How`s possible Brazil still accept the Union Unity?

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July 2012

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by **PEDREIRA, Christina**

1. First lines

Brazilian's Labor Unions were shaped by the Italian Corporatism, on the 1930's decade, limiting the social group's actions. Even though our democracy has been established over 20 year, labor organization structures remain the same and since then no legislative reform turned out satisfactorily.

Our Labor Union representativeness is ruled by the "Union Unity". What define the Union's representation are the economic category and the territory limit but not the disposal of the group.

For us the Union Unity has brought enough losses for collective bargaining. On one side the harmful agreements are increasing, and in the other side the unionization's rate are decreasing. This equation should not be part of a democratic country.

In fact, the collective bargaining terms has turned out into inexpressive salary adjustment, long terms journeys, decreasing the benefits and so on. By these collective arrangements, we cannot see the employment's protection that was supposed to be. It is clear the deterioration on the labor relationship. It is clearly not working, and for how long do we have to continue accepting that?

In our concept, the Union Unity is incompatible with democratic countries. And Brazil presents this clear mismatch since 1988.

Doctrinal debates have been waged since then. Our Federal Constitution guarantees half of the freedom – if we could admit so. At the 8th article of our Constitution, there are some lines about freedom of association – they have the right to establish and subject only to the rules of the organization concerned, for example – and others lines forbidding joining organizations of their own choosing. These conflicting terms hold back those needed changes.

In this research, our proposal is to bring up a modern interpretation technique that will permit the implementation of human rights' international treaties. After all, the freedom of association is a human right established on a several international treaties signed out by the Brazilian Government.

In short, we present a legal reorganization of Brazilian's Union model by constitutional mutation technique.

We believe that only the full freedom of association will happen through the trade union pluralism. By that it will allow the Brazilian society to build alliances between trade unions and its members, as part of the consolidation of democracy, freedom of choice and maintenance of social power.

The Union's pluralism could guarantee changes in labor union structures, and also on its strategies and leadership. So, if the freedom of association is the answer for an effective representativeness, which would be the options to change these perspectives?

Nowadays, our legal system does not provide effective leadership, after all, further on the collective bargaining's results; the Union Unity will perpetuate the legitimacy. Because of that, recent cases that are put into solution by the Supreme Courts, the Union's legitimacy no longer is absolute to enter into any collective bargaining.

Even though ILO had established freedom of association through the Convention 87 in 1948, shamefully it was never submitted for internal ratification.

We know our struggle after all. Brazil has its legal bases in the Roman-Germanic model, linked to the formal written rules. For our legal culture, the safest definitely would be legislative amendment enshrining the full freedom of association, but there are also conflicting interests in society that do not admit such a scenario (including the proposed constitutional amendment since 2004 in Congress to vote).

However, the freedom of association is not the only outdated theme in our *Magna Charta*. Because of this context, our Supreme Court has been deciding according to a constitutional amendment rules called "constitutional mutation theory", which admits informal constitutional changes from concretion theory. It shows that the Judiciary is aware about the necessity about improving the system.

Only a constitutional amendment through the mutation technique will allow the immediate application of these international standards and so updating the jurisprudential and doctrinal understanding on the subject. As law researchers we have no alternative but to seek new ways of interpreting and applying the standard as a way to update legislation.

Rather than analyze the principle of freedom of association itself, our proposal is to admit the application of the rules listed by two international treaties ratified by the Brazilian Government: the International Covenant on Economic, Social and Cultural Rights – which is a multilateral treaty adopted by the UN General Assembly on December 16th, 1966 – , and the San Salvador Protocol – which is an Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights opened for signature on November 17th, 1998.

So, to change the perspective, we would rather admit multiple labor unions foundation guaranteeing the freedom of association, than delegate the legitimacy to other types of social organizations to fight for rights at work.

If we expect any innovation on our labor unions' actions, full freedom of association is the only way out. Labor unions should fear low membership rates, because this would represent inefficiency. But it is not our reality. It seems they just do not care.

On our perspective, labor unions should be an alliance between the employees, the employers and the Government; they should approach the labor's interest to the Government's policies.

