Trade Union Financing Law in the United States and in Brazil - An Ironic Convergence

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ABSTRACT

This study analyzes the compliance of Brazilian and United States trade union financing law with the international legal principle of freedom of association. In doing so, it notes an ironic convergence of both systems over the past three years. The entire public sector and much of the private sector are "right to work" in the United States, which resembles the recent universal "right to work" regime in Brazil. The Brazilian and American systems have coincided in this respect, despite continuing differences involving other aspects of labor relations and union structure. This article also briefly reviews how the labor movements of both countries are coping with the challenges of a right to work regime.

Keywords: Freedom of association; trade union contribution; Brazil; United States.

I. INTRODUCTION

Our objective is to analyze how well Brazilian and U.S. trade union financing law conform to the principle of freedom of association. The labor law regimes of both countries have been distinctly divergent for many years. The Brazilian regime has been associated with the ideal type

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of state corporatism, and the American system with liberal contractualism.[1]

Considering the vast differences between both labor law systems, it is reasonable to question the value of comparative analysis for the purpose of this article. For example, the Anglo-Saxon common law tradition continues to be a central influence on the American legal system, even in the area of administrative law.[2] In stark contrast, Brazil, with its Romano-Germanic civil law legacy, has a system of codification far more general and universal, which lacks the *stare decisis* limitations characteristic of the Anglo-American tradition. Another difference between both regimes is the role of the State in labor relations and in guaranteeing labor and trade union rights. In the United States, the State maintains a great distance, for the most part, from the collective bargaining process and the substantive results of collective agreements; this is in contrast to the Brazilian reality.[3]

In relative terms, there are fewer guarantees of substantive labor rights, benefits, and terms and conditions of employment in the American constitutional and infra-constitutional regime than in Brazil. It is also important to note that unlike the Brazilian labor courts, neither the American judiciary nor U.S. administrative agencies determine the substantive terms and results of collective bargaining agreements, provided that such substantive content is not in violation of the law.[4] For labor law and labor justice adjudication, there is a highly diverse and dispersed system in the United States that covers freedom of association, collective bargaining, minimum terms and conditions of employment, minimum wage, health and safety, employment discrimination, and many other subjects relating to the world of work. This system functions at both the federal and state levels and with different sets of labor relations legislation to cover private and public sector workers. Nevertheless, the National Labor Relations Act (NLRA) is the predominant legislation for labor relations in the private sector. The National Labor Relations Board (NLRB), a federal administrative agency, is responsible for the interpretation, application, and enforcement of the Act. The NLRB has both rule-making faculties and

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1. Stanley A. Gacek, *Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21, 26 (1994).

2. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 186-89 (Little, Brown and Co., 1976).

3. H.K. Porter Co., Inc. v. NLRB, 397 US 99, 102-09 (1970).

4. *Id.* The Supreme Court found that although the National Labor Relations Board (NLRB) has the power under the National Labor Relations Act (NLRA) to require employers and unions to negotiate in good faith, it does not have the power to compel either to agree to any substantive contractual provision of a collective bargaining agreement.

the power to produce case law based on the review of petitions and complaints. NLRB decisions have finality, but most of them are subject to further review by the federal judiciary. The Brazilian labor justice system, on the other hand, is highly centralized with a specialized system of labor courts at the local, regional, and national levels that have the power to adjudicate both individual and collective disputes concerning all of the labor and employment law subjects mentioned.

Notwithstanding the contrasts noted above, the current Brazilian labor law reality, and particularly the financial sustainability of the Brazilian union movement, should be of importance to American unionists, students of comparative labor law, and labor relations attorneys for the following reasons:

- Brazil's population is the fifth largest in the world, with over 211 million inhabitants and with a labor force of well over 100 million.[5] It is also still among the top ten economies in the world, notwithstanding the current economic downturn and unemployment exacerbated by the COVID-19 pandemic.[6]

- Although industrialized at different times, both Brazil and the United States share a common nineteenth and twentieth-century history of trade union struggle and militancy; draconian state and employer repression; and the eventual institutional recognition, legitimation, incorporation, and containment of the trade union movement during the same period—with the New Deal and Wagner Act of Franklin Delano Roosevelt and the *Estado Novo* and CLT (Consolidation of Labor Laws-Brazilian Labor Code) of Getúlio Vargas.[7]

- China replaced the United States as Brazil's number one trading partner over a decade ago; however, the United States continues

5. *Population, Total - Brazil*, THE WORLD BANK (2019), *available at* https://data.worldbank.org/indicator/SP.POP.TOTL?locations=BR (last visited Nov. 8, 2020).

6. *World Economic Outlook Database*, INT'L MONETARY FUND (Oct. 2019), *available at* https://www.imf.org/en/Publications/WEO/Issues/2019/10/01/world-economic-outlook-october-2019 (last visited Nov. 8, 2020).

7. Franklin D. Roosevelt, *Remarks at a Banquet Given by President Getúlio Vargas of Brazil in Rio de Janeiro*, AM. PRESIDENCY PROJECT (Nov. 27, 1936), *available at* https:www.presidency.ucsb.edu/documents/remarks-banquet-given-president-getulio-vargas-brazil-rio-de-janeiro (last visited Nov. 8, 2020).

to lead in foreign direct investment (FDI),[8] and the Bolsonaro and Trump administrations discussed the possibility of a Brazil/United States free trade agreement (FTA).[9]

- Brazilian multinational companies have increased their investments and operations in North America to a remarkable degree in recent years. These companies include Gerdau Steel, Embraer Aircraft, construction conglomerates OAS and Odebrecht, Petrobrás for oil and gas exploration and refining, and banking giants Banco do Brasil, Itaú, and Bradesco, just to name a few. JBS has become the largest producer of animal protein in the world and is now the largest employer of packinghouse workers represented by the United Food and Commercial Workers (UFCW).

- There are hundreds of thousands of Brazilians living in the United States,[10] and many of them are working in both the formal and informal sectors of the economy.

- There was an official, formal recognition between the Brazilian and United States governments about the importance of interchange and cooperation in the labor field. In May of 2012, Brazilian Labor Minister Brizola Neto and U.S. Labor Secretary Hilda Solis signed the Memorandum of Understanding for Labor Cooperation, Brazil/United States, further making the area of social dialogue and collective bargaining a priority for a mutual discussion of best practices.[11]

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8. Abrão Neto & Roberta Braga, *U.S.-Brazil Trade and FDI: Enhancing the Bilateral Economic Relationship*, ATL. COUNCIL (Mar. 5, 2020), *available at* https://www.atlanticcouncil.org/in-depth-research-reports/us-brazil-trade-and-fdi-enhancing-the-bilateral-economic-relationship/ (last visited Nov. 8, 2020).

