted by the Supreme Federal Court (Justice Gilmar Mendes) to suspend the effects of decisions of the Labor Court about the applicability of collective rules after abrogation (10/17/16) (BRAZIL, Supreme Federal Court).

In order to put the topic into context, in 2012, the Superior Labor Court had changes the interpretation on the matter, changing the language of Precedent 277, making the collective rule applicable after abrogation (BRAZIL, Superior Labor Court, precedent no. 277). In this regard, it should be noted that the text of the labor reform (PLC 38/2017) contains a provision to forbid the applicability of rules after abrogation (section 614, §3º - NR) (BRAZIL, Chamber of Deputies, Bill - PL 6787/2016).

Having grasped the importance of collective bargaining – a fundamental right, from the opening of its possibilities to social adjustments, while having well-established constitutional limits about rights that cannot be reduce or changes, the international rules on the matter are examined next.

4. International treaties on collective bargaining

Regarding collective bargaining, conventions 98 (1949) (BRAZIL, Decree no. 33,196, 1953) and 154 (1981) (BRAZIL, Decree no. 1,256, 1994) of the International Labor Organization (ILO), ratified by Brazil respectively

in 1953 and 1994, both come to the fore. On the other hand, the 1948 ILO Convention no. 87, which deals with freedom of association in a broader manner, has not yet been internalized by Brazil (ILO, 1948).

Convention no. 98 is titled “The Right to Organize and Collective Bargaining”. Its main focus is on the fact that employees must enjoy adequate protection against any acts of anti-union discrimination in respect of their employment (BRAZIL, 1953).

On the other hand, according to Convention no. 154, the expression Collective Bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other, for: determining working conditions and terms of employment; regulating relations between employers and workers; regulating relations between employers or their organizations and a workers' organization or workers' organizations all at once (BRAZIL, 1994).

Thus, it is a way of adjusting interests between the parties, which resolve their diverging positions, seeking to find a solution capable of settling their positions (MARTINS, 2002, p. 727).

In Brazil, according to instructions from the ILO Convention no. 154, the collective bargaining procedure follows the following steps (STÜRMER, 2007):

1. Trade unions notify their demands to employers' unions or directly to the companies, thus initiating a direct negotiation procedure, with no interference from the State. The law requires parties to maintain a dialogue [12] and the Judiciary has admitted the filing of a collective labor dispute only upon robust evidence that negotiation did take place and has been exhausted;
2. If negotiation is denied, the Ministry of Labor, by means of its regional bodies, may call a round table, thus initiating the mediation procedure which, as in any mediation, will not have decision-making power, but will only present suggestions which the parties may or may not accept;
3. In the event of imminent strike, a round table may also be called by the Regional Labor and Employment Superintendence;
4. If the conflict cannot be resolved by the parties themselves (by means of collective labor agreement or collective bargaining

[12] Section 616, Consolidation of Labor Laws (BRAZIL, 1943).

agreement), with or without mediation, the law authorizes a strike according to the provided procedure and events;

5. Finally, if the conflict cannot be resolved by the parties themselves, an attempt will be made to have it resolved by the labor courts, in case the parties have not opted for arbitration[13].

Once the collective labor dispute has been filed, it will be judged by the labor courts (regional labor courts and Superior Labor Court) which, by means of a normative judgment, will settle the conflict, observing the minimum legal provisions for labor protection, as well as those previously agreed (STÜRMER, 2007, p. 67 e ss.).

The judiciary acts as legislator, as it establishes rules to be observed by the parties in dispute (STÜRMER, 2007, p. 67).

According to a constitutional provision, collective bargaining is a requirement for arbitration and for jurisdiction [14]. Furthermore, the Consolidation of Labor Laws[15] itself imposes the filing of a collective labor dispute and unequivocal evidence of an attempt at prior negotiations as conditions.

Collective bargaining is different from a collective labor agreement and a collective bargaining agreement as it is a procedure seeking to overcome a conflict between the parties, and the outcome thereof is a collective labor agreement or a collective bargaining agreement[16].