2. Development of the Brazilian trade union legal system: form corporatism to democracy

Far from the discussion about Liberal or Social State, we can ensure that, in a certain way, the unions' configuration was due to the association of workers oppressed by employers' economic power, which were looking for better and more decent working conditions. But we can also affirm, under a juridical aspect, that the unions were drawn to be intermediate bodies between the employers and employees - the unions had the special function to act as intermediate social bodies.

However, the Brazilian's trade union organization legal system was built on the foundations of corporatism, whereby the regulating State, the whole process of creation and functioning of social intermediaries bodies - even trade unions, federations or confederations. The law restricts not only the social groups represented, but also the geographic scope of their representations.

The Government established, along the 1930s, all the legal rules that should be enforced by society for the creation, organization and functioning of trade unions. In this context, therefore, the legitimacy of union's authorization was given by the Government and bounded to the concepts of territorial representative base and representative category.

The limits of the territorial base and category association are established by the economic activity exercised by the employer or occupation of the worker, according to the table previously established by law.

So, it was determined that the unions would only have legitimacy after authorizing action by the state through what it was called the "Union Charter", document signed by Minister of Labor in which insured the union monopoly to a single organization. That is, no economic or professional category would be represented by more than one union in the same territory.

Unions were set up in Brazilian law, since then, as intermediaries' bodies between the state it is society; and not between the social actors themselves - which would be typical of societies in the early twentieth century.

So that state control was possible, the Act n. 19.770 of 1931 conditioned the trade unions action through authorization of national government, which recognized the legitimacy of a single organization by category, in the same territory. This is what is called trade union unity.

Indeed, this rule violates the principle of freedom of association, as workers or employers could not – and still can't – choose which union to join.

Considering that we are a country of formalist tradition, the only possible alternative would be to recast through constitutional amendment. However, several legislative proposals that are pending vote in Congress on the subject.

Over 20 years have passed since the promulgation of this Constitution; and, so far, none have been appreciated. At this point it is difficult to say whether it is overwork or lack of political interest of our congressmen.

So it's up to us interpreters, proposing alternatives.

Given this fact, we propose the use of international treaties ratified by Brazil, which admitted, from the year 1990, the full freedom of association; after all, this is a process of social change in course.

After all, warns RODRIGUEZ, (2003: 195) "the issue being discussed is whether this model of legal regulation gives an account of the social change process underway; we may be facing an exhaustion of this form of social regulation, it is necessary to consider new possibilities".

Particularly in Brazil, the union legal monopoly is also linked to the statutory payment of trade union funding for its financial maintenance, regardless of affiliation of the interested parties.

This situation creates a profound social discontent, particularly by workers – that cannot exercise their individual citizenship[1].

Without claiming that the defense of freedom of choice will solve the problem of compulsory payment to finance the unions, this research is concerned only with the assurance of full freedom of association, in accordance with international acts and which Brazilian law should become effective.

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[1] Not only that funding mandatory, regardless of the association, there are organizations that predict other compulsory payments - further burdening the category. So, it is frequent litigation about the abuse of union autonomy. On one side we have the workers usually represented by State Labour Prosecutor (MPT), which demands in the Judiciary the invalidity of such charges. And on the other, we have the trade unions who claim that it is regular exercise of freedom of association. This situation is being examined by the Committee on Freedom of Association of the ILO, the case number 2739. "The complainant organizations raise objections to the measures adopted by the State Labor Prosecutor (MPT) and to the decisions handed down by the judiciary revoking clauses in collective agreements referring to the payment of assistance contributions by all workers, including non-unionized workers, who benefit from a collective agreement; they also allege that the Office of the Public Prosecutor of São Paulo has initiated legal proceedings to prevent trade unions from engaging in protest action ". Available at http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1. Accessed on February 2nd, 2012 at 3:49 pm.

3. Effectiveness of the Brazilian constitutional rights and freedoms in harmony with the international protection of fundamental rights

The Brazilian political history throughout the nineteenth century, interspersed periods of democracy and authoritarianism, economic and social systems of liberalism and interventionism; this is confirmed by the successive constitutions of the years 1934, 1937, 1946, 1967, and the current, 1988.