9. *Brazil-U.S. Joint Statement on Enhancement of Bilateral Economic and Trade Partnership*, DAILY COMP. PRES. DOC. (Apr. 7, 2020), *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/brazil-us-joint-statement-enhancement-bilateral-economic-and-trade-partnership (last visited Dec. 11, 2020).

10. Brittany Blizzard & Jeanne Batalova, *Brazilian Immigrants in the United States*, MIGRATION POL'Y INST., (Aug. 29, 2019), *available at* https://www.migrationpolicy.org/article/brazilian-immigrants-united-states-2017 (last visited Dec. 11, 2020).

11. *Memorandum of Understanding between the Department of Labor of the United States of America and the Ministry of Labor and Employment of Brazil Concerning Labor Cooperation*, U.S. DEP'T OF LABOR (May 17, 2012), *available at* https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/US%20Brazil%20MOU%20English.pdf (last visited Nov. 4, 2020).

This document was renewed following the official summit between U.S. President Barack Obama and Brazilian President Dilma Rousseff in Washington, D.C., at the end of June 2015. In addition, there was an agreement signed at the time of the summit concerning the portability and application of acquired social security benefits for U.S. nationals working in Brazil and for Brazilians working in the United States.[12]

An unprecedented convergence developed over the last three years between the Brazilian and American legal regimes concerning trade union financing. The compulsory *contribuição sindical*,[13] also known as the *imposto sindical* or trade union tax, helped sustain the Brazilian trade union structure for approximately seventy-five years, but it was effectively eliminated by the radically neo-liberal labor law reform, Lei 13.467, that was approved in the Brazilian Congress in July 2017 and implemented the following November. In 1998, almost twenty years earlier, the Tribunal Superior do Trabalho – Superior Labor Court (TST) declared the practice of collecting the *contribuição assistencial*—a trade union assistance contribution[14] from all of the workers of a given professional category in a geographical area not inferior to a municipality—invalid and only permitted the assessment to be exacted from the *associados*,[15] or voluntary union members. The combined effect of these

12. SOCIAL SECURITY ADMINISTRATION, AGREEMENT ON SOCIAL SECURITY BETWEEN THE UNITED STATES OF AMERICA AND THE FEDERATIVE REPUBLIC OF BRAZIL (2015).

13. The compulsory trade union tax amounted to one day's pay per year and was collected from all workers covered by the monopoly union structure (governed by the principle of *unicidade*, or exclusive representation—only one union (*sindicato*) is allowed to represent the workers of a given professional category or economic activity (i.e., bank workers) and for a geographical area not inferior to a municipality, and regardless of whether or not the workers are voluntary members). The proceeds of the tax were destined for social welfare services on behalf of the union membership (such as medical and legal services). However, the Brazilian labor movement often used the proceeds for other trade union purposes during less repressive governments.

14. This contribution and its collection from all workers represented by the union had been similar to union security and agency fee practices in the United States. It has financed all types of trade union activity in Brazil.

15. Precedente Normativo do TST nº 119 (Normative Precedent 119 of the Superior Labor Court): "The Constitution of the Republic, in Articles 5, XX and 8, V, guarantees the right of freedom of association and free unionization. It is, therefore, offensive to this liberty if a clause established by an *acordo* (a collective agreement between the union of workers for a given professional category or economic activity and for a geographical area not inferior to a municipality and one or more individual employers of that same professional category or economic activity), by a *convenção coletiva* (a collective agreement between the union of workers of a given professional category or economic activity for a geographical area not inferior to a municipality with all of the employers of that professional category or economic activity represented by their own union, or *sindicato*), or by a normative sentence (issued by a labor court), providing for a confederative contribution (for the financing of a union confederation at the national level), or for any financing which assists, reinforces or strengthens

measures has invalidated approximately 90% of the financial base for the Brazilian labor movement.

In the United States, the NLRA permits clauses in collective agreements, providing for the obligatory payment of union dues, known as "union security" provisions, to be negotiated.[16] These clauses stipulate that, within thirty days, new employees are obligated to join the labor union as a condition of their employment.[17] In the event they exercise their right not to become full union members, they are required to pay a fee equivalent to union dues to help underwrite the costs of the collective representation and benefits they enjoy.[18]

However, the U.S. Supreme Court held in 1988 that when there is a union security clause in a collective agreement, a union can only collect from non-members those dues and fees absolutely necessary to perform its duties as a collective bargaining representative. The non-member has the right to demand a refund for any fees paid that had underwritten activities separate and apart from the strict bargaining representative function, including, for example, political action.[19] The remaining trade union financing obligation for the non-members became known as the *financial core* contribution.

Even with the union shop system having survived constitutional scrutiny in the United States, twenty-seven states outlaw union security clauses altogether, using so-called "right to work" legislation. Section 14(b) of the 1947 Taft-Hartley Act, which amended the original Wagner Act of 1935 and forms the current NLRA, enables states to pass these laws.[20] In "right to work" states[21], the union must engage in constant

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any union entity, and exacts payment from the non-members. Such a clause shall be considered null and void, with the proceeds irregularly collected to be returned." (The source was translated by the note's authors). It should be noted that the Brazilian labor relations system also has a counterpart and mirror image union structure for employers, consisting of local unions (or *sindicatos*), federations (generally at the state level), and confederations (at the national level). The employer *sindicatos* often function as the collective bargaining counterpart for the worker *sindicatos*.

16. The Railway Labor Act of the United States, 45 U.S.C. § 152 (2020).

17. National Labor Relations Act, 9 U.S.C. § 158(a)(3) (2020).

18. *See* NLRB v. Gen. Motors Corp., 373 U.S. 734, 743-44 (1963).

19. *See* Comm. Workers of Am. v. Beck, 487 U.S. 735, 752-53 (1988).

20. National Labor Relations Act, 29 U.S.C. § 164(b) (1947).

21. The term "right to work" is really a misnomer. The legislation has nothing to do with full employment nor the right of every American to a job. For a study of the true historical origins of the term; *see generally* Michael Pierce, *The Origins of Right to Work, Vance Muse, Anti-Semitism, and the Maintenance of Jim Crow Labor Relations*, LAWCHA (Jan. 12, 2017), *available at* http://www.lawcha.org/2017/01/12/origins-right-work-vance-muse-anti-semitism-maintenance-jim-crow-labor-relations (last visited Nov. 09, 2020).

organizing campaigns and attempt to convince new employees to become voluntary due-paying members. If the union fails to do so, it risks losing its majority authorization status as a collective bargaining representative, with the possibility of becoming decertified.

