HISTORY OF LABOR LAW IN BRAZIL

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INTRODUCTION

The classical liberal period of Brazilian labor law began after the abolition of slavery and the proclamation of the Republic in 1889. Its inception was characterized by certain initiatives that had little impact at the time, but which subsequently contributed to the development of our labor legislation.

In 1890, the federal capital (Rio de Janeiro) had a population of 522,000. São Paulo had only 65,000 people, but this figure grew to 240,000 by 1900. In 1907, 30 per cent of Brazilian industry was concentrated in Rio de Janeiro, with 16 per cent in São Paulo. A substantial number of workshops and factories for shoes, clothing, furniture, paint, ironworking, etc., were located in sheds or the back lots of warehouses and other places not easily reached by inspectors of any kind.

Immigration, principally from Italy, was substantial. In 1901, Brazilians numbered fewer than 10 percent of the manual labor force in the State of São Paulo. In the City of São Paulo, 4,999 out of 7,962 laborers were Italian. According to the 1906 census figures for Rio de Janeiro, 118,770 of the total population of 811,443 were laborers. The majority of these laborers were foreigners, principally from Spain and Portugal. The 1912 Report by the State Labor Department of São Paulo states that 10,204 laborers worked in the 31 textile mills of the city, of whom 1,843 were Brazilian (18%), 6,044 Italian (59%), 824 Portuguese (8%) and 3% Spaniards.[1]

Thus, conditions were ripe for enactment of laws to protect manual labor, but the legal system turned to a deaf ear to labor's complaints. That there were serious complaints is apparent from the large number of strikes and the political movements.[2]

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[1] Leôncio Rodrigues, *Conflitos Industrial e Sindicalismo no Brasil* 108-110 (Difusão Européia do Livro: São Paulo 1966).

[2] During the first years of the Republic, strikes were sporadic. One occurred in São Paulo in 1890, two in 1891, four in 1893, with at least one per year until 1896. Strikes were also rare in other States. Strikers usually sought higher wages and the reduction of the work day. The number of strikes, however, grew in the beginning of the 20th century.

I. POSITIVISM AND CLASSICAL LIBERALISM

The rise of Positivism in São Paulo was reflected in Brazilian labor law. Júlio de Castilhos, who became a political leader in the southern State of Rio Grande do Sul, carried with him Comte's idea of assimilating the proletariat into society. This thought, which influenced the direction followed in the State Constitution of Rio Grande do Sul of July 14, 1891, was described by Ivan Lins as "the first in the New World to include provisions in defense of the worker," even preceding the Mexican Constitution.[3] From his earliest writings, Comte contended against the *laisser faire, laisser passer* of classical liberalism and forthrightly advocated State intervention in the economy. From the time of his youth, Getúlio Vargas, as shown by his actions, was influenced by Comte.

Republican discourses showed signs of concern for the burgeoning consequences of the social question. For example, Cândido José Lins stated:

> As to the assimilation of the proletariat, I must state that I consider this a capital issue for the Republic. The Republic is the system of the common good: the common good is shaped by the great mass of the proletariat, whose contribution is the principal element in the production of public wealth.[4]

Classical liberal philosophy, however, guided most governmental actions. One of these is important: the veto by Vice President Manual Vitorino Pereira (temporarily acting as President) of the Bill submitted by Senator Moraes e Barros, which would have regulated rural leases. The reasons for the veto were:

> Under the principle of equality before the law (Art. 72 § 2 of the Constitution) the leases procedural and penal rule of exception. In civilized societies, human activity is carried out in almost all its forms under the system of contract law.
>
> For the State to intervene in the formation of contracts is to restrict liberty of contract and to offend freedom and individual activity in their most elevated and regular form; it is to limit the free exercise of all occupations, fully guaranteed by Art. 72 § 2 of the Constitution. The role of the State in free systems is to be present as a mere spectator at the formation of freely negotiated contracts. In this way the State does not limit, nor diminish, but rather broadens the scope of liberty and of individual activity, guaranteeing its effects.[5]

The liberal period was not propitious for the development of labor law, given the thinking guiding its principal actions. Any legislative measure regulating human labor could be interpreted as a serious restriction upon freedom of volition and incompatible with the principles deemed valid for full national emancipation. The Republican Constitution of February 24, 1891, was not directed towards social

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[3] Ivan Lins, *História do Positivismo no Brasil* 185 (Nacional: São Paulo 1964). In dealing with labor, the brief Castilho Constitution limited itself to extending to other workers the rules governing civil servants.

[4] *Id.* at 329.

[5] 2 *Documentos Parlamentares, Legislação Social* 183.

questions and its fundamental provisions were omissive with respect to labor problems. The core of important figures guiding political thought was not sufficiently sensitive to the plight of labor.

Although labor legislation became prevalent in Europe, this development had few repercussions in Brazil, influencing only a few thinkers, who were unable to convince the government to act. Indeed, the Constitution did not even specifically grant to the National Congress the power to legislate on labor questions. This lacuna was not filled until adoption of a constitutional amendment in 1926.[6] On the other hand, the Constitution could be interpreted as favorable to freedom of association and to occupational freedom.[7]

During the liberal period, isolated bills designed to obtain juristic treatment for labor relations were frequently submitted to the legislature.

FIRST LAWS: SYNDICALISM AND PROTECTION OF MINORS

The first two legal provisions on syndicates (labor and employer syndicates) were Decree No. 979 of 1903 and Legislative Decree No. 1.637 of 1907. The former covered rural syndicates, while the latter covered urban syndicates. Article 8 of the latter provided:

> Syndicates constituted in the spirit of harmony between workers and employers, such as those having permanent councils of conciliation and arbitration, designed to resolve disputes and controversies between capital and labor, shall be considered as legal representatives of their entire category of working men, and as such, shall be consulted on all matters concerning their profession.

Thus, the law promoted peaceful solutions to labor conflicts, influenced by the contemporary experience of other countries, especially New Zealand, which, since 1894, had a law on arbitration of labor questions.

In 1891, minors working in factories in the federal capital were granted legal protection. Decree No. 1.313 of 1891 instituted regular inspection of manufacturing places employing sizeable numbers of minors. Night work was prohibited for minors under 15. The length of the day shift for minors was limited to 7 hours, extendable to 9; children under 12 were prohibited form working. Evaristo de Moraes considered this law "one of a truly social stamp." Decree No. 1.150 of 1904, which created agricultural savings accounts, created privileged treatment for debts stemming from unpaid wages of rural workers.

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[6] Article 54 (28) of a Constitutional Amendment adopted on Sept. 7, 1926 provided: "Congress shall have exclusive powers to legislate on labor."

[7] Article 72 § 8 of the 1891 Constitution provided that "all are free to associate and to meet freely without arms." Article 72 § 24 provided that "the free exercise of any moral, intellectual and industrial occupation is guaranteed."

THE CIVIL CODE AND HIRING OF SERVICES

With the enactment of the Civil Code,[8] the *civilista* phase of the liberal period began. The Civil Code provisions on the hire of services were the historical predecessor of the work contract under subsequent specialized legislation. Based upon the ideas of that time, the Civil Code did not satisfy the principal demands of the changing social environment. Nevertheless, certain of its provisions on the hiring of services did serve as a basis for the subsequent development of labor law. These provisions included: (a) arbitration of disputes over the amount of compensation owed, according to local customs, the length of service and the quality of work;[9] (b) setting a maximum period of four years for contracts for a fixed term;[10] (c) prior termination notice of eight days for monthly workers, four days for weekly or fortnightly workers, and one day for those contracted for few than seven days;[11] (d) listing of certain types of just cause for termination of the contract;[12] and (e) criteria for compensation due for termination without just cause.[13]

Two significant laws were issued in 1923. One was the Eloi Chaves Law,[14] which created a retirement and pension fund for railway workers. This law also created tenure for those railway workers who had completed 10 years of service, permitting their dismissal only for serious misconduct or *force majeure*. Termination of the employment contract, when permitted, had to be preceded by an investigation to determine the misconduct, carried out by the supervising engineer of the railway. The second statute created the National Labor Council, "an advisory body for government agencies in matters related to the organization of labor law and social security."[15]

In 1925, legislation was enacted mandating vacations for certain workers.[16] Two years later, a Code for Minors, designed to protect and assist children under the age of 18, was enacted.[17] Although far broader than a labor law, the Code

[8] Law No. 3.071 of Jan. 1, 1916, as amended by Law No. 3.725 of Jan. 15, 1919.

[9] *Id.*, art. 1218.

[10] *Id.*, art. 1220.

[11] *Id.*, art. 1221.

[12] *Id.*, art. 1226.

[13] *Id.*, arts. 1225 and 1231.

[14] Law No. 4.682 of Jan. 29, 1923.

[15] Decree No. 16.027 of Apr. 30, 1923, art. 1. The Council was composed of 12 members chosen by the President of the Republic; two were workers, two were employers, two were high-level Ministry officials, and six were chosen from persons of recognized authority in the field.

[16] Law No. 4.982 of Dec. 25, 1925. This law provided that: "Without prejudice to their wages, salaries and bonuses, workers and employees of commercial and industrial establishments, banks and charitable and beneficent institutions in the Federal District and the States, shall receive 15 days annual paid vacation."