The Constitution, as already mentioned, recognizes the collective labor agreements and the collective bargaining agreements[17]. It further determines that "the trade union is responsible for defending the collective or individual rights and interests of the employees, including legal or administrative disputes"[18], and that "the participation of trade unions in collective bargaining is mandatory". [19] Thus, as a result of collective bargaining (methods of resolving the collective labor conflicts by the parties themselves), the legal systems encompasses collective labor agreements and collective bargaining agreements.

[13] Section 114 and paragraphs, Federal Constitution (BRAZIL, 1988).
[14] Section 114, §2º, Federal Constitution (BRAZIL, 1988).
[15] Section 856 and subsequent ones, Consolidation of Labor Laws (BRAZIL, 1943).
[16] See MARTINS, 2004, p. 727.
[17] "Section 7º. The following are rights of the urban workers, apart from any others seeking to improve their social condition: (...) XXVI – recognition of collective labor agreements and collective bargaining agreements. (...)" (BRAZIL, 1988).
[18] Section 8º, III, Federal Constitution (BRAZIL, 1988).
[19] Section 8º, VI, Federal Constitution (BRAZIL, 1988).

According to section 611 of the Consolidation of Labor Laws: “a Collective Labor Agreement is a regulatory agreement by which two or more union representing employers and employees stipulate working conditions applicable to individual labor relationships within the scope of their respective representations” (BRAZIL, 1943, section 611).

Indeed, at least two unions – as one party, the trade union, and as the other party, the employers' union – put an end to the conflict by means of a settlement (negotiation) which establishes rules applicable to the individual labor relationships of the respective category within the scope of its representation, observing the single trade union rule (STÜRMER, 2007, p. 67 e ss.).

It is of normative nature because the collective labor agreement is legally binding upon the parties. And since it is a contract, there is also the mandatory nature of the clauses and conditions stipulating rules between the unions. The first paragraph of section 611 of the Consolidation of Labor Laws (BRAZIL, 1943) provides that: “trade unions are allowed to enter into Collective Bargaining Agreements with one or more companies of the respective category stipulating working conditions applicable within the scope of the company or companies agreeing to the respective working relationships”.

Thus, on a smaller scale, the trade union may negotiate with one or more companies to stipulate rules applicable to the labor relationships in those companies.

In spite of positions to the contrary, it is understood that the provision was incorporated by the 1988 Federal Constitution, since section 7, subdivision XXVI of the Constitution recognizes collective labor agreements and collective bargaining agreements. Thus, when section 8, subdivision IV, requires the participation of units in collective bargaining, it is certainly referring to workers' unions (professional category) [20].

Section 616 of the Consolidation of Labor Laws (BRAZIL, 1943) states that employers' unions and companies, including those not represented by unions, when called, cannot refuse to take part in a collective bargaining, which aims at a collective labor agreement or collective bargaining agreement.

It should be further noted that, pursuant to section 620 of the Consolidation of Labor Laws when the terms established in a collective labor

[20] See STÜRMER, 2007, p. 67 and subsequent ones.

agreement are more favorable, they shall prevail over the ones established in a collective bargaining agreement. This is because, being special, the collective bargaining agreement prevails over the collective labor agreement, as a rule. However, in view of the principle of protection, the rule of the most favorable provision to the worker is in force in Labor Law, which explains the rule under section 620 of the Consolidation of Labor Laws (BRAZIL, 1943)[21].

The Brazilian union system was developed under the disastrous cloak of corporatism and interventionism. Even though Brazil has been a signatory of ILO since its creation in 1919, it has not incorporated the entity's main Convention, namely no. 87, published in 1948 and dealing with freedom of association. Only with the enactment of the current Federal Constitution on October 5th, 1988 did some light of freedom of association appear in the horizon.

Section 8 of the Federal Constitution (BRAZIL, 1988) provides that professional or union association is free and that the law cannot require State authorization for the creation of a union, except for registration in the competent entity, and Public Authorities are forbidden from interfering with and intervening in union association[22]. It so happens that Brazilian unions still suffers from interventionism and absence of full freedom. The striking features are as follows (STÜRMER, 2007, p. 67 e ss.):

- Single trade union rule: stated in section 8, II, of the Federal Constitution[23]. The alternative, by means of a constitutional amendment, would be pluralism or even union unification, when unions unite without imposition by the state.
- Union classification by category: according to section 570 and subsequent ones of the Consolidation of Labor Laws, union classification in Brazil is done by identical, similar or connected category[24], which means that a worker or an employer who are

[21] See RODRIGUEZ, 1996, p. 53.