On June 27, 2018, the U.S. Supreme Court in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, held that the equivalent of union solidarity contributions for the public sector, known as agency fees or fair-share fees, were unconstitutional.[22] The decision overturned all of the legislation that permitted such trade union financing for the collective bargaining representation of public employees at the state, county, and municipal levels.[23]

In the United States, all of the public sector and most of the private sector are right to work, which corresponds to Brazil's nearly universal right to work regime. The two systems converge in this respect, despite continuing differences in trade union structure. We now turn to the question of how both trade union financing systems should be evaluated under international labor law.

II. WHAT DOES INTERNATIONAL LAW HAVE TO SAY ABOUT THE MATTER?

The international labor standards (ILS) of the International Labor Organization (ILO) include conventions, recommendations, protocols, declarations, and resolutions. ILO jurisprudence includes the observations of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the conclusions and recommendations of the Committee on Freedom of Association (CFA), and the conclusions

22. Janus v. American Fed'n of State, Cnty. and Mun. Emp., Council 31, 585 U.S. 138, 244 (S. Ct. 2018).

23. Federal employee unions are prohibited from negotiating union security or agency fee provisions applying to all workers in the bargaining unit of the relevant federal agency. The law only permits the voluntary payment of dues by authorization of the individual. *See* Federal Service Labor-Management Relations Statute, 5 U.S.C § 7115(a) (2012) [hereinafter FSLMRS], *available at* https://www.flra.gov/resources-training/resources/statute-and-regulations/statute/statute-subchapter-ii-rights-and-4 (last visited Nov. 09, 2020). Moreover, the scope of collective bargaining is very limited for federal workers. It does not include salaries and benefits and is restricted to a limited class of terms and conditions affecting the employees—such as personnel policies. *See* FSLMRS, 5 U.S.C § 7103(a)(12-14) (2012), *available at* https://www.flra.gov/resources-training/resources/statute-and-regulations/statute/statute-subchapter-i-general-2 (last visited Nov. 09, 2020); *see also* Fort Stewart Schools v. FLRA, 495 U.S. 641, 649 (1990) (wages and fringe benefits excluded under the definition of "conditions of employment").

and recommendations of the Governing Body (GB). Such standards and jurisprudence constitute the primary foundation for all international labor law. Nearly every human rights system, multinational body, and trade agreement in the world today relies on the ILO as the primary authoritative reference.[24] ILO Convention 87 is the principal international instrument defining freedom of association and its guarantees.[25] It does not prescribe or presuppose an ideal system of trade union representation. Both trade union plurality (or pluralism) and trade union unity (or exclusive collective bargaining representation by one union) are compatible with the principle of freedom of association provided there is democratic worker authorization of the union that is free of governmental domination or employer interference enabled by the State.[26] According to the CFA, concerning the principle of freedom of association:

> It is derived from this principle that, although the Convention does not aim to make trade union pluralism compulsory, pluralism must be possible in every case, even if trade union unity was once adopted by the trade union movement. Systems of trade union unity or monopoly must not, therefore, be imposed directly by the law.[27]

Accordingly, the CFA has concluded: "[u]nity within the trade union movement should not be imposed by the State through legislation because this would be contrary to the principles of freedom of association."[28]

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24. "The vast majority of trade agreements that include labour provisions promote ILO instruments, such as the Declaration on Fundamental Principles and Rights at Work and its Follow-up [adopted by the ILC in 1998], the Decent Work Agenda, and the Declaration on Social Justice for a Fair Globalization [adopted by the ILC in 2008]." *See* ILO GOVERNING BODY, LABOUR-RELATED PROVISIONS IN TRADE AGREEMENTS: RECENT TRENDS AND RELEVANCE TO THE ILO (2016), *available at* https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_530526.pdf (last visited Dec. 20, 2020).

25. *See* International Labour Organization, *Freedom of Association and Protection of the Right to Organize Convention*, NORMLEX (July 9, 1948), *available at* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 (last visited Sept. 17, 2020).

26. ILO, *Compilation of Decisions of the Committee on Freedom of Association*, § 484 (2017), *available at* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3944476,2 (last visited Nov. 20, 2020).

27. JEAN CLAUDE JAVILLIER, INTERNATIONAL LABOUR STANDARDS: A GLOBAL APPROACH: 75TH ANNIVERSARY OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 37 (Geneva: ILO, 2002).

28. COMM. ON FREEDOM OF ASS'N, INT'L LABOUR OFF., FREEDOM OF ASSOCIATION 90 (6th ed. 2018).

Moreover, Convention 87 does not presuppose any ideal regime of trade union funding. The ILO supervisory system on standards interprets and applies the Convention with an eye to the different cultures of union representation and, thereby, recognizes different modalities of financing. In systems that enable union pluralism for trade union representation, voluntary members of the trade union pay their contributions.[29] In regimes governed by trade union unity or exclusive bargaining representation, it is possible, according to Convention 87, to permit the collection of representation fees from all of the workers, including the non-members. Regarding this matter, the CFA has concluded:

> Problems related to union security clauses should be resolved at the national level, in conformity with the national practice and the industrial relations system in each country. In other words, both situations where union security clauses are authorized and those where they are prohibited can be considered to be in conformity with ILO principles and standards of freedom of association.[30]

Based on the findings of the CFA[31], the former *contribuição sindical* would have violated freedom of association because it was imposed on all workers by the State as a tax that was separate and apart from collective bargaining representation; mandatory dues collected from members and non-members were not a violation. According to the ILO, collective bargaining is a valued democratic practice.[32] Therefore, if the *contribuição sindical* was established through the collective bargaining

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29. Taking the example of Austria, Blaschke et al. explains: "the ÖGB's affiliates define the basis of calculating the membership dues." The affiliation is the linkage that constitutes the trade union representation that justifies the payment of the contribution. *See* Sabine Blaschke, Andrea Kirschner & Franz Traxler, *Austrian Trade Unions: Between Continuity and Modernization*, 92 J. OF LAB. RSCH. (2000).

30. *Id.* at 102.

31. ILO, *supra* note 26, at § 700 ("When legislation admits trade union security clauses, such as the withholding of trade union dues from the wages of non-members benefiting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements").