[17] Decree No. 17.934-A of Oct. 21, 1927.

contained several measures in Chapter IX governing the work of minors: (a) a prohibition of employment of children under 12 in any part of the Country; (b) a ban on hiring children under 14 who had not completed primary school; (c) a prohibition against employing children under 14 in certain occupations, especially those dangerous to health, life or morality, those overly tiring or that exceed their strength; (d) a requirement that to be employed, a child must have a certificate of physical fitness; (e) a limitation of the work day to six hours for minors serving as apprentices in certain shops; (f) a prohibition of night work for minors; (g) a restriction on hiring children in theatrical productions; (h) a requirement that a work schedule for minors be made; (i) a requirement of periodic submission of reports on employed minors and (j) a requirement of a work booklet (*carteira de trabalho*) for minors.

II. THE INTRODUCTION OF A CORPORATIVIST SYSTEM

Beginning in 1930, labor law began to expand in Brazil. The expansion was the result of various factors, including the continuation of the various conquests of the past. These gained new force in both the political and legislative fields.

Under the labor policies of Getúlio Vargas, who first assumed power in 1930 as the head of a successful military revolution, the concept of state intervention in labor relations had greater acceptance. The State began to play the central role in labor relations, as it did in its corporativist Italian model. Without considering here whether Vargas's purpose was the domination or the elevation of the working classes, it is clear that during the first Vargas regime (1930-1945), the legal order of labor relations was restructured, taking on many of the characteristics that it has retained until today.

In 1930, Decree No. 19.433 created the Ministry of Labor, Industry and Commerce. Great importance was given to the nationality of workers, and measures protecting Brazilian citizens were passed. These included a statute requiring that two-thirds of each firm's work force be Brazilian, known as the Two-Thirds Law.[18]

Legislation was adapted requiring use of a work booklet (*carteira profissional*).[19] A series of decrees determined the length of the workday in commerce,[20] industry,[21] pharmacies[22], entertainment establishments,[23] pawn

[18] Decrees Nos. 19.482 of 1930 and 19.740 of 1931.

[19] Decree No. 21.175 of 1932.

[20] Decree No. 21.186 of 1932.

[21] Decree No. 21.364 of 1932.

[22] Decree No. 23.084 of 1933.

[23] Decree No. 23.152 of 1933.

shops,[24] banks and banking houses,[25] land transportation,[26] hotels,[27] etc. The same legislative technique was always employed; legal provision were decreed by the Executive Branch.

The employment of women in industrial and commercial establishments merited a special statute,[28] as did the employment of children[29] and stevedoring services.[30]

THE FOUNDATIONS OF COLLECTIVE RIGHTS

The above-described movements and actions by workers, aided by new ideas patterned after the ideals spreading across other countries, led the State to seek to improve working conditions and to achieve social justice. The institution of syndicalism[31] and the legal right to enter collective labor compacts[32] formed part of a group of laws characteristic of relatively autonomous collective rights.

Syndicates were considered not only bodies to defend the interests of the trade and the interests of their members, but also entities for coordinating the reciprocal rights and duties of workers and employers, as well as collaborating with the state;[33] the unionizing of civil servants was prohibited;[34] the creation of labor unions was subject to recognition by the government;[35] obligatory standard clauses for syndical by-laws were imposed, which also depended upon governmental approval.[36] The basic structure was that of a pyramid: syndicates, federations and confederations. The "penalty of closing the syndicate" was already provided for, although only for 6 months.[37]

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[24] Decree No. 23.316 of 1933.

[25] Decree No. 23.332.

[26] Decree No. 23.766.

[27] Decree No. 24.696.

[28] Decree No. 21.417-A of 1932.

[29] Decree No. 22.042 of 1932.

[30] Decree No. 20.521 of 1931.

[31] Decree No. 19.770 of 1931 and Decree No. 24.694 of 1934.

[32] Decree No. 21.761 of Aug. 23, 1932.

[33] Decree No. 24.694 of 1934, art. 1.

[34] *Id.*, art. 4.

[35] *Id.*, art. 8.

[36] *Id.*

[37] *Id.*, art. 34.

The 1934 Constitution called for a pluralistic syndicalist system, but it was subject to criticism for its artificial nature and its creation of so-called "rubber stamp syndicates" (*sindicatos de carimbo*) that existed only on paper.

Beginning with the Constitution 1937, Brazil, syndicalism was organized along the lines of Italian corporativism, although it never became a complete copy. Brazil went only half-way, building a structure that in the future would enable the system to become identical to the law of the Peninsula.

As historians have observed, Article 138 of Brazil's 1937 Constitution was a transcription of Clause III of the Carta del Lavoro: "Professional or syndical association is free to all. However, only a syndicate duly recognized by the State has the right to represent legally those who are members of the production category for which it was founded, to defend their rights before the State and other professional associations, to agree upon collective bargaining agreements binding upon all its members, to require contributions from members and to exercise, in relation thereto, delegated governmental functions."

According to the ideas that infused Italian corporativism, syndicates ought to remain under State control. As the law states, syndicates carry out functions that were originally governmental. These functions were transferred to them by the States; therefore, syndicates should be regarded as part of the State itself, and not as private law entities with autonomy to organize themselves and develop their own activities. In Brazil, syndicates were organized bilaterally, with syndicates of employees on one side, and syndicates of employers on the other. Under the Italian fascist model, however, syndicates were unified by synthesizing and integrating them into superior bodies, called "corporations." These were the cells of the body politic, concentrating within themselves the productive forces of the Nation, having the power to issue instructions, supervise prices and wages, etc. It was thought that with this scheme, which joined employees, employers and self-employed professionals in one sole supra-syndical entity, whereby the State exercised control over the labor movement, it would be possible to eliminate any possibility of class struggle. There is an expression which sums up the thinking of Italian corporativism: everything within the State, nothing outside the State, nothing against the State.

Article 57 of the Brazilian Constitution of 1937, under the influence of these principles, created the Council on the National Economy. This Council was composed of representatives of the various branches of national production, nominated by professional associations or syndicates recognized by law, from among persons qualified by their special competence, thereby guaranteeing equality of representation to employees and employers. To update the syndicalist law of 1934, the Government issued Decree Law No. 1.402 of June 5, 1939, regulating the 1934 Constitution.

Our legal system, therefore, was based upon concepts characterizing the authoritarian form of syndicalist organization. Among these are the requirement that a syndicate be recognized by the State, the governmental nature of the functions of syndicates, the prior syndicalist structure drawn up by the State, the principle of one syndicate per trade, the syndicate tax (*contribuição sindical*), the intervention of the State and its punitive power over syndicates, etc. Some of these are compatible with social and economic reality, but others require re-evaluation.

The Constitution of 1937 prohibited the resolution of collective labor disputes through direct pressure by the interested parties. It declared that "strikes and lockouts are anti-social measures, harmful to labor and to capital and incompatible with the superior interests of production." This could not be otherwise in a regime where the State created corporations with the purpose of preventing the exercise of the right to strike, supposing it would be able to resolve the social problem and to redistribute wealth better -- an objective that proved to be unattainable. Its Article 139 created the Labor Court System "to resolve disputes arising between employees and employers, as regulated by social legislation", even though the 1934 Constitution had already made such provision. The Labor Courts are a result of an evolution that began with the Permanent Conciliation and Arbitration Councils, created in 1907, to decide controversies between labor and capital, but which never took hold in practice. These were followed by the Mixed Conciliation Committees in 1932; some 28 Committees had been installed by 1937. They were designed to attempt settlement of collective disputes between workers and employers. For individual disputes, the Government created the Boards of Conciliation and Judgment (*Juntas de Conciliação e Julgamento*); in 1937, some 75 of these Boards existed.

The above-described structure was the object of doctrinal criticism of the time, and the Committees and Boards were considered weak. They had no general power to impose solutions, and their efforts were limited to attempts at mediation. Only on May 1, 1939, with Decree-Law No. 1.237, was the Labor Court System finally created, and officially installed on April 1, 1941. It was composed of the Boards, the Regional Labor Councils and the National Labor Council; in 1946 these last two were converted into the Regional Labor Tribunal and the Superior Labor Tribunal, and thus moved from the administrative sphere into the Judiciary.

THE CONSOLIDATED LABOR LAW (CLT)

Labor laws had grown up in a disorganized fashion; they were scattered, with each professional occupation governed by its own specific rules. This structure, besides prejudicing many of the occupations that remained without legal protection, suffered the defect of being unsystematic, with the attendant inconveniences of fragmentation.

The first general statute was Law No. 62 of 1935, applicable to workers in trade and industry, and which guaranteed several rights: (a) compensation for dismissal without just cause (art. 1); (b) the guarantee of counting the years worked when businesses succeeded each other or changed their legal structure (art. 3); (c) priority for worker claims in bankruptcy (art. 4); (d) enumeration of the grounds for just cause (art. 5); (e) the effects of *force majeure* upon labor debts (art. 5 §§ 1 and 2); (f) transfer liability for compensation to the Government when it caused termination of activity (art. 5 § 3); (g) prior termination notice (art. 6); (h) anticipatory termination of contracts for a fixed period (art. 7); (i) suspension of contracts (art. 9); (j) tenure after 10 years (art. 10); (l) reduction of wages (art. 11); (m) nullity of contractual stipulations contrary to legal rules (art. 14); (n) exclusion of apprentices from legal protection (art. 15); (o) joint liability for indemnification, for syndicates or associations causing breach of contractual obligations (art. 16);

and (p) a one-year statute of limitations for actions for compensation. Law No. 185 of January 14, 1936, created the minimum wage, and the first table was published in 1940.