Inevitable, then, that the constitutional texts blend rights and freedoms, without which the society has real perception of the difference

For theoretical purposes, we bring the distinction clearly summarized by BENEVIDES (1994:08), for whom “freedoms and rights often overlap, but are not synonymous. Freedoms have, in return, the general abstention even by the State, or by the society. The holder of a liberty claim non-interference of others in their own legal spheres (freedom of thought, expression, to come and go, religion, sexual orientation, and association). Rights in the strict sense are always subject an intervention, a positive action, a provision of State or private (wages, education, social security)”.

In labor matters, this confusion is evident. For the protection of individual work, all Brazilian Constitutions, published in the last century, guaranteeing minimum rights inherent in the employment contract as a result of social constitutionalism. On the other hand, for the protection of the collective work, when we expected the legal protection of the freedoms inherent in intermediate social bodies, Brazil regulates the issue by restricting its activities.

The legal union unity that was established in the 1930s is still in force in the constitutional text, in which coexist freedom of trade union membership and prohibition of choosing which union to join.

And this antagonism is that we want to overcome overlapping the principle of freedom of association on the rule of union unity, by modern rules of interpretation.

After all, considering SILVA (2008:84) “union autonomy and freedom of association are the constituent principles of the rights of resistance and countervailing labor and constitute axial analytical references. And the inclusion of union autonomy and freedom of association, collective self-protection and protection of employment within the contemporary constitutionalism, can contribute to building a set of guarantees and balances of economic power, providing more adequate theoretical understanding of the challenges of nowadays”.

Therefore, we expected that with the solidification of democratic principles enshrined in the Constitution of 1988, members of Congress to review the union uniqueness, and guarantee full freedom.

After all, Brazil is original member of the ILO and the UN, therefore should follow the international standards published by such organizations, regardless of ratification. (MARCOS-SANCHES; RODRÍGUEZ CALDERÓN, 2001:33)

Internationally, the Convention n. 87 ILO, published in 1948, is the reference text on freedom of association. This rule, however, that has not yet been submitted for approval by the Brazilian National Congress, precisely because it is incompatible with the monopoly union rooted in our Constitution.

On the topic, two aspects should be considered: First, the fact that the Brazilian law stems from the legal formalism of the Roman-German model; and, second, economic globalization and internationalization of fundamental rights require new responses to the international community.

On the first point, the intention of this paper is to present a new technique of interpretation used by the Supreme Court, called the constitutional mutation, which we see in due course. For the classical theory of legal formalism the international treaties shall only be effective in internal law after the confirmation of the document by Congress. And though its content is more modern and essential, it must be written according to constitutional rule.

On the second point, globalization had a significant impact in Brazil. In the 1990s, Congress ratified important international treaties on human and social rights. Worldwide, we highlight the Convention on Economic, Social and Cultural Rights and on Civil and Political (Act n. 591 and 592, both on July 6th, 1992) and in the American context, the Pact of San José, in Costa Rica (Act n. 678, November 6th, 1992). In 1999 the Protocol of San Salvador (Act n. 3321, December 30th, 1999). And all of them - some more than others - provide full freedom of association and unionization.

And also worth remembering that the Declaration on Fundamental Principles and Rights at Work, published by the ILO in 1998, whose contents should be observed by all member states regardless of ratification, was not enough to overcome the Brazilian law perspective of legal formalism.

We therefore propose overcoming the uniqueness of association with international standards already entered in the national legal system - by infra-constitutional rule, or the prevalence of the principle against the constitutional rule, which we see in a moment.

Then, as noted by OLIVEIRA (2001:15), “The real truth - that stubbornly still not accepted by most members of the Brazilian labor movement – is the legal union monopoly is entirely overcome in time and space. Fighting for their survival is to deny the evidence of the axiomatic development of the world and all its values”.

We conclude that perpetuate the union unity in current constitutional context is to deny evolution social-democratic, which is inserted in Brazil.