32. According to the ILO, "[c]ollective bargaining is a way of attaining beneficial and productive solutions to potentially conflictual relations between workers and employers. It provides a means of building trust between the parties through negotiation and the articulation and satisfaction of the different interests of the negotiating partners. collective bargaining plays this role by promoting peaceful, inclusive and democratic participation of representative workers' and employers' organizations." *See Freedom of Association and the Effective Recognition of the Right to Collective Bargaining*, ILO (2008), *available at* https://www.ilo.org/declaration/principles/freedomofassociation/lang—en/index.htm (last visited Nov. 20, 2020).

process and approved in an assembly of the relevant workers then the collection from all workers, including non-members enjoying the benefits of the collective agreement, would have been compatible with freedom of association. The contribution would not have violated any dimension of freedom of association, including the negative—an issue to be addressed later in this essay.[33] As the CFA has made clear: "A distinction should be made between union security clauses allowed by law and those imposed by law, only the latter of which appear[s] to result in a trade union monopoly system contrary to the principles of freedom of association."[34]

Case No. 2739 (Brazil)[35] is one of the most recent and general observations of the ILO concerning the law of trade union financing. One should note that Brazil ratified Convention 98 in 1952, but has not yet ratified Convention 87.[36] The CFA, founded in 1951 by the ILO Governing Body (GB), has the authority to review and supervise the compliance of all ILO member states with the principles of freedom of association and collective bargaining guaranteed by Conventions 87 and 98, respectively. The Committee has this authority even in the cases of member states failing to ratify either convention because the principles of Conventions 87 and 98 are inherent to the ILO Constitution, making compliance with them a condition for ILO membership.[37] Accordingly, the United States is also subject to the CFA's jurisdiction, even though it has failed to ratify either convention.

In Case No. 2739, the Brazilian national trade union centrals, which bring together unions of various industries and sectors, alleged that the principles of Conventions 87 and 98 were violated by the decision of the Ministério Público do Trabalho (MPT – Public Ministry of Labor)[38] to prosecute the inclusion of *contribuições assistenciais* clauses in *acordos*

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33. *Id.*

34. *Id.*

35. COMM. ON FREEDOM OF ASS'N, INT'L LABOUR OFF., INTERIM REPORT - REPORT NO. 362 (2011).

36. *Information System on International Labour Standards, Ratifications for Brazil*, ILO (2017), *available at* https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102571 (last visited Sept. 20, 2020).

37. *See* Ana Virginia Moreira Gomes, *The Effect of the ILO's Declaration on Fundamental Principles and Rights at Work on the Evolution of Legal Policy in Brazil: An Analysis of Freedom of Association* (2009) (unpublished thesis on file with the University of Toronto Graduate Department of Law), *available at* https://tspace.library.utoronto.ca/bitstream/1807/18895/5/Gomes_Ana_VM_200911_LLM_thesis.pdf (last visited Sept. 20, 2020).

38. A branch of the Brazilian Government responsible for the prosecution of labor law violations in the country, and analogous to a Labor Attorney General's Office.

or *convenções coletivas*—obligatory for all workers covered by the union, including the non-members.[39] The CFA concluded the following:

> With regard to the question of salary deductions agreed to in a collective agreement that is applicable to non-unionized workers who benefit from a union's activities, the Committee recalls that it has stated in the past that, when legislation admits trade union security clauses, such as the withholding of trade union dues from the wages of non-members benefitting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements.[40]

The implication of the CFA's final report is the following: *contribuições assistenciais*, approved in assemblies of the workers represented by the union and included in collective bargaining agreements, follow ILO norms concerning freedom of association. This is the case even if collected from both members and non-members, provided that national legislation permits such a practice and that process occurs exclusively through collective bargaining. In sum, Brazilian *contribuições assistenciais* and other collectively bargained contributions, as well as U.S. union security clauses, are permitted by ILO jurisprudence.

III. THE SIGNIFICANCE OF THE U.S. SUPREME COURT'S DECISION IN JANUS V. AM. FED'N OF STATE, CTY., & MUN. EMPLOYEES, COUNCIL 31

The *Janus* decision from June 27, 2018 leveled a major financial blow to unions representing public employees in the United States. The Court prohibited charging an agency fee to non-members for the union's cost of collective representation for everyone that is part of the bargaining unit.[41] This is a significant financial assault on the entire American labor movement since the critical mass of existing union coverage is from the

39. Committee on Freedom of Association Complaint against Brazil, Case No. 2739 Definitive Report, ILO (June 2012), *available at* https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3063459 (last visited Sept. 20, 2020).

40. *Id.*

41. Janus v. Am. Fed'n. of State, Cty., and Mun. Employees 31, 585 U.S. 138, 248-49 (S. Ct. 2018).

public, rather than the private, sector.[42] In 2020, the unionization rate for public sector workers was 34.8%, more than five times higher than the 6.3% rate for private sector workers. Aggregating both sectors, the unionization rate in 2020 was 10.8%, increasing 0.5% from 2019.[43]

The law requires labor unions in the U.S. private and public sectors to provide equal collective bargaining representation based on their exclusive bargaining status for members and non-members alike.[44] Even with this legally mandated duty of the unions on behalf of non-members, the five-to-four majority in *Janus* overturned an earlier Supreme Court decision, rendered in *Abood v. Detroit Board of Education*.[45] In *Abood*, the Court held that as long as an agency fee clause requires contributions from all workers in the bargaining unit, including non-members, and is strictly limited to the underwriting of collective bargaining representation costs, then it withstands First Amendment scrutiny.[46] However, agency fees used for political or ideological purposes that the employee did not agree to and which are not germane to the union's role as exclusive bargaining representative could infringe on First Amendment speech, expression, and association rights.[47]

By reversing *Abood*, the Court majority in *Janus* reversed over four decades of established doctrine governing trade union financing on behalf of public workers.[48] Public employee unions and the relevant public sector employers relied on *Abood*'s labor relations stability for the previous forty-one years. The *Janus* majority made an unusual, rare break from the bedrock principle of *stare decisis* in U.S. constitutional law.

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42. *See* Bureau of Labor Statistics, *U.S. Department of Labor News Release* (Jan. 22, 2021), *available at* https://www.bls.gov/news.release/union2.nr0.htm (last visited Sept. 21, 2020).

43. *Id.* The BLS explains the increase in the midst of the COVID-19 pandemic in its 2021 release: "The number of wage and salary workers belonging to unions, at 14.3 million in 2020, was down by 321,000, or 2.2 percent, from 2019. However, the decline in total wage and salary employment was 9.6 million (mostly coming from non-union workers), or 6.7 percent. The disproportionately large decline in total wage and salary employment compared with the decline in the number of union members led to an increase in the union membership rate."

44. *See* Steele v. Louisville and Nashville Railway Co., 323 U.S. 192 (1944); *see also* Vaca v. Sipes, 386 U.S. 171, 176-77 (1967); *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991).