The Government decided to combine all these laws into one statute that went far beyond mere compilation. Even though called a Consolidation, it added new matter, and so approached becoming a true Code. Laws covering individual labor rights, collective labor rights and procedural labor law were brought together. Nevertheless, the subjects of social security and job accidents remained covered by separate legislation.

In this way, the Consolidation of Labor Laws (CLT) came about, joining 11 titles of subject matter.[38] It resulted from the work of a committee under the chairmanship of Minister Alexandre Marcondes Filho, which after almost one year of study, sent its conclusions to the President of the Republic on April 19, 1943, containing the suggestions of jurists, magistrates, governmental entities, private companies, cultural associations, etc. The Committee Report declared, however, that:

> The Consolidation represents, therefore, through its substantive rules and its title, in this year of 1943, not a point of departure, nor a recent adherence to a doctrine, but the maturation of the social process instituted more than a decade ago. This process has already been applauded by the judgment of knowledgeable public opinion for the benefits it has bestowed, and under whose spirit of equity all classes of economic life become brothers, thus inaugurating in this area, formerly unstable and uncertain, the same sentiments of Christian humanism that have filled the annals of our public and social life with generosity and nobility.

The CLT would not be, however, the awaited instrument of solidification of workers' rights. The mutability and the dynamics of the labor field demanded constant legal modifications, as can be seen from the number of subsequently enacted decrees, decree-laws and laws changing the CLT. Moreover, there was a substantial modification in the philosophy underlying the development of constitutional rules with the Federal Constitution of 1946, which was of a social-democratic stamp. The neo-liberal measures of the Constitution permitted greater respect for liberty and clashed with the corporativist mentality that underlay the principal parts of the CLT. The stark contrast between the Constitutional order and the statutory order was self-evident. The Constitution was more sensitive to the principles of private collective autonomy, whereas the CLT was still tied to the ideas that prevailed during the period when the unfinished corporativist framework was constructed.

A steady stream of laws modifying the existing labor legislation followed the 1946 Constitution.[39] In 1955, a Commission to revise the CLT was created, but it

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[38] Decree-Law No. 5.452 of May 1, 1943.

[39] *E.g.*, Law No. 605 of Jan. 5, 1949 (paid weekly rest and vacations); Decree No. 31.546 of Oct. 6, 1952 (child apprentices); Law No. 2.573 of Aug. 15, 1955 (additional pay for dangerous working conditions); Law No. 2.959 of Nov. 17, 1956 (contracts for specific jobs); Law No. 3.207 of Jy. 18, 1957

was unsuccessful. In 1961, Portaria 482-B of the Justice Ministry nominated jurists Evaristo de Moraes Filho and Mozart Victor Russomano to prepare drafts for a Labor Code and a Code of Labor Procedure. Even though they concluded their studies and submitted them to the Executive Branch, their proposals were also unsuccessful.

THE EFFECTS OF THE 1964 ECONOMIC POLICY

In the aftermath of the military takeover in 1964, economic policy was significantly restructured. The effects of the new order were immediately felt in labor law, which began to display an economic character, subordinated to the high priority goals that have continued from that date to the present, chief among them being the combatting of inflation.

Several laws were enacted that, taken together, constituted the so-called "wage policy of the Government." This policy subordinated wage increases, formerly agreed through collective bargaining or determined by the Labor Courts, to readjustment factors, standardized according to the official model. This technique was used to try to reach an economic equilibrium for more than 15 years, foreshadowing Law No. 6.708 of 1979, which called for negotiations to determine increases arising from productivity and an index for inflation adjustments (INPC).

In 1966, the Fund for Guarantee of Time of Service (FGTS) was created to promote development of resources to be applied in the housing system, and which had major repercussions on employment tenure and compensation for dismissal.[40] Complementary Law No. 7 of 1970 created the Program for Social Integration (PIS), designed to regulate participation of employees in the overall growth of companies, without defining itself as a profit-sharing program. Law No. 4.330 of 1964 regulated the constitutionally guaranteed right to strike, restricting it, both as to form and purpose for which the right could be exercised.[41]

Another abortive attempt to revise the CLT occurred in 1975, when the Government designated a Commission, chaired by Minister Arnaldo Sussekind, called the Interministerial Commission for Updating the CLT. The Commission concluded its studies by drafting a bill for a new CLT. Law No. 6.514 of 1977, accompanied by voluminous regulations, modified Chapter V of Title II of the CLT on Work Security and Medicine. Decree-Law No. 1.535 of 1977 changed the rules governing vacations.

(employment of traveling salesmen); Law No. 5.584 of June 26, 1970 (ratification of receipt of releases in contractual terminations of employees with more than one year of service); Law No. 4.090 of Jy 13, 1962 (13th month salary); Law No. 4.266 of Oct. 3, 1963 (family wage); Law No. 4.214 of Mar. 2, 1963 (rural workers).

[40] Law No. 5.107 of 1966.

[41] The right to strike had previously been regulated by Decree-Law No. 9.797 of 1946.

THE FEDERAL CONSTITUTION OF 1988

As a consequence of the political process favoring the democratization of the country, the National Constitutional Assembly approved a new Federal Constitution on October 5, 1988. This Constitution modified certain aspects of the law of labor relations.

One of the positive aspects was the restructuring of relations between syndicates and the State through the adoption of two basic principles: self organization of syndicates and autonomous administration of the syndicate. The first principle permits syndicates to be freely created, without the necessity of prior governmental approval. The second principle assures syndicates the freedom to make their own internal administrative decisions, which means that the by-laws of the syndicates rather the law will determine rules for resolutions, quorums, elections, and other matters in which the government used to interfere.

Collective bargaining was enhanced as the appropriate means for resolving questions such as the new working conditions governing shift work and the general reduction of salaries. The right to strike assumed broad proportions never before seen in our positive law. The right to strike was combined, however, with a new doctrine limiting its breadth, the abuse of right. If the right is abused, those responsible for the abuse are liable.

Other material alterations were the reduction of the work week from 48 to 44 hours; the general application of the FGTS system and the consequent elimination of tenure after 10 years; the creation of compensation for arbitrary job dismissal; an increase in the minimum premium for overtime pay to 50%; a one-third additional increment for vacation pay; the extension of maternity leave to 120 days and the creation of a 5-day paternity leave; raising the minimum age for employment to 14; the non-wage treatment given to participation in profits, as an incentive to companies to initiate such plans; creation of the position of an employee representative in companies with more than 200 employees; reformulation of the requirements for day-care and pre-school centers; and the inclusion, now at the constitutional level, of three classes of workers who cannot be dismissed: syndicate officials, elected members of internal accident prevention committees, and pregnant employees.

III. SYNDICAL ORGANIZATION

SPONTANEOUS UNION MOVEMENT

Very few changes occurred in this syndical legal regime until the 1988 Constitution. Worth mentioning are Portaria No. 3.100 of 1985, which revoked Portaria No. 3.337 of 1978, which had prohibited central syndicates; the 1985 Resolution that rehabilitated previously punished syndicate leaders, and Portaria No. 3.117 of 1985, which gave syndicates time to include election provisions in their by-laws, and indicated a new Labor Ministry point of view in relation to the syndical problem.

On June 22, 1987, the Executive submitted to Congress Bill No. 164, dealing with syndical organization, collective bargaining and strikes. The Bill would have revoked not only Title V of the CLT, which covered the first two topics, but also Law No. 4.060, the second law on strikes, which had incorporated principles considered too restrictive. In many respects, the Bill aligned itself with basic ideas of union freedom. This new official posture was a consequence of the process of political openness and redemocratization of Brazil, which began in 1985, with the New Republic following the end of the military governments. The redemocratization of labor relations began to be considered part of the greater process of political renewal. The Labor Ministry, headed by Minister Almir Pazzianotto Pinto, a former lawyer for unions, promoted collective bargaining as the primary solution for labor conflicts.

Parallel to the syndical organization defined by the State, three central labor syndicates appeared without any specific legal foundation: Workers Sole Central (*Central Única dos Trabalhadores*) — CUT, Workers General Central (*Central Geral dos Trabalhadores*) — CGT, and Independent Syndical Union (*União Sindical Independente*) — USI. Thus, above the confederative system set out in the prior legislation, a spontaneously organized structure with central syndicates had institutionalized itself. Even though these central labor organizations were syndical legal entities, they were very active and performed outstandingly in linking the workings of the three officially-formed entities — the syndicates, federations and confederations.

In the places with the highest concentration of workers in Brazil, such as the State of São Paulo (and more precisely its ABC region),[42] with its highly industrialized automobile industry, a combative union movement arose, at the same time as a new Workers Party (*Partido dos Trabalhadores*) grew, thus combining political action with union action. This combination resulted in interaction between workers and firms.

Taking advantage of the freedom given by the government and living in a time of inflationary erosion of real wages, the more militant union movement sponsored strikes with a regularity never before seen. This policy of labor conflict also intensely affected the public sector.

This conflictive conception of union activity, which seemed all absorbing, was rejected by a new attitude undertaken (also in São Paulo) by the metalworkers union, which began to develop a *result-oriented* unionism. This was pragmatic, devoted mainly to the achievement of good collective bargaining agreements rather than fighting the government. In this way, two syndicalist ideologies became clearly pronounced: the revolutionary, followed by the CUT, and the reformist, followed by the São Paulo metalworkers, who eventually founded the National Confederation of Metalworkers, headed by Luiz Medeiros.

