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CHANGE IN UNION FINANCE LAW

Brazilian Labour reform Law no. 13.467, promulgated on July 13, 2017, made the 1931 corporatist mandatory trade union dues (*contribuição sindical*) voluntary by amending art. 578 of the Consolidation of Labor Laws (CLT). The political justification for this change was to eliminate a legally-imposed and universal contribution that resulted ultimately in complacent and often unrepresentative unions. The normative justification was the incompatibility between the obligatory contribution and the negative dimension of the freedom of association principle, that is, the freedom not to join or to dissociate from a union.

The end of the mandatory nature of trade union dues was considered constitutional in 2018 by the Federal Supreme Court - STF¹. This normative change raises an important issue for Brazilian labor law. In Brazil, trade unions represent rights and interests of workers and employers grouped into categories². All are represented regardless of whether or not they have voluntarily affiliated with the trade union. In the system designed by Law no. 13.467/2017, while all members of a category benefit from collective bargaining, the trade union cannot charge any form of contribution for a worker who is not associated to the trade union. In this case, according to Law no. 13.467, the union would need the consent of each and every employee who are in the category to collect a contribution. This situation may encourage free riders, that is, those who benefit from the effects of collective bargaining, but do not pay for the costs that the union has incurred in negotiating.

It is important to analyze the on-going debate on the extent to which the Brazilian legal order prohibits mandatory union contributions to be charged to non-union members based on the protection of negative freedom of association.

I - FROM MANDATORY TO VOLUNTARY: CHANGES IN RULES GOVERNING TRADE UNION DUES

One main aspect of the Brazilian corporatist system was the universal and legally-imposed trade union dues, required under law to be collected from employers and workers represented by trade unions. There are basically four types of trade union contributions in the current system: the dues paid by individual workers who choose to associate with the trade union (CLT, Article 548, b); the negotiated contribution (based on a general provision in CLT Article 513); the confederation contribution (Article 8, IV, Federal Constitution); and the trade union dues provided by law to be paid by all members of a

1 Brazil. Direct Unconstitutionality Action no. 5794: <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5288954>

2 In the Brazilian corporatist system, employers also organize in trade unions through economic categories. Here, we will focus on workers' trade unions.

category (CLT Articles 578 to 610). Among the four, only the last one, the CLT trade union dues, was mandatory to the entire categories of workers or employers.

The CLT universal trade union dues was a major part of the constituency of trade unions' resources, especially for unions with a small membership, which depend almost entirely on it. Collected once a year, the dues were compulsory for employed workers, unionized or not, self-employed professionals and for employers in the case of employers' trade unions. The value of this contribution is equivalent to one day's pay in the case of workers' trade unions³. The new rules make the compulsory trade union dues voluntary, that is, workers have to formally and individually agree to pay the dues.

This change has caused a serious decline in the dues on which trade unions have relied for their economic survival. In 2018, data from the former Ministry of Labor⁴ indicate that the amount related to the CLT trade union dues passed on to unions fell by 90% in 2018⁵.

The end of the compulsory trade union dues has been considered as a way to make Brazilian trade unions more representative, forcing them to engage directly with their membership. Trade unions' reaction to the 2017 changes comes mainly in the sense of reviving the negotiated contribution, based on CLT Article 513. The negotiated contribution is fixed by a workers' assembly, which would then define the percentage to be charged; the contribution discount would be provided for in a collective agreement, to be performed by the employer on the wages of all workers in the category. The question now is whether the negotiated contribution would be constitutional, considering jurisprudential positions prior and after to the reform, specially the decision of the Supreme Court on the constitutionality of Law no. 13.467/2017 that turned the CLT trade union dues voluntary.

II - THE NEGOTIATED CONTRIBUTION AND THE NEGATIVE FREEDOM OF ASSOCIATION

Trade unions are already including the negotiated contribution into collective agreements⁶. This solution bumps into the jurisprudence of the courts from before and after Law no. 13.467/2017. Before Law no. 13.467/2017, in the case of the confederative and negotiated contribution, the courts' understanding was to consider the compulsory payment of contributions contrary to the principle of freedom of association, even if the contributions were approved by the workers' assembly and negotiated with the employer.

After the promulgation of Law no. 13.467/2017, legal actions presented at the STF argue that the Federal Constitution allows the compulsory trade union dues. On June 29, 2018, at the trial of one of these actions (Direct Unconstitutionality Action no. 5794),

3 The total amount in 2015 was about US\$ 1 billion for workers' and employers' trade unions. Only in 2015, the Ministry of Labour was forced to disclose the values. Controladoria Geral da Uniao: <http://www.cgu.gov.br/noticias/2015/07/cidadaos-usam-lei-de-acesso-para-obter-receita-de-sindicatos-com-contribuicao-obrigatoria>

4 On January 1/2019, a Presidential Decree, Provisional Measure 870, eliminated the (federal) Ministry of Labour, dispersing its functions across three ministries.