45. Janus v. Am. Fed'n. of State, Cty., and Mun. Employees 585 U.S., 46-47 (2018)

46. Abood v. Detroit Board of Edu., 431 U.S. 209, 217-32 (1977), *overruled by* Janus v. Am. Fed'n. of State, Cty., and Mun. Employees, Council 31, 138 (2018).

47. *Id.* at 235-36.

48. Janus v. Am. Fed'n. of State, Cty., and Mun. Employees, Council 31, 585 U.S. 1 (2018), (Kagan, J., dissenting). The Kagan dissent provides the explicit reference to the four decades of established doctrine and stable labor relations in the public sector.

Justice Samuel Alito, writing for the majority in *Janus*, insisted *inter alia* that the prohibition on using the proceeds of agency fees for lobbying, political activity, and other ideological ends was not an adequate safeguard against compelled speech or speech subsidies in favor of third parties.[49] According to Justice Alito, union speech restricted to the collective bargaining process in public service necessarily involved political and ideological matters, such as budget crises, taxes, education, child welfare, and health care.[50] For Justice Alito, the firewall in *Janus* separating the subsidy of public sector collective bargaining from the subsidy for political speech could not adequately protect First Amendment rights.[51]

Justice Elena Kagan, writing for the dissenting minority, questioned the majority's radical break with *stare decisis* by noting that *Abood* had "struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper."[52] In light of this stable balance, there could be a requirement for the public employees "to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment, but no part of that fair-share payment could go to any of the union's political or ideological activities."[53]

Justice Kagan found pre-empting free-ridership to be a legitimate policy that justified the agency fair-share payment requirement or fee.[54] She also found that there was no significant infringement on the First Amendment rights of the public employee that did not choose to be a union member. She understood that without fair-share requirements:

> [T]he class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their membership expire. And as more and more stop paying dues, those left must take up the financial slack (and, anyway, begin to feel like suckers)—so they too quit the union. *See* Ichniowski & Zax, Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector, 9 J. Labor Economics 255, 257 (1991). And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the

49. Janus v. Am. Fed'n. of State, Cty., and Mun. Employees, Council 31, 138 S. Ct. 2448, 2462-65 (2018).

50. *Id.* at 24-25.

51. *Id.* at 37-38.

52. *Id.*

53. *Id.* at 1.

54. *Id.* at 7-10.

> responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive representation scheme will promote stable labor relations.[55]

Justice Kagan recognized and understood the principle of exclusive representation in the American labor relations system, including the public sector—namely, the legal imperative of only one union representing the bargaining unit for collective bargaining purposes, and with the union's concomitant legal obligation of representing the member and nonmember equally for such ends. Given such a legal and practical reality, the requirement of a fair-share fee without compelling union membership or infringing on speech, expression, and association rights of the individual public employee in any other way was an entirely reasonable and constitutionally defensible practice, according to Justice Kagan and the *Janus* minority. As noted in our prior discussion of ILO jurisprudence, it would be reasonable and defensible in terms of international labor standards.

IV. WHAT IS THE SIGNIFICANCE OF THE BRAZILIAN SUPREMO TRIBUNAL FEDERAL – SUPREME FEDERAL COURT (STF) DECISION IN ADI 5794: A NEW PROTAGONISM FOR NEGATIVE FREEDOM OF ASSOCIATION?

An important characteristic of the Brazilian corporatist system of labor relations was the *contribuição sindical*, or trade union tax, legally imposed and collected universally—from both union members and nonmembers. Among the four sources of union revenue,[56] only the *contribuição sindical* stipulated in Article 578 of the Consolidation of Labor Laws – Brazilian Labor Code (CLT) had been mandatory for both employers and workers in the relevant professional and economic categories.[57]

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55. *Id.* at 8-9.

56. The sources of union revenue according to the CLT include: Dues paid by individual workers who opt to join the union (Article 548(b)); *Contribuição negociada* or collectively bargained contribution (provided for in Article 513); *Contribuição da confederação* confederative contribution (Article 8, Section IV, of the Federal Constitution); and the contributions imposed by law and to be paid by all of the employees or employers of a given category, (in other words, the trade union tax imposed by law—Articles 578 to 610 of the CLT).

57. The Brazilian corporatist trade union system was based on *unicidade*, representation by category, and the *contribuição sindical*. On how these three elements interacted, *see* Ana

The *contribuição sindical* was an important source of funding, and for unions with a small number of members, it was often the only source. The 2017 CLT reform (Lei 13.467/2017) made the entire *contribuição* voluntary—in other words, there must be a formal and express agreement on the part of the individual worker for payment to be valid. This change led union budgets to abruptly contract. In 2018, the former Labor Ministry (now removed per order of President Bolsonaro) reported to the press that the income flow to unions fell 90%.[58]

Some observers argue abolishing the compulsory *contribuição sindical* is an effective means of making the Brazilian unions more responsive to their constituencies because they must now organize additional voluntary members to survive financially.[59] One of the union responses since implementing the 2017 CLT reform has been a greater reliance on the negotiation of *contribuição assistencial* clauses in collective agreements, as referenced in Article 513 of the CLT. The critical question is whether Brazil will uphold the constitutionality of *contribuição negociada* clauses considering the judicial decisions before and after the 2017 reform and in light of the STF's recent decision concerning the constitutionality of Lei n° 13.467's termination of the obligatory trade union tax.

Among the union prerogatives permitted by Article 513(b) of the CLT, unions may negotiate "*convenções de trabalho*"—collective labor conventions.[60] In Section (e) of the same article, the union has the faculty of "impos[ing] contribution requirements on all of those who participate in the economic or professional categories or in the liberal professions represented."[61] In other words, Brazilian labor law permits the practice of these obligatory representation fees through the process of collective bargaining. Although the 2017 reform ended the obligatory nature of the *contribuição sindical*—which had been imposed as a tax by law and not

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Virginia Gomes & Mariana Mota Prado, *Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to Meaningful Reforms in the Labor Law System*, 32 COMPAR. LAB. L. & POL'Y J. 843 (2011).

58. Cleide Silva, *Sindicatos Perdem 90% da Contribuicao Sindical No 1° Ano da Reforma Trabalhista*, ESTADÃO (Mar. 2019), *available at* https://economia.estadao.com.br/noticias/geral,sindicatos-perdem-90-da-contribuicao-sindical-no-1-ano-da-reforma-trabalhista,70002743950 (last visited Nov. 13, 2020).