In sharp contrast to the reality, the law still adhered to its prior patterns, with their outmoded corporativist principles, totally fallen out of use and not in accord with actual practice. The law was not even applied by the State, in view of its

[42] Called the ABC region because it contains the cities of Santo André, São Bernardo do Campo and São Caetano do Sul.

decision to preserve syndical freedom and not to interfere in internal syndical organization.

It was in this state of affairs that an attempt was made to ratify Convention 87 of the International Labor Organization (ILO), by speeding up its passage through the Federal Congress. The Chamber of Deputies had approved the convention long before, but the Senate had not. Part of the union movement was opposed to approval of Convention 87, however, because it felt that adoption would permit the splintering of labor unity because of its facilitation of the formation of labor unions, and also because it encouraged the formation of ideological unions. With these arguments, the trade unionists opposed to ratification managed to attract enough legislative support to once again paralyze all proceedings seeking ratification of Convention 87.

At the same time, the National Constituent Assembly was working on a draft of the Constitution of 1988. The unions managed to influence the Assembly in certain ways, especially in the preservation of two principles considered untouchable: *syndical exclusivity*, — the legal prohibition against the existence of more than one syndicate of the same type in the same territorial unit, and the *compulsory union tax*,[43] fixed by law, that had been instituted during the interventionist phase.

THE FEDERAL CONSTITUTION OF 1988

The Federal Constitution of 1988 is of signal importance as the instrument effectuating the democratization and the legal restructuring of the Nation. It also represents, in certain aspects, an advance in the improvement of the social conditions of workers. It must be recognized, however, that the system of syndical organization that it provides is self-contradictory. It attempts to combine syndical freedom with syndical exclusivity imposed by law and an official syndical tax. It establishes the right to form unions without prior governmental authorization, but it maintains the confederative system with its strict territorial limits, representation by occupational categories, and types of syndical entities.

The principles of the 1988 Constitution (articles 10 to 12) may be summed up as follows:

(a) the right to form syndicates and syndical freedom;

(b) retaining the confederative system of syndicates, federations and confederations, without mention of central syndicates;

(c) union exclusivity with self-determination of territorial bases, provided, however, that no syndicate may be formed if another already exists for the same category in the same territory, which cannot be less than the area of a county;

(d) free formation of syndicates without prior government approval;

[43] In September 1990, the Collor government abolished this tax through a Provisional Measure.

(e) free administration of syndicates with no State interference or intervention permitted;

(f) freedom for syndical assemblies to determine the dues contributions owed by their category, to be withheld from the payroll and paid over by the firms to the syndicates, with the preservation of the syndical tax imposed by law;

(g) individual freedom to join or leave a syndicate;

(h) the unification of treatment for urban, rural and fishing workers;

(i) the right of syndical retirees to vote in syndicate elections and to hold office;

(j) the guarantees to union officials that they cannot be dismissed without cause from the time of their candidacy until one year after their term of office;

(l) the right to collective bargaining;

(m) the right to strike, with greater flexibility;

(n) the right of workers to be represented in companies having a certain number of employees.

These constitutional provisions, which are the basis for the syndical structure, rest upon, in part, the principles of free organization and action of syndicates; in other areas, however, they are restrictive. The limits have been defended by the syndical movement itself, so that they represent the will of the interested parties rather than a governmental imposition. It is possible to argue that the restrictions represent an agreed upon legality. Whenever restrictions are imposed by law, and set out by a governmental decision that is counter to the desire of the syndicates, there is an obvious abridgement of syndical freedom. But, when union exclusivity and the compulsory syndical tax are preserved in law so as to placate the syndicates, the resulting legality is not coercive; it is the reflection of the parameters which the trade union entities wish to establish.

IV. CHARACTERISTICS OF THE BRAZILIAN MODEL OF COLLECTIVE BARGAINING

The Brazilian model of collective bargaining had its development inhibited by excessive legislation and the public nature of syndical organization. These factors deterred the strengthening and free initiative of unions. Since 1930, the State has legislated broadly on Labor Law based upon a corporativist system. The corporativist system is *dirigiste*, starting from the principle that it is up to the State to resolve labor questions, eliminating conflicts between the social protagonists by the unitary integration of classes, confined by the action of the State. Hence, the 1932 decree that legally instituted collective bargaining agreements had very little impact.[44]

[44] Decree No. 21.761 of 1932, Art. 1 defined the collective bargaining agreement as "the agreement relating to work conditions, concluded among one or more employers and their employees, or between unions or any other group of employers, and unions or any other group of employees." It thus introduced the possibility of two levels, the syndical and the non-syndical.

Some legal rules on procedure were also determined, such as the written form, publication, entry into force, adherence of interested parties to the compact, the natural form of extension of its provisions, certain content requirements, filing and registration at the Labor Ministry, and the decision by the Ministry on the extension of its clauses. The State also issued instructions for drawing up collective agreements, with an official model for agreements on overtime work and rules for registration at the Ministry.

The first constitutional recognition of collective bargaining agreements occurred in 1934.[45] The 1937 Constitution set out a number of rules on collective bargaining to be observed by statutory law, including: (a) application of the agreement's terms to all employees represented by the legally recognized contracting syndical associations, and (b) the obligatory stipulation of the duration of the contract, the amount and types of wages, internal discipline and the hours of work.[46] The 1937 Constitution, which served as a model for subsequent ones, also limited the right to "stipulate collective bargaining agreements binding upon all its members" to legally recognized syndicates.[47] This meant that the efficacy of collective agreements was constitutionally restricted by express only to syndicate members, and not to all those represented, *i.e.* all members of a professional category.

The 1946 Constitution did not repeat this limitation, transferring "legal representation in collective bargaining agreements" to the statutory level. The CLT of 1943 already accorded collective bargaining agreements a *normative character* applicable to all members of the professional category, and this was the only basis for contractual provisions. Collective agreements were only permitted at the trade level, and not at the firm level.

The extension of collective bargaining to the level of firms occurred in 1967.[48] This was, undeniably, a most significant change, in that it broadened the dimensions of negotiation, decentralizing it from the trade level and permitting direct agreements with firms. Nevertheless, the labor union's negotiating monopoly was maintained, because on the labor side, workers could only be represented by unions in collective agreements for the trade or for the firm. The collective agreement became applicable to all workers represented by the labor union, whether or not union members, and the collective agreement affected all employees of the company, whether or not union members.

It is worth noting the observation by Ruy de Azevedo Sodré on the historical background of the beginnings of our collective bargaining system:

[45] Const. of 1934, art. 121 (j).

[46] Const. of 1937, art. 137.

[47] *Id.*, art. 138.

[48] Decree-Law No. 229 of 1967 added a paragraph that changed Article 611 of the CLT to read: "Syndicates representing professional categories may celebrate collective bargaining contracts with one or more firms of the corresponding economic category, stipulating working conditions applicable within the scope of the labor relations of the firm or firms."

> In Brazil, collective bargaining agreements did not develop normally. They were not the dynamic and powerful institution heralded by the law-givers, destined to settle labor relations among economic classes and professions. They were not the source of our social law. Several factors contributed to this. First, as we said at the outset, in contrast to what occurred in other countries, our social law was not nourished by collective agreements, by customs and mores, by factory regulations. Our social law was born from statutes, is nurtured by statutes and reflects social reality through statutes. This is a system in whose climate the seeds of collective agreements cannot germinate. Another factor is the bureaucratic procedure to which the collective agreements are subject. The laws require a series of actions to be carried out for their preparation that retards their conclusion for at least two months, not to mention the time spent by the contracting syndicates in agreeing upon terms and conditions." [49]

It is also noteworthy that the lawgiver conferred exclusivity upon the syndical organizations. Logically, this should mean that collective agreements are applicable to an entire economic or professional category, under the presupposition of the common interests of all members of the group, rather than only those of union members. Until today, this issue continues to generate conflicting opinions and positions in other countries' legal systems.

Henrique Stodieck's appraised the effects of Decree-Law No. 229 of 1967 in the following terms:

> The new wording of the CLT introduces another stage in the legal development of our legal agreements. If, under the 1932 Decree, any group could sign an agreement, under the 1943 Consolidation these agreements, now called collective agreements, were exclusively for syndicates, and could be extended by a ministerial order. Now these agreements, properly named and designated, are valid *ab initio* for entire economic and professional categories, and do not require extension. Under another designation — collective bargaining agreements — they may be contracted at the level of one whole firm, with the employer as one party and the union (or the employees themselves if the union is not interested) as the other party.[50]

These basic characteristics have been retained in our model, so that its chief identifying marks are: *exclusivity* of union organization; *heteronomy* resulting from the legal foundation of collective bargaining; *inhibition* of contractual content because of excessive governmental legislation and judicial decision as the primary form of settlement of individual and collective labor disputes; the *monopoly of the syndicate* to negotiate, withholding original legitimation for higher levels of syndical organizations; *concentration* of bargaining at the professional category level, although agreements between unions and firms are permitted; and *general applicability of the terms* of collective compacts and agreements, on both union members and nonmembers. To these features, several others should be added to

[49] Ruy de Azevedo Sodré, *Os Contratos Coletivos no Brasil. História, Denominação, Sistema Legal Vigente* 21:23 (Ltr: São Paulo 1958).

[50] Henrique Stodieck, *Convenção Coletiva de Trabalho* 32:5 (LTR: São Paulo 1968).

portray the Brazilian model and to point out paths that could have been followed to make collective bargaining a more dynamic process.