[22] Section 8, main paragraph and subdivision I.

[23] Section 8: "Professional or union association is freely permitted, observing the following: (...) II - the creation is forbidden of more than one union in any degree to represent professional or economic workers n the same industry, within the same territorial base, as shall be determined by the interested workers or employers, and shall not be smaller than the area of a Town; (...)" (BRAZIL, 1988).

[24] According to the sole paragraph, section 570 of the Consolidation of Labor Laws, "when the practitioners of any activities or jobs, either because of their reduced number, or the nature of their activities or jobs, or because of the existing affinity among them, are in such conditions

engaged in a certain activity (for instance, metallurgy) cannot be represented by another union which may seem more representative to them[25]. A change in the law, in conjunction with the aforementioned constitutional changes, would solve the issue.

- Mandatory union dues: set forth in sections 578 and subsequent ones of the Consolidation of Labor Laws, it has existed since 1940 and violates the principle of freedom of association and also the constitutional rule that says that no one will be required to join or remain as a member of a union[26]. The workers, the independent providers, self-employed and employers are required to pay union dues[27]. Not only is such circumstance contrary to freedom but it leads to unions being maintained which are not representative, or in some cases veritable phantoms. Such modification depends on an amendment to the law, but more than that, it depends on overcoming lobbyism, conservatism, corporatism and interventionism which hamper the advancement of unions in Brazil.
- Actual exercise of the right to strike: the Federal Constitution provides for such rights in sections 9 (private workers) and 37, VII (public workers). Public servers do not have laws to regulate their rights yet. Private workers have their right to strike regulated by Law no. 7,783 dated June 28th, 1989, but their freedom to exercise such right is still quite restricted. One should not lose sight of the fact that, more than a juridical fact, a strike is a social fact.

These are some examples of the absence of freedom of association in Brazil. It is understood that the Constitutional Amendment no. 45/2004 provided a unique legal opportunity for the advent of freedom of association in Brazil. The new paragraph 3 of section 5 provides that international treaties and conventions on human rights approved in each house of the

that they cannot efficiently organize in a union by the category classification criteria, they are allowed to organize by similar or connected categories, meaning those included in the limits of each group contained in the list of activities or jobs"(BRAZIL, 1943).

[25] Because of this circumstance, it is understood that, save for exceptions, Chapter II, Title V of the Consolidation of Labor Laws, which deals with union classification and encompasses sections 570-577, was incorporated by the 1988 Federal Constitution (BRAZIL, 1943).

[26] Section 8, V of the Federal Constitution (BRAZIL, 1988).

[27] Section 580 and subdivisions of the Consolidation of Labor Laws (BRAZIL, 1943).

National Congress, in a two-round system, by three fifths of the votes of the respective members, shall be equivalent to constitutional amendments[28].

The ILO Convention 87, which deals with freedom of association (ILO, 1948) is actually a treaty on human rights. If there is political will to overcome the formality, the status of constitutional amendment would open the door to union pluralism, the end of classification, mandatory union dues and normative power (STÜRMER, 2007, p. 67 e ss.).

Finally, a concept of freedom of association is proposed where there is no room for single trade union rule, union classification, mandatory union dues and the normative power of the Labor Court (STÜRMER, 2007, p. 60-61):

> right of workers, meaning employees, employers, independent contractors and self-employed workers, to organize and terminate unions as they please; of joining and leaving unions individually according to their interests and with no limits arising from their occupation; of freely managing the union organizations, organizing higher bodies and joining international bodies; of freely negotiating without any interference from Public Authorities (executive, legislative, or judiciary); and of freely exercising their right to strike, observing the legal formalities; all of this without territorial limitation and in a pluralist system, financed solely and exclusively by the voluntary contributions determined by themselves.

Thus, there is no doubt that the constant search for the achievement of the social rights provided for by the 1988 Constitution, more specifically in its sections 7 and 8, necessarily requires the implementation of freedom of association in Brazil.