59. Ana Virginia Gomes & Mariana Mota Prado, *Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to Meaningful Reforms in the Labor Law System*, Comp. Lab. L. & Pol'y J., 1, 6 (2010).

60. According to Article 513(b) of the CLT, "The prerogatives of the trade unions are: b) to negotiate collective labor contracts."

61. Consolidacao Das Leis Do Trabalho [C.L.T.] [Consolidation of Labor Laws], art. 513(b) (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm (last visited Nov. 13, 2020). (The source was translated by the note's authors).

by collective bargaining—it did not alter the text of Article 513. However, it added Article 611-B, Section XXVI, which states:

> [T]he suppression or the reduction of the following rights shall constitute an illicit object in the negotiation of a *convenção coletiva* or an *acordo coletivo*: union or professional freedom of association of the worker, including the right not to suffer, without express and prior approval, any union dues charge, or dues checkoff established in a *convenção coletiva* or *acordo coletivo*.[62]

Before the implementation of Lei 13.467 / 2017, the understanding of both the STF and TST in cases of the *contribuição confederativa* and the *assistencial* was that any required payment violated freedom of association, even if the assembly of workers represented by the union approved the contributions and the employer collectively negotiated those contributions.[63] The STF decided, in general terms, that the *contribuição assistencial* could not be exacted from a non-member.[64] In sum, these decisions considered the imposition of the *contribuição assistencial* on the non-members so they would violate Article 8, Section V of the Federal Constitution, which assures the right of freedom of association in its negative dimension: "no one shall be required to join a union or to

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62. Consolidacao Das Leis Do Trabalho [C.L.T.] [Consolidation of Labor Laws] Article 611-B, Section XXVI (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm (last visited Nov. 13, 2020). (The source was translated by the note's authors).

63. Precedente Normativo, *supra* note 13; *see also* Orientação Jurisprudencial nº 17 [Jurisprudential Orientation no. 17] of the SDC (department of Dissidios Coletivos, LABOR COURT (2020), *available at* https://www.tst.jus.br (last visited Dec. 20, 2020). Decisions determining the final collective agreements in cases of impasse of the TST ("Collectively bargained clauses which establish a contribution on behalf of the trade union entity, at whatever level, and which are required of the non-members, are offensive to the right of freedom of association and unionization, a right constitutionally guaranteed, and, therefore, they are null and void, with the proceeds collected to be returned to the non-members"). (The source was translated by the note's authors). *See also* Súmula Vinculante, *[Binding Summary Doctrine] 40 of the STF* (2020), *available at* https://www.stf.jus.br (last visited Dec. 20, 2020). ("The confederative contribution, as referred to in Article 8, Section IV of the Federal Constitution, may be collected only from the members of the respective union"). (The source was translated by the note's authors).

64. S.T.F, ARE 1.018.459, Realtor: Min. Gilmar Mendes, 23.02.2017, Supremo Tribunal Federal [S.T.F.], 03.09.2017, 1 (Braz.) (2020), *available at* https://www.stf.jus.br (last visited Dec. 20, 2020). ("The institution of imposing the obligatory payment of the assistance contribution by means of a collective agreement, collective convention, or normative judicial sentence on those employees of the professional category who are not union members is unconstitutional"). (The source was translated by the note's authors).

maintain their union membership."[65] Even though Article 8, Section V does not expressly prohibit the *contribuição assistencial*, the conventional wisdom justifying its proscription predominated in the courts due to non-members already paying the obligatory *contribuição sindical* at the same time. Brazilian jurist Sergio Pinto Martins, in asserting the incompatibility of imposing *contribuições assistenciais* on non-members with the principle of negative freedom of association, said the following:

> [T]he argument that the workers are beneficiaries of the collective agreements for the category and, for that reason, must pay the *contribuições,* just does not hold. The workers already pay the *contribuição sindical*, which serves to underwrite the union's activities. Such a contribution is compulsory, according to the terms of Article 545 of the CLT. Therefore, there is no obligation to pay another contribution for those workers who are not union members.[66]

After the passage and implementation of Lei 13.467/17, direct petitions were submitted to the STF, asserting that the Brazilian Federal Constitution permitted the practice of obligatory *contribuições sindicais*. On June 29, 2018, exactly two days after the U.S. Supreme Court's decision in *Janus*, the STF ruled on one of the petitions (Ação Direta de Inconstitucionalidade nº 5794). The STF decided that revised Articles 545, 578, 579, 582, 583, 587, and 602 of the CLT, which extinguished the obligatory nature of the *contribuição sindical,* were constitutional. Joining with the majority, Justice Alexandre de Moraes remarked: "there is no union autonomy when the union system depends on the money from the State to survive."[67] Justice De Moraes' comment demonstrates just how much the obligatory trade union tax has dominated the Brazilian judicial discussion and rationale regarding trade union financing.

STF Justice Luiz Fux also joined the majority and pointed to the U.S. Supreme Court's decision in *Janus* as a justification for his vote.[68]

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65. Constituição Federal of 1988 [C.F.] [Constitution], art. 8, sec. 4 (Braz.), *available at* https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (last visited Nov. 13, 2020). (The source was translated by the note's authors).

66. Sérgio Martins, *Exigência da Contribuição Assistencial de Não Associados,* REVISTA SÍNTESE TRABALHISTA E PREVIDENCIÁRIA 334, 413 (2017).

67. *Supremo Tribunal Federal, Case Abstract (ADI 5794), available at* http://www.stf.jus.br (last visited Nov. 13, 2020). *See also* Zuini, *É Obrigatório Recolher a Substituição Tributária do ICMS no Simples?*, EXAME (Jun. 29, 2018), *available at* https://exame.com/brasil/supremo-mantem-fim-de-imposto-sindical/obrigatorio (last visited Nov. 13, 2020).

68. *Id.*; *see also* Renata Queiroz Dutra & João Gabriel Lopes, *Os pesos da balança da justiça: custeio e liberdade sindical no STF,* JOTA (Oct. 19, 2020), *available at*

However, his reliance on *Janus* was totally inapposite. First, *Janus* applied exclusively to state, county, and municipal employees in the United States and did not invalidate the remaining legal union security regimes covering private-sector workers. Moreover, the agency fee clauses negotiated for public sector employees in the United States were totally unlike the trade union tax in Brazil, which had been separate and apart from collective bargaining and exclusively imposed by State fiat.