Brazil's collective bargaining system should be expanded to base our labor relations model on private collective autonomy, making it more democratic and less government-imposed. Nevertheless, it cannot be converted into a totally open model, with completely autonomous contractual regulation by the interested social classes. Rather it should be a partially self-governing system, where the law and the courts are retained as indispensable components but with redefined roles. Bargaining is directly related to and reflects union organization, making it difficult to change the system of bargaining without syndical organizational reform.

Another direct influence upon bargaining arises from the governmental posture of determining wage policy, which removes from collective accords and agreements the power to index wages. This necessarily makes the government interfere with contractual liberty, limited only insofar as socio-economic planning results from the political consensus of all interested parties. This requires tripartite negotiations involving the State, unions, and firms, including confederations and central syndicates.

With collective bargaining concentrated at the level of official categories set forth in syndical legislation, two gaps need to be filled. One is the gap above the professional category level, conferring legitimate powers on confederations of employers and employees to negotiate. The second gap is below the professional categories, intensifying firm-level bargaining.

As the parties voluntarily expand the binding subject matter contained in the agreements, it will be possible for the agreements themselves to include rules designed to resolve controversies arising from their application. The withdrawal of the State from the structure and dynamics of syndical life and collective bargaining is desirable, but should not be confused with governmental indifference, which would have adversely affect the system's equilibrium. It is impossible to replace legislation by collective contracts in a country as large as Brazil, with its diverse regional characteristics. These run from intense union bargaining activity in large urban centers to total inertia in the more rural regions where trade unionism is little developed.

Collective contracts should have general effects stipulated with force of law and be applied to both members and non-members of unions. Unless they have the force of law, a complicating factor would enter the system: the necessity for applicability to be extended either judicially or through ministerial fiat.

Legal problems already resolved by corporativism should not be recreated just because the proper solution was found during the time of an authoritarian regime. Techniques proven viable, even if corporativistic, must be preserved. In Italy and Spain, the courts decide questions on collective contracts as collective disputes, so that it has not been possible to eliminate the action of the judiciary; this has not been understood, however, as governmental intervention in private collective autonomy. Even though it may be conceived of as a collective bargaining act, negotiation resulting in collective contracts can not be treated as the equivalent of an ordinary civil law contract. Precisely because it is a collective juristic act is why it must be applied to all who are in the same situation.

In a country in which 90% of the firms are small, and where there are natural difficulties in establishing a system of arbitration, mediation could play an important role in bringing the adversary parties to agree. In the short term, Brazil does not have the necessary conditions to implement a system of arbitration, with the absence of professional training, the inability to choose arbitrators by mutual agreement, the inability to define who would be responsible for arbitrators' fees, and the inability to make non-appealable awards. Even in countries that have adopted it, arbitration is little used in collective disputes.

Breach by the employer of the terms of collective bargaining agreements allows the government to act coercively through labor inspectors who file assessments against the company. It also affords the affected employees the right to bring individual court actions at the Boards of Conciliation and Judgment of the Labor Court System. Finally, it allows the union, as defender of the individual interests of members of the trade, to file an individual labor claim.

CHANGES INTRODUCED BY THE 1988 FEDERAL CONSTITUTION

There are basically four changes in the system of collective bargaining introduced by the 1988 Constitution:

(1) Mandatory involvement of syndicates in bargaining.[51] This reinforces the monopoly of the unions, which had previously been manifested by their exclusive powers to act, conferred by statute. In effect, no collective bargaining can be carried out by workers without the union. Workers not organized in a union are represented by the federations or confederation, which act as surrogates for the union. Notwithstanding the terms of the Constitution, this rule should not be abolished, under penalty of making collective bargaining impossible in these cases. Everything leads us to believe that the employers' syndicates must participate in collective agreements at the company level, given the wording of the new constitutional text.

(2) The principle of the irreducibility of wages, except as provided in a collective compact or agreement.[52] The purpose of bargaining is thus reinforced, not only as a means of obtaining advantages for the worker, but also as an administrative tool in company crises where the union is disposed to cooperate by accepting a reduction of employee wages. Article 503 of the CLT, which allowed employers unilaterally to reduce wages generally by up to 25%, in cases of *force majeure* or proven losses, has been revoked. Reduction is now lawful only bilaterally, requiring approval of the labor union. Agreement on the percentages and conditions of the reduction in wages, with or without a corresponding reduction of the workday, must result from an accord reached by negotiations.

(3) The possibility of arbitration if collective bargaining negotiations are frustrated and the parties so desire.[53] The parties may appoint an arbitrator to hear

[51] Const. of 1988, art. 8 (VI).

[52] *Id.*, art. 7.

[53] *Id.*, art. 114 § 1.

and decide the dispute. The arbitrator will make an award, which will avoid litigating a collective labor dispute at the Regional Labor Court.

(4) The importance of the terms and conditions fixed in collective agreements for the purposes of a subsequent judicial decision of a collective dispute.[54] This change is having great effect. The decision of a court in a collective labor dispute must now uphold the contractual provisions, as well as the legal minimums to protect the workers. This is the same as saying that the rights contained in a collective compact cannot be reduced by the labor courts and must be maintained in their decisions. The terms and conditions of a prior collective agreement will serve as the guaranteed minimum for the workers.

This guarantee will mean the incorporation of agreed rules and provisions governing working conditions into the collective rights of the professional category, so that they cannot be set aside by the Judiciary. Nevertheless, although a court decision cannot be used to reduce benefits, the collective compact itself is not subject to this limitation. Nothing prevents collective agreements from deciding not to maintain rights agreed in the preceding accord. In other words, the only limiting factor is autonomous collective volition: court decisions no longer have the same power.

V. INDIVIDUAL LABOR RELATIONS

Labor contracts are classified according to their form and duration. The master/servant relationship is informal and does not require a solemn document for legal existence. The law indicates the ways in which this legal relationship can be formed.[55] First is by express written agreement, although, as a general rule, such agreements are unwritten. Only in a few exceptional cases does a labor contract have to be written.[56] Contracts for a fixed period customarily take written form, but this is not a legal requirement. The written form is advisable to avoid doubts about the length of the contract.

Second is by express verbal agreement. A simple oral exchange of words between employer and employee on certain continuing aspects of the job produces legal effects and reciprocally binds the parties because it is a meeting of the minds.

Third is by tacit agreement, characterized by the non-existence or oral exchange of words. Tacit agreements are shown by behavior. When services are performed by someone, without opposition by the person whom they benefit, such behavior permits drawing the inference that an employment relationship exists. A popular expression facilitates understanding the tacit agreement: "silence seals a bargain" (*"quem cala consente"*). Anyone who takes advantage of the work of

[54] *Id.*, art. 114 § 2.

[55] CLT, arts. 442 and 443.

[56] The exceptions are:
(a) contracts for professional athletes (Law No. 6.354 of 1976, art. 3); (b) contracts for professional artists (Law No. 6.533 of 1978, art. 9); and (c) apprenticeship contracts (Decree No. 31.546 of 1952).

another, even though silent, benefits from the services and is obligated as an employer. The way to avoid this situation is to prevent the work from being performed. The tacit agreement is usually found, in practice, in cases of underemployment, where nothing is done formally, but the typical elements of an employment relationship are present. Thus, in practice, tacit agreements are often the same as legal employment relationships.

Some labor contracts are for an indefinite period, while other contracts are for a fixed period.[57] The difference between the two types of contracts depends on a determination of whether the parties agreed upon a final date. If they did, it is a contract for a fixed period. Usually, the contract is for an indefinite period, which is not only the common form but is presumed in all labor contracts. A contract for a fixed period must be proved by the interested party. A contract for a fixed period is an exception, and it does not benefit the employee as much as the contract for an indefinite period. In countries where employees have the right to job tenure from the beginning of their employment, contracts for fixed periods are disfavored because there can be no tenure under them. Another diminution of the worker's rights is the absence of prior termination notice, which is not due either upon termination or early cancellation.

Consequently, labor law only permits contracts for a fixed period under certain restrictions and limits the cases in which they are permissible. Brazilian law simply lists the cases when the fixed period is valid and enforceable; in all other cases, employment is deemed to be indefinite. Our law defines a contract for a fixed period as "a work contract whose effectiveness depends upon a prefixed date or upon the performance of specific services, or upon the occurrence of some event susceptible to prediction."[58] It further provides that "the contract for a fixed period will only be valid when it covers (a) services whose transitory nature justifies the prefixing of the period; (b) temporary business activities; or (c) a training contract."[59]

The CLT provides a maximum time period of two years for fixed- period contracts in general, with 90 days for training or trial contracts.[60] Only one extension is permitted.[61] Under the prevailing doctrine, there cannot be another contract for a fixed period signed with the same employee until 6 months after the end of the first contract,[62] unless the expiration of the contract depended upon specialized services or the occurrence of certain events. If a contract for a fixed period contains a provision permitting the parties to rescind it for any reason before its end, the contract will be deemed to be indeterminate.[63]

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[57] CLT, art. 433.

[58] CLT, art. 443 § 1.

[59] *Id.*, art. 443 § 2.

[60] *Id.*, arts. 445 § 1.

[61] *Id.*, art. 451.

[62] *Id.*, art. 452.

[63] *Id.*, art. 481.