4. Recognition of trade union freedom as a fundamental right inherent in democratic societies

To our knowledge, we can say that the maintenance of trade union unity in the Constitution of 1988 was the result of two factors: first, the argument that the union plurality would lead to the weakening of union workers; and second, the "lobby" of trade unions to ensure, by the monopoly, the mandatory payment of union dues, regardless of affiliation.

Within the conceptual logic that freedom of association encompasses the individual and collective, positive and negative aspects, it ensures not only to individuals (workers and employers), but also organizations the freedom to train, to associate and, especially, to choose which one to join.

The Brazilian Constitution guarantees most of these aspects, but it forbids the existence of more than one union to the same profession or economic category and territorial basis. And this statutory prohibition imposes a monopoly union.

We have here a clear violation of the individual right to choose which union workers and employers want to join. Ensure freedom of affiliation or not is insufficient for the fulfillment of the principle of freedom of association.

The right to plenty freedom was the great achievement of mankind, which was consolidating itself over the centuries.

We defend the freedom of workers and employers to choose the union, not only to join them, but rather to choose whom to associate. We see this decision as an element of citizenship.

But citizenship in Brazilian law was limited to the field of political parties and election. Citizen is one who obeys their electoral obligations. The exercise of the freedoms inherent in the intermediate social bodies it is not recognized as a result of citizenship.

And this trait is due to the fact that “we never had social reforms aimed at effectively democratic citizenship; our exalted modernization undertaken institutional reforms (extension of political rights and freedoms of association party), economic reforms (financial sector) and social reform (labor laws imposed by the Vargas dictatorship). [...] Citizenship remained partial, unbalanced and exclusionary. Rights were seen as privileges - only for some and under certain conditions. (BENEVIDES, 1994:7-8)

Our purpose is to strengthen the idea that freedom of association is intrinsically linked to the concept of citizenship, and this to the democracy.

According to BOBBIO (2001:24), democracy is characterized by a set of rules that establish who is authorized to make collective decisions about what and procedure. Because every

social group needs to make decisions binding all its members aiming and its survival. After all, social groups are the key players in democratic societies, because modern democracy was born as a participatory democracy.

Then, state intervention on the free choice of workers and employers on union membership is contrary to the democratic foundations in any country. It is because; democracy and citizenship are universal concepts.

Although we have the perception that the conceptual freedom of association is set up by various aspects, the limitation of any of them is severely restrict their own freedom.

So, the legal prohibition of choice, by the unity of association, in countries whose socio-political decisions are built on democratic structures, is to prevent the behavioral evolution of a people.

In this context, CURTIS (2012) said that “in order for true headway to be made towards the complete realization of the right of all workers and employers to form and join organizations of their own choosing to represent their respective interests, there must first be universal acceptance not only that democracy is the political model by which societies should be governed, but also that, without freedom of association in all walks of life, democracy is merely an illusion. Freedom of association for the partners in economic activity who jointly provide for society’s needs and make the economy run is no exception to this rule. And if a democratic society is the respected goal, all good intentions, just as those of the bearded man so many years ago, to provide workers with good wages and working conditions must not amount to a usurping of the workers’ right to express their own voice, and have the means to effectively do so”.

Effective freedom of association through the democratic constitutional grounds does not lead necessarily to pluralism; but provides workers and employers the right to choice about union unity or not.

On this matter, PAMPLONA FILHO (1997:54) says that “plurality is the true union democracy applied to union activity, with ample respect for individual and collective freedoms. […] Only by the union plurality, absolute guarantor of freedom of association that can lead to a trade union unity, understanding the unity of workers’ interests”.

Also the ILO (1993:42) argues that the guarantee of freedom of association does not mean the establishment of trade union pluralism, but delegate the choice about whether or not the creation of new entities to interested parties. When drafting the Convention n. 87, the International Labor Conference was not to impose mandatory trade union pluralism in; it was limited to ensure at least the possibility that it could provide various organizations

In summary, the current democratic constitutional model does not include such a monopoly, after all, the ideological basis of the 1988 Constitution were built on pluralism and democracy. Therefore, the plurality union is not a necessary purpose, but would represent the

conformation of the constitutional union model to contemporary.