Brazilian judicial reflection following the passage and implementation of Lei 13.467/2017 and the STF's decision in ADI 5794 should focus seriously on whether something like the *contribuição assistencial* truly violates freedom of association in its negative dimension as defined by Article 8, Section V of the Federal Constitution. Moreover, should Section V be the chief protagonist in the interpretation and application of Brazilian trade union financing law, or should negative freedom of association dominate that interpretation and application? To answer this question, it is essential to understand what negative freedom of association is. Negative freedom of association is the individual's right of self-defense vis-à-vis his or her union through the prohibition of certain types of union security clauses as part of a defense mechanism.

The ILO Committee of Experts on Application of Conventions and Recommendations (CEACR) has observed that union security clauses found in collective agreements or arbitration decisions, which "make trade union membership or payment of union dues compulsory," could be subject to certain regulatory conditions and limitations.[69] The various types of union security systems include: a "closed shop"—the employer is only permitted to hire workers who are already union members and maintain union membership as a condition of employment;[70] a "union shop"—the employer may hire the workers of his or her choice, but they must become union members within a specific period;[71] and an "agency shop"—all of the workers, be they members of the union or not, must pay union dues and fees, but without the requirement of union membership as a condition of employment.[72]

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https://www.jota.info/opiniao-e-analise/artigos/os-pesos-da-balanca-da-justica-custeio-e-liberdade-sindical-no-stf-19102018 (last visited Nov. 13, 2020).

69. International Labour Organization, Convention on the Freedom of Association and Collective Bargaining, 81st Session, Geneva, 1994, Report III (Part 4B), *available at* https://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf (last visited Nov. 13, 2020).

70. *Id.*

71. *Id.*

72. *Id.*

Convention 87 does not expressly recognize or protect negative freedom of association. Article 2 of the Convention guarantees freedom of association for the individual, but only the right to join the organization of one's choice.[73] Uruguayan jurist Helios Sarthou commented on this express omission concerning the dubious doctrinal basis for the negative dimension: "if this modality of freedom of association has a philosophical foundation, it is, no doubt, and from a certain point of view, an individualistic and anti-union plan, which seeks to protect the individual from the so-called 'tyranny of the group' . . . ."[74]

Sarthou's observation has a special significance for Brazil, where negative freedom of association appears to be used as a defense against unions obtaining exclusive representation in an undemocratic manner. If that is the case, then the real violation of Article 8, Section V does not arise from *contribuições* paid by the non-members represented by the union. Rather, the real transgression stems from a system of exclusive representation created without democratic guarantees. For example, the *sindicato* representing the professional category in a geographical area not inferior to a municipality could obtain its monopoly status simply by being the first to register or a labor court could grant the monopoly based on the specific characteristics of the professional category, or on the efficiency of merging or dividing prior union jurisdictions. Such outcomes can occur because there is nothing within the CLT unconditionally requiring the establishment of exclusive representation status by means of majority authorization.[75] Article 8, Section V appears to guarantee negative freedom of association—like positive freedom of association, however, the right's negative dimension should not be interpreted or applied

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73. Pierce, *supra* note 21

74. Helios Sarthou, *Rasgos Ontológicos Generals de la Libertad Sindical, en: Instituciones de Derecho del Trabajo y de la Seguridad Social*, MEXICO: UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO 193 (1997); *see also* Paola Opertti & Andrés Marabotto, *Libertad Sindical Negativa en el Ordenamiento Jurídico Urguayo*, REVISTA DE DERECHO 40 (2008). ("Doctrine and jurisprudence are unanimous in their recognition of positive freedom of association. However, the same cannot be said for negative freedom of association, and that is due to several factors. In the first place, the lack of express recognition in Convention 87. Secondly, it runs counter to union security clauses which are very common in the Anglo-Saxon world. Finally, it is also resisted by the unions insofar as it is merely an individual right"). (The source was translated by the note's authors).

75. In the United States, the establishment of exclusive collective bargaining status is legally impossible without democratic and majority authorization (50% + 1) of the workers in the bargaining unit. Nevertheless, many unionists would argue that the American system is far from democratic, given the legally permitted employer interference in the process of organizing a union for collective bargaining purposes. *See, e.g.*, CHIRAG MEHTA & NIK THEODORE, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS (2005).

in a vacuum, nor should it stand as an absolute and unqualified axiom. All of the other facets of freedom of association derived from Article 8 form the context in which to read Section V; this context includes the positive individual and collective dimensions and the current reality of Brazil's union structure based on the exclusive representation of a professional category in a given geographical area. Accordingly, the CFA struck the balance between all of the dimensions of freedom of association in relation to trade union financing by relying on the institution of collective bargaining:

> In a case where the law authorized the trade union to set unilaterally and to receive from non-members the amount of the special contribution set for members, as a token of solidarity and in recognition of the benefits obtained from a collective agreement, the Committee concluded that to bring this in line with the principles of the freedom of association, the law should establish the possibility for both parties acting together—and not the trade union unilaterally—to agree in collective agreements to the possibility of collecting such a contribution from non-members for the benefits that they may enjoy.[76]

The CFA recognizes collective bargaining as the means to resolve the question. Such a solution is legitimate if the union representation is truly authentic and democratic in the first place.

One of the central questions following the recent CLT reform is how to conciliate two opposing and irreconcilable provisions from the same statute: Article 513(e) and Article 611-B, Section XXVI (added by Lei 13.467/2017). Article 513(e) authorizes a union to collect a *contribuição* from the entire professional category for a given geographical area and on the judicial basis for being a collectively negotiated assessment—*contribuição negociada*. Ideally, in conformity with the international principle of freedom of association, the contribution would be approved by a democratic, representative workers' assembly convened for the purpose of authorizing the amount of the payment.

In systems where the union must equally represent members and non-members, as in Brazil and the United States, it is sensible for sustainability purposes to collect *contribuições* from all of the workers represented. In the Brazilian case, a *contribuição* should be authorized by the workers through collective bargaining in a democratic assembly. The State, through its taxation power, imposed the prior *contribuição*

76. ILO, INT'L LABOUR OFFICE, FREEDOM OF ASSOCIATION: COMPILATION OF DECISION OF THE COMMITTEE ON FREEDOM OF ASSOCIATION 103 (6th ed. 2018).

sindical, which violated freedom of association because it was separate and apart from the institution of collective bargaining.

Article 611-B, Section XXVI of the CLT, established by Lei 13.467 / 2017, prohibits the establishment of obligatory *contribuições* through collective bargaining, in direct contradiction of ILO jurisprudence according to the CFA. This is regrettable and unfortunate for Brazilian workers because the "agency shop" model of union security guarantees the provision of collectively bargained gains and benefits for members and non-members by making the union financially sustainable.