The following contracts are for fixed periods:

(a) contracts for employees in general, so long as they are for temporary purposes;[64]

(b) contracts for foreign technicians;[65]

(c) contracts for professional athletes;[66]

(d) contracts for professional artists;[67]

(e) apprentice contracts;[68]

(f) contracts for specific jobs;[69]

(g) seasonal contracts.[70]

Other types of labor contracts have been depicted by certain authors. Such is the case with "team contracts," an expression designating the contracting of a group of employees at the same time. But team contracts are, in reality, only individual contracts. There are writers who speak of contracts of "intermittent duration" to designate the contracts of people who work in certain seasons of the year, such as the employees of hotels that only operate during vacation periods. These are really contracts for a fixed period with successive renewals. Our law does not prevent successive renewals of fixed-period contracts, so long as it is understood that the expiration thereof depends upon certain events, as the law states.[71] Other writers include special contracts, such as those covering workers in certain occupations (*e.g.*, bank and railway workers) where the law has specific provisions covering the length of working hours, etc.

The CLT defines an employee as "every person who provides services on a regular basis to an employer, under the orders thereof and for wages."[72] These requirements, however, do not exhaust the definition. In order to make it complete, one must turn to the definition of an employer to find a further requirement: that of the personal rendering of services.[73] Thus, there are 5 requirements, of which 4 are found in the definition of an employee and 1 in the definition of an employer. We shall analyze each of these.

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[64] *Id.*, art. 443 § 1.

[65] Decree-Law No. 691 of 1969.

[66] Law No. 6.354 of 1976, § 3.

[67] Law No. 6.533 of 1978, art. 9.

[68] Decree No. 31.546 of 1952.

[69] Law No. 2.959 of 1958.

[70] Law No. 5.889 of 1973, art. 14 sole para.

[71] CLT, art. 452.

[72] *Id.*, art. 3.

[73] *Id.*, art. 2.

An employee is an individual, a physical or natural person. It is impossible for a legal entity to be employee. The protection of the law is granted to every human being who works, to his life, health, physical integrity and leisure. These values only exist in relation to human beings and are not protected as to legal entities.

An employee is someone who works regularly, not occasionally. Here discussions revolve around two issues. First, determining the criteria to demonstrate that work is not occasional, which implies a study of the differences between employees and occasional workers, which shall be done separately. In principle, a non-occasional worker is one who carries out activity in a permanent way. However, several other explanations are necessary. Second is whether labor law should protect the occasional worker.

An employee is a worker whose activity is carried out in dependence upon direction of another. Our law uses the word "dependency." Nevertheless, in place thereof, another expression is generally used today: the word "subordination". This is of great importance because it permits the division of human labor into two large fields: subordinated and autonomous labor. An employee is a subordinated worker. If he is not subordinate to someone, he will be considered an autonomous worker or independent contractor rather than an employee. Labor laws are directed to protecting subordinated workers and not independent contractors. The CLT applies to employees and not to independent contractors. We will explore the difference between employee and independent worker below.

An employee is a salaried or wage worker rather than one who receives a remuneration for the service he renders. Where services are performed free of charge, no employment relationship is formed. One example is typically cited to clarify this point. A nun who gratuitously serves in a hospital, rendering religious assistance to patients, will not be considered an employee of the hospital, because her activity is performed without any salary, because of its nature and purposes. Certain authors have given enhanced status to the requirement of a salary and claim there is only an employment relationship where the contract is onerous. By "onerous" they mean reciprocal duties of the parties.The duty of employees is to render services, while the duty of employers is to pay salaries.

Finally, an employee is a worker who personally performs services. The personal nature is another necessary element of the definition. A labor contract is agreed upon because of a determined person. In this sense a labor contract is *intuitu personae*. The labor upon which the employer has the right to count is that of a determined and specific person, and no one else. Thus, the employee cannot be replaced by another person on his own initiative without the consent of the employer. This is what is meant by its personal nature. Without it, the character of the employment relationship is lost. The São Paulo Regional Labor Court has held that in exceptional cases the principle of personal nature can be restricted:

> Occasionally the performance of services can be delegated to some one other than the employee. So long as there is express agreement, the employee can, with the consent of the employer, have himself replaced by another in rendering personal services. However, when replacement becomes the rule, so that the purported employee is permanently substituted, one can no longer talk of a master/servant relationship. The personal nature of performance is lacking.[74]

The difference between employees and independent contractors is of the utmost importance, because the CLT is applicable to the former, but not to the latter. In theory, it is not difficult to determine the fundamental element distinguishing employees from independent contractors: subordination. The basic idea is that an employee is a subordinated worker, while an independent contractor is not subordinated.

The distinction between employees and occasional workers is necessary because the CLT is applicable to the former, not to the latter. Employees fall into a different legal category from irregular workers. The term *avulso* is sometimes applied to occasional workers, but that is not its precise meaning. Portaria No. 3.107, issued 4/7/71 by the Labor and Social Security Ministry, defines *avulso* as: "Within the general system of social security, an *avulso* worker is one who, without a specific employer, and whether or not he is unionized, is granted labor law rights assured by the respective class entity." The Consolidated Social Security Laws — considers as an *avulso* "someone who renders services to several companies, unionized or not, including stevedores, checkers and related occupations."[75] The 1988 Federal Constitution made *avulso* equivalent to a worker with an employment relationship. Even before this equivalence, *avulsos* had several labor law rights.[76]

Temporary labor is legally defined as "that rendered by an individual to a firm, because of a temporary need to substitute its regular permanent staff or an extraordinary increase in business."[77] The definition is not completely self-explanatory and needs to be completed with another concept from the same law that states: "Any urban individual or legal entity whose activity consists in placing properly qualified workers temporarily at the service of other businesses, and pays their remuneration, is deemed a temporary employment firm".[78] Such companies lease temporary labor. Their services are requested by other firms that need, for a short time, a certain type of professional service. The client asks the temporary employment firm for a worker. The client, also known as the recipient of the services, pays an agreed fee to the temporary employment firm, which has a list of workers on file and sends those selected to perform the work requested by the client. No labor relationship is formed between the client and the worker. Such a relationship is formed, however, between the temporary employment firm and the worker, and this firm is liable for the rights of the worker.

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[74] Ac. 1698 of 1982, Reporter Hélio de Miranda Guimarães.

[75] CLPS, Decree No. 89.312 of 1984, art. 5.

[76] Law No. 5.480 of August 10, 1968, orders the provisions of several laws and decrees to be applied to "avulsos", such as the 13th month salary, the FGTS, the family-support salary, and paid vacations. Large group work (cleaning and maintenance of merchant vessels, tanks, rust removal, painting and repair of ships) is also regulated by a law that provides for payments shipowners must make to *avulsos*. Law No. 5.385 of 1968. The social security system also applies to *avulsos*.

[77] Law No. 6.019 of 1974, art. 2.

[78] *Id.*, art. 4.

Thus, the figures of employee and temporary worker are different, even though both are subordinate. However, the legal subordination of the temporary worker is to the temporary employment firm with which he maintains his contract. When a temporary employment firm goes into bankruptcy, the recipient of services or client is jointly liable to the temporary workers for payment of social security contributions, wages and indemnities.[79]

Law No. 6.019 of 1974 confers the following rights on temporary personnel: (a) remuneration equivalent to that earned by employees of the same occupation in the recipient company or client, calculated on an hourly basis, with a minimum wage guaranteed; (b) maximum work day of 8 hours; (c) overtime at 20% extra; (d) vacation pay of one half salary for each month of service (or fraction thereof greater than 15 days), except in cases of dismissal for just cause or voluntary resignation;[80] (e) paid weekly rest;[81] (f) 20% extra night work pay; (g) compensation for dismissal without just cause or upon the termination of the contract, corresponding to one-twelfth of the salary per month of work; (h) job accident insurance coverage; and (j) social security.

Domestic workers are not governed by the CLT, but by a special law.[82] Persons are deemed domestic workers "when they render services on a continual and not-for- profit basis to a person or family, within its residential limits."[83] Private placement agencies for domestic workers are liable for damages caused to the employers by the workers.[84]

The 1988 Federal Constitution broadened the rights granted by statutory law to domestic workers by adding the following: (1) minimum wage; (2) irreducibility of remuneration; (3) 13th month salary; (4) paid weekly rest, preferably Sundays; (5) prior termination notice proportional to the length of service, with a minimum of 30 (thirty) days; (6) maternity leave of 120 days; (7) paternity leave; (8) vacation with one-third additional remuneration; and (9) retirement.[85]

The Statute of the Rural Worker, which had been in effect since 1963, sought to assure rural workers almost the same rights enjoyed by urban workers, including indemnities, prior notice, wages, vacation, paid rest, offsetting hours, special protection to women and children, etc.[86] The Statute of the Rural Worker was revoked by Law No. 5.889 of June 8, 1973, in favor of the universally approved

[79] Law No. 6.019 of 1974, art. 16.

[80] Law No. 5.107, art. 26.

[81] Law No. 605 of 1949.

[82] Law No. 5.859 of 1972.

[83] *Id.*, art. 1.

[84] Law No. 7.195 of 1984.

[85] Const. of 1988, art. 7, sole para.