5 Jornal O Estado de S. Paulo: <https://economia.estadao.com.br/noticias/geral,sindicatos-perdem-90-da-contribuicao-sindical-no-1-ano-da-reforma-trabalhista,70002743950>

6 See for example: Brasil, Acordo Coletivo de Trabalho 2018/2018, CE000016/2018, 18/01/2018: <http://www3.mte.gov.br/sistemas/mediador/>

STF decided that CLT articles 545, 578, 579, 582, 583, 587, 602 that extinguished the compulsory character of the trade union dues are constitutional. Among the winning arguments, we highlight Minister Alexandre de Moraes vote: « There is no autonomy as long as a union system depends on state money to survive». It is identified as the central point of this discussion that the Supreme Court continue to adopt the same reasoning used before the Law no. 13.467/17 regarding the incompatibility between trade union contributions charged of all members of the category - associated to the trade union or not - and Item V of Article 8 of the Constitution - «V - no one shall be required to join or to remain a union member».

III - A NEW CONTRIBUTION ACCORDING TO THE PRINCIPLE OF FREEDOM OF ASSOCIATION

The debate over this issue involves the interpretation of two CLT rules: article 513, sub-paragraph (e); and article 611-B, item XXVI, that was included by Law no. 13.467/2017. Article 513 (e), authorizes a union to impose a contribution to all members of the category, and it is, as already mentioned, the legal base for the negotiated contribution. Ideally, this contribution, in accordance with the principle of freedom of association, would be established through a workers' assembly convened for this purpose, where the value of the contribution and the consent of the category would be voted.

This model would be in accordance with the principle of freedom of association expressed by ILO Convention no. 87, which does not prohibit dues imposed on workers who are not members of the trade union, provided that the dues are decided through a democratic deliberation within the trade union. In systems in which the trade union represents workers associated and non-associated with the trade union - as it is the case in Brazil - it makes sense to charge contributions from non-associated workers. The contribution must be then decided by the workers themselves in the assembly and its collection provided for by collective bargaining. The old trade union dues violated the principle of freedom of association by being imposed by law for the entire category and having its *quantum* determined by law without the proper participation of the category.

With respect to CLT Article 611-B, item XXVI, included by Law no. 13.467/2017, it prohibits collective bargaining over the establishment of mandatory contributions for the entire category.

We suggest that such a limitation violates the principle of freedom of association, rather than protecting it, even though there seems to be a tendency in the labor courts to find that collecting contributions from unassociated workers hurts negative freedom of association⁷. In this respect, the Federal Labour Public Prosecutor expressed its position in a Technical Note from 2018, arguing that «The Constitution does not prohibit the "agency shop" clause, i.e. clauses that allow "the collection of contributions from non-affiliates, provided they have

7 See for example: Brasil, TRT. Enunciado no. 096/2018 Contribuição sindical. Instituição por assembleia geral . Impossibilidade. A contribuição sindical prevista no art. 578, da CLT, não pode ser autorizada por assembleia geral. Brasil, Tribunal Regional do Trabalho. 3ª Jornada de Direito material e processual do trabalho do tribunal regional do trabalho da 7ª Região - Ano 2018: http://www.trt7.jus.br/files/publicacoes/Enunciados_aprovados_2018.pdf. Accessed on 01 Sep 2019.

been covered by the negotiation”, since this type of contribution does not violate item V of Article 8 of the Constitution».

In discussing an agency shop clause’s possible violation of Article 8 (V) of the Constitution, the first point to consider is whether such a clause was provided for by law or by collective bargaining. Trade union dues provided for by law would constitute a restriction on the principle of freedom of association, as the example of the old article 578 of the CLT trade union dues.

Trade union contributions established under an «agency shop» clause in collective bargaining, plays the role of strengthening unions by linking non-associated workers (and who may remain so) with the benefits derived from collective bargaining. Strengthening the differentiated status of collective bargaining, Article 8 of ILO Convention 95 on Protection of Wages, ratified by Brazil in 1957, provides that «deductions from wages shall be permitted only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreement or arbitration award».

Law no. 13.467/2017 has justified itself as a reform that sought to ensure greater space for collective bargaining. Among its rules, however, are limitations to collective bargaining that do not rely on values of the labor order. Item XXVI of Article 611b is one such case. Freedom of association, ensured in the caption of Article 8 of the Constitution and in its Item V does not prohibit the collective bargaining of mandatory contributions to the category, which are justified in a system of representation by category and exclusivity of representation, according to Item II of Article 8. The law cannot therefore restrict freedom of association and the right to collective bargaining in breach of the Federal Constitution and, as interpreted by the ILO itself, in breach of ILO Conventions 87 and 98 - the latter ratified by Brazil.