ILO Convention 95 on the protection of wages, ratified by Brazil in 1957, recognizes the status of collective bargaining as a fundamental labor right and stipulates the following in Article 8: "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."[77] Bargained contributions, collected through salary checkoffs that support a union's function as an exclusive bargaining representative are cognizable and permitted according to Article 8 of Convention 95. Under international law, Brazil's ratification of the convention makes the instrument legally binding.

Freedom of association does not expressly prohibit collectively bargained obligatory *contribuições*. In addition, Section II of Article 8 implicitly justified such contributions through the exclusive collective bargaining status of the *sindicato*.[78] Therefore, any provision of law, such as Article 611-B, Section XXVI of the CLT, which contradicts freedom of association and collective bargaining rights, as defined by the Brazilian Federal Constitution, and by ILO Conventions 87, 95, and 98—the latter two ratified by Brazil—should be invalidated by the Brazilian judiciary. Moreover, the Brazilian judiciary should reconsider its prior decisions proscribing collectively bargained contributions because they run afoul of the Brazilian Constitution and international labor law.

77. Protection of Wages Convention, art. VIII, July 1, 1949, ILO.

78. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art.3, sec. 11, (Braz.) ("[T]he creation of more than one union organization is prohibited at whatever level, to represent the professional or economic category for a given geographical area, as defined by the interested workers or employers, provided that such a geographical area is not inferior to a municipality"). (The source was translated by the note's authors). This constitutional provision is also known as *unicidade*, referred to earlier in this essay.

V. HOW ARE BRAZILIAN AND AMERICAN UNIONS COPING WITH THE OVERWHELMING "RIGHT TO WORK" REALITY?

As mentioned, all public services in the United States are subject to the functional equivalent of the right to work, thanks to the *Janus* decision that invalidated agency shop for all state, county, and municipal employees. From the outset, union and agency shops were never permitted for federal employees. Right to work prevails for private sector workers covered by the NLRA in the vast majority of states. However, union security survives in California, New York, Washington, Pennsylvania, Illinois, and several other large states, which form the minority of the twenty-three states that have not implemented Section 14(b) of the Taft-Hartley Act.

Given this situation, which has the gravest effect on the U.S. labor movement since the Second World War, how are the unions coping? They are coping by constantly organizing, engaging with the new employees, and continuing communication with the already unionized workers to maintain membership, majority authorization status, and financial sustainability.

For example, the United Food and Commercial Workers International Union (UFCW), which represents over one million working women and men in the United States and Canada's retail, wholesale, service, food production, and food processing industries, succeeded in maintaining majority union status through its bargaining units and accompanying financial stability in U.S. right to work states for many years. UFCW did this by constantly reaching out to the new employees hired by unionized employers to convince them of the importance of becoming voluntary union members. The UFCW succeeded in incorporating clauses in its collective agreements with employers in right to work states, guaranteeing access to the stores and factories to orient the new employees on the importance of voluntary union membership.

In addition to informing new workers that union membership is critical for maintaining majority support and authorization status, allowing unions to avoid decertification, the UFCW offered special benefits to voluntary members. These benefits included special legal services for immigrant workers and financial assistance to workers and their families for continuing education—including university degrees. Although the union is legally obligated to represent members and non-members equally for collective bargaining and enforcement of the contract, it is entirely legal to offer members-only benefits *outside* the scope of the collective agreement.

Other American unions, including the Culinary Workers of Nevada, affiliated with UNITE-HERE (Hotel Employees and Restaurant Employees), have utilized similar methods to maintain successfully high levels of membership with financial sustainability. The Culinary Workers maintained a 90% unionization rate in Las Vegas before the COVID-19 pandemic, with many immigrant workers in their rank-and-file (including both documented and undocumented workers) despite being a right to work state.[79]

Notwithstanding the disastrous effects the *Janus* holding had on public sector workers in the United States, public employee unions are using the same strategies and methods previously cited for the private sector.[80] Unions are also pushing progressive state governments to pass legislation that would enable organizing more voluntary, due-paying members:

> In California, for example, unions now have the right, thanks to a new law, to meet with new public employees as soon as they start working. A second new law keeps private the phone numbers and email addresses of employees of public agencies, so that anti-union groups will have a harder time convincing them to drop out of unions.[81]

Moreover, with cuts to state government spending affecting public services across the country, many public employees have organized collectively and provoked strikes in protest. For example, in 2018, public school teachers walked out of classrooms in West Virginia, North Carolina, Colorado, Kentucky, Oklahoma, and Arizona in protest over their salaries and other terms and conditions of their employment. Most of these actions were spontaneous strikes; the teachers' unions saw the need to catch up with the rank-and-file militancy and organize accordingly. In West Virginia, for example, the American Federation of Teachers organized 1250 new voluntary members after the walkout.[82]

It is still too early to say exactly how the Brazilian unions will cope effectively with their new right to work reality. Many Brazilian unions

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79. Ruben J. Garcia, *Nevada's Unions Show How U.S. Labor Groups Can Adapt In a Right to Work Reality*, PAC. STANDARD (June 28, 2018), *available at* https://psmag.com/news/what-nevada-can-teach-fellow-unions (last visited Nov. 4, 2020).

80. *See* Alana Semuels, *Is This The End of Public Sector Unions in America?*, THE ATLANTIC (June 27, 2018), *available at* https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/ (last visited Nov. 2, 2020).

81. *Id.*

82. *Id.*

rely on regional labor prosecutors, labor courts, and willing employers who respect collectively bargained assistance contributions approved in worker assemblies, notwithstanding the contrary positions of the TST and the STF. Some are attempting to organize more aggressively to expand their voluntary membership, by offering social welfare, medical, and legal services traditionally provided by the *sindicatos*. However, these benefits were financed in the past by the trade union tax, which is now extinct.

Although the U.S. labor movement's coping strategies are not perfect or complete and are very much a work in progress, they may be of some instructive value to Brazilian unions. Nevertheless, the current COVID-19 crisis often precludes in-person recruitment of new members in Brazil and the United States, forcing the labor movements of both countries to employ virtual and remote organizing methods. Moreover, the public health crisis has caused economic devastation and massive unemployment in those sectors where American unions had made impressive organizing gains before the pandemic, including, for example, the hotel, hospitality, and gaming industries. At the same time, essential and front-line workers in health care, pharmacies, food retail, food production and delivery, public safety and transport, and other sectors, including the gig economy, are turning to the union movement to assure their physical and economic survival. Such an adverse environment is driving many workers in Brazil and the United States to understand the imperative of collective organization and defense as never before. Authentic solidarity and cooperation between the Brazilian and American labor movements have never been more important, especially given the ironic and dangerous convergence of trade union financing law in both countries.