[86] Law No. 4.214 of Mar. 2, 1963. The worker in an industry located in a rural area is considered an industrial worker and covered by the CLT rather than by rural labor law. (*TST*, Emenda No. 57.).

criterion of simply extending to the rural worker the labor legislation applicable to urban workers, albeit with a few restrictions that do not alter substantially its menu of rights. The rights of rural workers were made totally equivalent to urban workers by the 1988 Constitution.[87]

Rural labor contracts may be for a fixed or indeterminate duration. Seasonal contracts in which the worker is bound to the employer during planting or harvest, with the master-servant relationship ending upon the end of the harvest, are permissible.[88]

Seeking to encourage worker training, the law permits employers, after observing certain formalities, to hire minors so that they may provide services for remuneration while receiving systematic job training. The CLT defines an apprentice as "a child between ages 12 and 18 subject to professional training methods for the job he performs."[89] The CLT obliges employers to place a certain number of apprenticed minors in courses offered by the National Industrial Apprentice Service.[90] Rural apprenticeship is administered by SENAR — National Rural Professional Training Service, under Decree No. 77.354 of 1979.

An employer is defined as "any business, individual or collective, which, assuming the risks of economic activity, hires, pays wages and directs the personal rendering of services."[91] "Whenever one or more businesses, even though they may each have separate legal identity, is under the direction, control or administration of another, and constitutes an industrial, commercial or other economic activity group, then for the purposes of labor relations, the principal company and each of its subordinates will be jointly liable."[92]

VI. ORGANIZATION OF THE LABOR COURT SYSTEM

The Constitution establishes a court system for the resolution of labor disputes.[93] Procedural labor law begins, therefore, with the organization of the labor courts, which are today part of the regular Brazilian Judiciary. The Labor

[87] Const. of 1988, art. 7.

[88] Law No. 5.889 of 1973.

[89] CLT, art. 80, sole para.

[90] There are provisions on the wages of apprentice children (CLT art. 80), the definition of an apprentice (art. 80, sole para.) commercial apprenticeships (Decree-Law No. 8.622 of Jan. 10, 1946), registration of minors at SENAI (Portaria No. 49 of May 14, 1946), formal requirements for apprentice contracts (Decree No. 31.546 of Oct. 6, 1952), and itemization of occupations fit for apprenticeship (Portaria No. 127 of 1956)

[91] CLT, art. 2.

[92] *Id.*, art. 2 § 2.

[93] Const. of 1988, art. 114. The antecedents of this system of labor courts began in 1907 with the Permanent Conciliation and Arbitration Councils, followed by the brief experience of Rural Tribunals in 1932, the Mixed Conciliation Commissions and the Boards of Conciliation and Judgment, also in 1932. The 1946 Constitution recognized of the Labor Court System.

Courts are inexhaustible sources of pronouncements, upon which depend, in large part, our societal stability and the full administration of justice as the principal means of insuring the common welfare.

The following are peculiar characteristics of the Labor Courts. First, they act in only with respect to labor law. Secondly, they are collegial at all levels, whereas the ordinary courts usually have single judges at the first instance and collegial courts at the appellate level. Third, they are mixed tribunals. Some of the judges represent the professional or economic interests of the parties, whereas others are professional career judges in labor law questions. Fourth, the courts of first instance, called Boards of Conciliation and Judgments, are not divided into departments within any given territory, be it in large cities or in the interior. In the regular court system there are territorial divisions and districts, a structure that does not exist in the Labor Court system. Fifth, courts of second instance, called Regional Labor Tribunals, may or may not be divided into panels. Appeals from the Regional Tribunals may be taken to the Superior Labor Tribunal. There are no Tribunals of Alçada, separate appellate courts such as occasionally exist in the regular court system, depending upon the need to distribute the work load. Sixth, no specialized courts for any particular labor law matters exist. All labor courts, obeying jurisdictional and hierarchical rules, have the power to decide any matter connected with Labor Law. In the regular court system, certain courts have special jurisdiction to hear family law matters, criminal law cases, public registry questions, etc.

The Labor Court System is made up of the following courts:[94]

(a) Boards of Conciliation and Judgment, consisting of a presiding judge with a law degree, designated among candidates showing professional qualifications, and two class representatives having three-year terms, one from employees and the other from employers, designated by their respective syndicates and chosen by the presiding judges of the Regional Courts. In the cities where there are no Boards, the district court judge carries out the functions of the labor courts.[95]

(b) Regional Labor Tribunals, two-thirds of whose members are professional judges, and one-third of which are class representatives who need not have a law degree, chosen from lists of three candidates submitted by the respective syndicates. Until the 1988 Constitution, there were 15 labor court regions, and each with a Regional Tribunal. The new Constitution provides for the creation of one Tribunal in each State of the Federation. The Tribunals sit in panels and groups of panels.

(c) The Superior Labor Tribunal has jurisdiction over the entire Country. It is composed of 27 judges, called Ministers, of whom 17 are professional judges and 10 are class representatives. Eleven of the professional judges are chosen from career labor judges, three from lawyers and three from members of the Labor Public Ministry.

[94] Const. of 1988, art. 111.

[95] *Id.*, arts. 668 and 669.

The labor court system has jurisdiction over the entire Country, since it is part of the federal judiciary. Thus, state courts cannot decide labor law questions.

Labor law jurisdiction is adversary when the courts decide cases in which there are controversies between parties. It is voluntary when the labor law courts act as public administrative bodies concerned with private interests, but without adversary proceedings, e.g., ratification of the option to participate in the FGTS. The characteristic of voluntary jurisdiction is the absence of litigation and *res judicata*.

The judges of the labor court system consist of: (a) Ministers, sitting on the Superior Labor Court; (b) Judges of the Regional Labor Courts; (c) Presiding Judges and Class Representatives on the Boards of Conciliation and Judgment; (d) Substitute Judges and Representatives. There are also civil servants, such as court clerks, accountants, etc. Attorneys are considered auxiliary officials of the courts.

The professional judges sitting on the Boards are chosen by competitive examinations and credentials. The class representatives are nominated by the Presiding Judge of the Regional Labor Court. The professional judges of the Regional Labor Courts are designated by the President of the Republic. Some of the vacancies on these tribunals must be filled by lawyers who are members of the Public Ministry. The Ministers of the Superior Labor Tribunal are nominated by the President of the Republic and require confirmation by the Senate.

Appellate labor judges are promoted, alternately on seniority and merit. The class representatives are not career judges but are temporary appointees. The career judges of the labor courts have constitutional guarantees of life tenure, intransferability and irreducibility of their compensation.

The Labor Public Ministry represents the interests of the Federal Government in labor disputes heard by the labor court system.[96] It consists a Procuracy of Labor Justice, which includes: (a) the Procurator General's Office, which works with the Superior Labor Tribunal; (b) Regional Procuracies, which work with the Regional Labor Tribunals. The Procurator General's Office has a Procurator General and Procurators. The Regional Offices have a Regional Procurator, aided by Assistant Procurators and their substitutes.

The Procuracy General of Labor Justice has powers to: (a) participate in labor cases heard by the Superior Labor Tribunal; (b) argue in hearings before this Tribunal; (c) request information and carry out investigations requested by the Tribunal; (d) appeal from decisions; (e) take action against persons who fail to comply with Court decisions; (f) request inquiries, investigations, expert examinations, pleadings, etc. from any authorities. Regional Procuracies perform similar functions before the Regional Tribunals.

The Labor Court System has jurisdiction to decide: (a) individual and collective disputes between employees and employers;[97] (b) small job questions, involving individual contractors or artisans[98] and temporary work; (c) labor

[96] *Id.*, arts. 736-754.

[97] Const. of 1988, art. 114; CLT, art. 643.

[98] Const. of 1988, art. 114; CLT, art. 652 (a) (III).

questions involving foreign public entities and those of the direct and indirect public administration;[99] and (d) questions concerning *avulso* workers.[100]

The labor courts have no jurisdiction to hear: (a) issues arising from job accidents and occupational diseases, which are heard at the administrative level by the National Social Security Institute (INPS), and by the ordinary courts; (b) social security disputes; which are resolved administratively by the National Social Security Institute and judicially by the federal district courts.[101] State courts may have jurisdiction, however, at the domicile of the covered worker or beneficiary, over actions against INPS for a pecuniary benefit, whenever that judicial district does not have a federal district court. In such cases, appeals from these courts will go to Federal Court of Appeals;[102] (c) questions covering independent contractors and occasional workers.[103] The labor court system does have jurisdiction over questions involving domestic and rural workers when they are employed.[104]

Territorial competence (venue), also called *ratione loci* or *forum*, is determined by the geographical area in which a court acts. It is therefore a method of delimiting territorial jurisdiction. Labor courts are distributed throughout the country, placed so as to satisfy the case load; each of them exercises its jurisdictional power within the limits of the district where it is located. For litigants, this corresponds to the same territorial limits within which their case will be heard. Thus, in order to file a labor action, it is necessary to check the venue rules, which have been created with the obvious and laudable purpose of giving the worker easy access to the courts, avoiding, insofar as possible, his having to travel and incur expense.

Venue is determined by the place where the employee, whether plaintiff or defendant, renders services to the employer. Neither the place where the work contract was signed, nor the headquarters of the company, matter. It would be cumbersome for the employee to have to travel, from the town where he works at a branch of a firm, to the location of the company's headquarters, in order to bring suit. So as to simplify matters, therefore, the employee generally brings suit where he was physically working.[105] Another reason supporting this rule is the desire to facilitate proof, since evidence is most easily obtained in the place when the services are performed.

In disputes where a travelling employee is a party, and where his services, by their very nature, are constantly being performed in diverse locations, the Board

[99] Const. of 1988, art. 114.

[100] CLT, art. 643.

[101] Const. of 1988, art. 109 (I).

[102] *Id.*, art. 109 § 3.

[103] *Id.*, art. 114.