5. Labor reform

Both union reform and labor reform have long been discussed in Brazil. Based on what was stated above, it is understood that union reform and the implementation of freedom of association should have preference. However, this does not happen.

The union reform remained in the background and, especially since 2016, when the current government came into power, the labor reform is in

[28] See STÜRMER, 2007, p. 64-65.

the agenda. It contains in its core a proposition to extinguish the mandatory union dues[29]. However, it should include other matters, especially with the incorporation of the ILO Convention 87.

This labor reform, which was registered in the Chamber of Deputies as Bill no. 6,787/2016, was approved at the end of April 2017. It was submitted to the Senate and received the Chamber Bill no. 38/2017. Approved on July 13th, 2017, Law no. 13.467 enters into force one hundred and twenty days after its publication.

The Law deals with and changes several aspects concerning labor and employment relationships. It proposes a revolution in the world of labor which, as substantiated above, arises from the dynamic nature of social and labor relationships in the early 21st Century. Brazil must simply guide its labor law towards the existing market scenario, which is inexorable. The purpose here is not to conduct an ideological analysis about the world of labor, but to adapt it to reality in a pragmatic fashion. It is known that the law runs after the social fact, but it is also known that reality takes revenge on the law when the law does not adjust to reality.

There have been major labor reforms in other countries such as Spain and Germany. Spain began to grow again and create jobs after the 2012 reforms. France now discusses the change of rules.

The purpose here is not to compare systems and countries. Unemployment in Brazil is historically low and depends on the economy. On the other hand, there are huge transaction costs, apart from "eternal" uncertainties. The relationships between employers and employees are extreme and with restricted room for negotiation.

The room for collective bargaining must be expanded. This is indeed a great merit of the proposed labor reform. We disagree with the expression “negotiated vs. legislated”, which is quite used in the media. That is not the case here. The Constitution, in its essential core, will remain unharmed. Non-constitutional laws will be the legal framework for categories that do not negotiate.

The possibility that the collective bargaining agreement and the collective labor agreement be legally binding for categories that prefer it that way will result in gains for both sides. The specific issues of each category will be part of the context. One cannot think of reducing the break to thirty minutes in situations in which there are no conditions for meals and rest

[29] New language of Section 578 and subsequent ones, according to Law no. 13,467/2017.

within the period. On the other hand, in cases where it is possible, there is clear advantage for the employee, who returns home thirty minutes before he would in case the break was not reduced.

Another important point, with the regulation of section 11 of the Constitution, is the creation of representation for the employees in the company (BRAZIL, 2016; 2017). The negotiation system begins inside the company. The representative deals with wages, but also with everyday conflicts. This mechanism will be a filter to prevent court actions. In this regard, the project proposes several filters in order to reduce the huge number of employment claims that are filed every year in Brazil. The predominance of the collective bargaining agreement over the collective labor agreement also allows the company and its employees to establish terms other than the general ones of the industry, which is certainly positive.

Other topics, such as out-of-court settlement, negotiation of quotas of apprentices and handicapped employees, tend to lead to better results. We repeat: the reform does not alter unchangeable provisions of the Constitution, nor does it revoke the Consolidation of Labor Laws. A union that chooses not to negotiate will have the law on its side. For this very reason, the end of mandatory union dues will tend to maintain alive and acting only the actually and effectively representative unions.

The regulation of new systems, such as work on distance, part-time work and intermittent work will be beneficial to those who work like that. These are systems that already exist in practice. Such change will bring to the legal field workers who are currently in informality.

The right to annual vacation remains unchanged. The idea is to be able to divide it in three periods, which is currently not permitted by the law, even though it is sometimes what the employee himself or herself wants.

The proposed language of section 611-A establishes that collective labor agreement and collective bargaining agreement shall prevail over the law when they provide about:

- Working hours, observing the constitutional limits;
- Individual bank of hours;
- Break during working hours, observing the minimum thirty-minute limit for working hours longer than six hours;
- Joining the unemployment insurance program;
- Position, pay and title plans, including positions of trust;
- Business regulation;

- Representatives for the workers in the workplace, as already mentioned;
- Working hours registration type;
- Change of holiday;
- Identification of positions demanding a quota of apprentices, as already mentioned;
- Classification of unhealthy work degree;
- Extended working hours in unhealthy rooms with no need for prior authorization;
- Incentive awards in assets or services; profit-sharing.

As demonstrated, the proposed new section 611-A for the Consolidation of Labor Laws does not amount to the concept of "negotiated over legislated" as disseminated by the media. As already mentioned, the Constitution remains untouched and the non-constitutional laws are maintained in their entirety. The existing legal rights, which cannot be excluded, may be differently molded if they are approved by the negotiation table. If anything is not liked it may return to the previous situation in the next negotiation. The idea is to preserve what has been negotiated between employees and employers, preventing absurd interpretations from annulling what the parties to the negotiation have freely agreed as supported by the law.

What clarifies the preservation of essential labor right without the possibility of being subjected to collective bargaining is the newly proposed language of section 611-B. This section repeats the rights listed in section 7 of the Constitution, unchangeable provisions as already mentioned, preserving them and ensuring the integrity of workers and the legal employment relationship.

As already mentioned, the bill for labor reform that is currently pending at the Senate (2017) seeks to adjust the world of labor to the current demands of society. There are other aspects to be analyzed, including in respect of the working process. Such aspects will certainly be covered in other texts.

6. Conclusion

The collective labor conflicts were examined as well as their definitions based on the conceptual proposition of authors chosen as theoretical basis. The connection of the conflict to its resolution methods

was also stressed, especially collective bargaining as a way for the parties themselves to resolve the conflict.

In the current Brazilian legal system, collective bargaining is in the social labor fundamental rights. Thus, collective bargaining is a fundamental right of the working class. This right does not change the fact that there are rights that cannot be subjected to collective bargaining as these are unchangeable provisions.

The collective labor conflicts have a sociologic origin rather than legal one. The Brazilian legal system privileges collective bargaining as a method to resolve conflicts and the collective labor agreements and collective bargaining agreements as an outcome of resolution of the conflict by the parties themselves;

In an international scope, Brazil has ratified the ILO conventions 98 and 154, privileging collective bargaining as a right. Unfortunately, the same has not happened with the International Labor Organization Convention 87, which paves the way for freedom of association.

For better utilization of collective bargaining in the Brazilian system, full freedom of association must be implemented, incorporating the ILO Convention 87 and establishing union pluralism, free union classification, the end of mandatory union dues, the opening to the constitutional right to strike and the actual suppression of the Labor Court's normative power.

The adoption of the ILO Convention 87, which as international human rights treaty, should take place by means of the instrument set forth in section 5, paragraph 3, of the Federal Constitution, as rewritten by Amendment no. 45/2004. In this context, a way would certainly be opened for the actual implementation of the social rights set forth by the Constitution.

All the aforementioned discussion and substantiation would have no reason if not to face and discuss the essence of the proposed labor reform, Law no. 13,467 dated July 13th 2017.

Even though it is part of discussions coming before the desired union reform, such reform is broad and, if approved in its entirety, will suppress mandatory union dues, which is great news in order to open Brazil to freedom of association.

On the other hand, the purpose of the text, in an idea of delimiting the topic, was to examine the proposed language for the new sections 611-A and 611-B of the Consolidation of Labor Laws, based on initial discussions and

theoretical bases - collective labor conflict, collective bargaining as a fundamental right and the examination of international rules about collective bargaining.

As already mentioned, but worth repeating, this is not a case of "negotiated versus legislated", but rather the possibilities of collective bargaining, as a fundamental right of workers, to expand horizons in order to adapt Labor Law to the real world.

Unlike what is preached by many, this is not the end of Labor Law or of the Consolidation of Labor Laws. What the reform does intend is to include Labor Law in the work of contemporary work, as law always runs after the social fact.

The text clearly and unequivocally demonstrates that the fundamental social labor rights set forth in section 7 of the Constitution remain unchanged, and that is the way it should be, as these are unchangeable provisions.

The same text, in the proposed section 611-B, specifies the situations and rights that cannot be subjected to collective bargaining.

Just like the law, scientific texts must be connected to reality, otherwise they may not be recognized by it. The intention here was to demonstrate that collective bargaining, a fundamental right that has existed since the origin of the current Constitution, has room to adapt to the new realities and require analysis and open recognition both by the interpreter and social actors.

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