[104] *Id.*

[105] "The jurisdiction of the Boards of Conciliation and Judgment is determined by the location where the employee, whether plaintiff or defendant, provides services to the employer, even if he has been contracted in another location or abroad." CLT, art. 651.

located where the employer has its domicile will have jurisdiction. If, in the case, the employer has establishments in various locations and the employee works at one of these, then the Board in the location of that establishment will have jurisdiction.[106]

According to the law, even in disputes that occur outside Brazil, so long as the employee is a Brazilian citizen, he has the right to bring an action in Brazilian courts. This action is to be filed at the place where headquarters of the company or establishment to which he is subordinate.[107] What counts is the nationality of the employee, not whether the company is domestic or foreign. In any event, these provisions should be understood in the context of principles on the scope of the application of labor procedural law.

The Labor Court System has subject matter jurisdiction over individual disputes between employees and employers; this jurisdiction is defined in a constitutional provision, setting out the limits in which labor courts may exercise jurisdiction. Such cases make up the vast majority of those heard by labor courts, even though they may not have the importance of the disputes termed collective.

An individual dispute is the same as a labor claim (*reclamação*) or even, which seems more technically correct to us, a labor action (*ação*) or proceeding (*processo*). Dispute, which in its common use, means dissension, divergence, discord, is a conflict brought before the courts. The qualifying adjective "individual" is necessary to distinguish it from collective disputes. Individual disputes differ from collective disputes in several aspects, including:

(1) The nature of the parties. In individual disputes, persons are considered separately, acting in their own names. In collective disputes, groups of workers and employees are considered abstractly, being given individual treatment only in exceptional cases.

(2) The position of the parties in the suit. In individual disputes, the parties are directly present and only occasionally represented by counsel. In collective disputes, they are generally represented by syndical entities.

(3) The nature of the decision. In individual disputes, the decisions are identical to those proffered by courts of any nature, resulting in *res judicata*. In collective disputes, which are unlike decisions rendered by other courts because they are characterized by their application to unnamed persons, decisions are termed "normative judgments." The subject matter, under certain conditions, can be reexamined, so that there is no *res judicata*, with its usual inflexibility.

(4) The nature of the object. Individual disputes are brought because of a singular interest of discrete individuals. Collective disputes have a collective

[106] "Whenever an agent or travelling salesman is a party to a dispute, the Board of the location where the employer is domiciled shall have jurisdiction, unless the employee is directly subordinate to an agency or branch, in which case the Board in whose jurisdiction that agency or branch is located shall be competent." CLT, art. 651, para. 1.

[107] "The competence of the Boards of Conciliation and Judgment set out in this Article extends to disputes that occur in an agency or branch abroad, so long as the employee is Brazilian and there is no international convention which provides to the contrary." CLT, art. 651 § 2.

interest, which belongs not to an individual or to more than one individual, but to a group made up of a number of persons with a purpose that transcends individual interests.

LABOR COURT PROCEDURE

Procedure in labor actions is divided into two parts: pleading and the hearing.

(A) Pleading. A suit begins with an initial complaint drafted by an attorney, which must state the court to which it is directed; family and given names, marital status, occupation, domicile of plaintiff and defendant; the facts and the legal basis of the claim; the claim itself, with particulars; the amount in question; the evidence that the plaintiff intends to introduce to prove the truth of the facts alleged; and a request to order service on the defendant.[108] The initial complaint must be accompanied by the documents essential to the filing of a suit, including the power of attorney given by the client to his attorney.

The case is then assigned, and the complaint is sent to one of the local Boards. At the clerk's office, the complaint is recorded and becomes part of the case record (called *autos*). Next is the service of process, which is the communication to someone that he is being sued, so that he may defend himself. The CLT calls for service by mail.[109] A date is then set for the hearing.

(B) Hearing. Under the law, there is only one hearing. Whenever necessary, however, the judge can convoke extraordinary hearings.[110] The acts carried out at the hearing are:

(a) The answer, which is either a 20 minute oral presentation by the defendant[111] or, as is more usual in practice, a written submission.

(b) The first attempt at conciliation; if successful, it puts an end to the suit.[112]

(c) The testimony of the parties and witnesses, with a maximum of three for each party.[113] The parties and witnesses are questioned by the judge. They may be requestioned through the professional judge, by its class representatives and attorneys.[114]

(d) The final argument, up to 10 minutes for each party, consists of a final analysis of the case by the attorneys.[115]

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[108] CLT, art. 840 § 1; Code of Civil Procedure, art. 282.

[109] CLT, art. 841.

[110] *Id.*, arts. 813 and 819.

[111] *Id.*, art. 846.

[112] *Id.*, art. 847.

[113] *Id.*, art. 821. In judicial inquests brought by an employer against a tenured employee, the maximum number of witnesses for each party is 6.

[114] *Id.*, art. 820.

(e) The final attempt at conciliation.[116]

(f) The decision, which is proposed by the professional judge to the class representatives. In the event of disagreement, the judge casts the tie-breaking vote or proffers a decision with a third opinion different from those submitted by the class representatives.[117] The votes of the class representatives, except in the above situation, have the same value as that of the judge.

In the Boards with the greatest case loads, the practice is to divide the hearing phase into three steps. The first is the initial hearing, with the answer and the first attempt at conciliation. The suit can end at this hearing by dismissal, default or conciliation. The case will be dismissed if the complainant does not appear.[118] This will end the suit but not prevent the filing of another claim. A plaintiff who causes two dismissals may not file another claim for a six-month period. Only the running of the statute of limitations definitively forecloses any further claims. There will be default if the defendant does not appear to defend himself. In such case, the decision will be that sought by the initial claim, unless there are no legal grounds therefor. Conciliation occurs when the parties agree, and the result is ratified by the Board.

The second is the discovery hearing, where the parties and the witnesses are questioned. Any party who is not present, but who was notified by the court to appear to give testimony, will be deemed to have admitted the factual allegations of the other party. This is a fictional or presumed admission.

The third is the judgment hearing, with final arguments and voting. Attorneys usually submit written briefs with their arguments rather than appear at this hearing. After the decision, the Judge draws up the opinion and the Clerk mails a notice with the text of the decision to the attorneys. The party who did not appear at the hearing then has a period in which to appeal, counting from the date of the publication of the decision.[119] If the amount in question is less than two minimum salaries, the judge may dispense with recording the minutes of the testimony and simply prepare a summary when the decision is rendered. These decisions may not be appealed, given the small amount in question, unless a constitutional matter is raised.[120]

A judicial inquiry to determine serious misconduct, permitted in order to justify the dismissal of an employee who has not opted for the FGTS system and who has acquired tenure after 10 years of service, continues to exist for those whose rights are vested.[121] These rights are not affected by the 1988 Constitution,

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[115] *Id.*, art. 850.

[116] *Id.*

[117] *Id.*, art. 850, sole para.

[118] *Id.*, art. 844.

[119] TST Emenda No. 197.

[120] CLT, art. 851 § 1.

[121] *Id.*, art. 853.

which abolished the ten-year tenure system. The inquest may also be used for the termination of a union official statutory tenure.

Suits in collective disputes to resolve collective labor conflicts. As Délio Maranhão has put it, "The abstract interest of a group or category is at stake." These suits are characterized by their purpose of seeking normative provisions generically covering working conditions, and by the parties, who are not individuals and are usually represented in court by syndicate. Collective suits are between labor syndicates and employers' syndicates, or between labor syndicates and one or more companies. Collective suits either declare or grant rights. The latter type is designed to create new collective regulations or to revise working conditions fixed by a previous regulation through interpretation a collective regulation already in force.

Collective suits are either voluntary or coercive. They are voluntary when filed by the interested parties. They are coercive when initiated *ex officio* by the court or by the action of the Labor Public Ministry, such as occurs in strike cases. Collective suits normally deal with wages and salaries, whose scope is limited to permissible raises, and working conditions, such as vacations, workdays, rest periods, etc.

The rulemaking power of the Labor Court System means the constitutional jurisdiction to decide collective disputes.[122] The Regional Labor Tribunals have original jurisdiction to hear collective dispute cases,[123] which means that these cases are not heard by the Boards.

Court proceedings in collective disputes brought by syndicates are preceded by a non-judicial phase, which consists of two parts. First, a general meeting of the syndicate assembly authorizing the directors to file the complaint.[124] Second, in economic disputes, an attempt at negotiated conciliation through a collective agreement or settlement.[125]

The judicial phase consists of the following acts: (a) the initial complaint; (b) designation of the date for a conciliation hearing, which the Presiding Judge of the Regional Labor Tribunal must do within 10 days; (c) if there is a settlement ending the dispute at the hearing, the agreement will formalized and ratified by the Tribunal; (d) if no settlement is reached, the Tribunal set for a decision session, at which the parties may have 10 minutes for oral argument, and then the votes of each judge on each issue will be determined.[126] The decision rendered is called a normative judgment. It has broad effects, establishing working conditions that must be observed in individual contracts with companies in the category and usually remains in effect for one year. Thus, when a collective dispute is resolved by

[122] Const. of 1988, art. 114.

[123] CLT, art. 678 (I) (a).

[124] *Id.*, art. 859.

[125] *Id.*, art. 616 § 4.

[126] *Id.*, arts. 856 and 859.

agreement of the parties, the rules are fixed in the collective agreements. When they cannot reach an accord, the collective dispute is settled by the normative judgment. Normative judgments may be appealed, as of right, to the Superior Labor Tribunal, which will then consider the collective disputes.[127]

[127] *Id.*, art. 895 (b).