5. Effectiveness of constitutional rights by interpreting

As previously mentioned, the purpose of this research is the recognition of the supremacy of the principle of freedom of association, as enshrined in international treaties ratified by Brazil, surpassing the writing expresses the art. 8O, section II of the Constitution in force, not weaken it.

Rather, we seek the integration between international and constitutional human rights.

But this is only possible through modern theories of constitutional interpretation.

Under the theoretical aspect, predominates in Brazilian law legal positivism, whereby the written rule prevails over principles. Although there are rules mutually incompatible.

In the last two decades, theories coming from the so-called post-positivism - especially the Portuguese and German model - provided rereading of the value of the principles and the necessary harmony of rules and principles within the legal system.

Of course, we follow the warning of ALEXANDRINO (2007) stating that "in fact, the Constitution is antagonistic - but without having in it several constitutions, and is penetrated by various views and contradictions[2], these conflicts and contradictions that cannot be ignored or eliminated by the interpreter authoritatively".

The proposal to use the theory of constitutional interpretation to apply the principle of freedom of association on the written rule is an alternative to the integration of different parts, considering the history of democratization of the Brazilian state.

This is because the maintenance of union unity, along with freedom of association, is juridically incomprehensible. Given the uniqueness, the partial freedom becomes meaningless.

We can admit that at the time of promulgation of the Constitution of 1988, after 20 years of military dictatorship, the prediction of these two rules side by side appeared as political contradiction. Over the years and the consolidation of Brazilian democracy, it became a legal contradiction.

But today, considering that Brazil is a world economic reference, keep the legal union monopoly is contradicting social expectations. And this contradiction must be eliminated from the Brazilian Constitution.

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[2] Contradictions detailed by Laurence Tribe e Michael Dorf, in *On Reading the Constitution, apud* ALEXANDRINO (2007).

After all, warns STRECK (2007), “in a democratic society they want, it is the role of legal interpreters committed to the society not only contribute to the formation of public opinion expert, but also for the citizens in general, deepening the discussion of issues central to the permanent realization of the democratic state of law".

So how do we want to see the consolidation of democracy in all aspects provided by the legal system, we use in the constitutional interpretation to achieve this goal.

5.1. Constitutional mutation

It is worth noting that the dynamics of new theoretical interpretation techniques is not new among the constitutionalists.

Under Brazilian legal doctrine, we highlight the influence of theorists such as MIRANDA (2010), with the technical regulation of utility; SARMENTO (2006), with the horizontal effectiveness of human rights; LEXY (2011), with the definition of principles as optimization commands; and also SILVA (2006), with the essential content of fundamental rights. They all have the common goal of ensuring more effective constitutional content.

The Supreme Court has admitted in its recent decisions, the occurrence of the hermeneutic phenomenon called "constitutional mutation" According to the Supreme Court, this phenomenon will provide the adequacy of the Constitution the social will.

Analyzing the theory in the context of contemporary constitutional state, MORAIS (2005:402) considers that “discussing the topic of constitutional mutation, more than reflect on the strategies of permissive change through the legislature, requires taking a position on the role assumed by the political-constitutional judicial body charged with the ultimate task of saying what the Constitution states and check the current strategies to change the constitutional”

We propose, by this technique of interpretation, that the Constitution should be interpreted to ensure greater effectiveness of their content, so the result effectively replace the one written in the *Magna Charta.*

To the Supreme Court, the then Judge GRAU (2006) said that the constitutional mutation “is transformation of the meaning of the Constitution provides that no actual text to be changed in your writing, that is, in its constitutional dimension text. When it happens, the legal interpretation of the text draws different standard from those that were originally enveloped him in a state of power. Then there are more than interpretation, this is designed as a process which operates in standard text processing. In the constitutional mutation we do not walk form the text to a standard, but from the text to another text, which replaces the first. In the constitutional mutation, not only the standard is different, but the statement itself is changed regulatory”

The purpose of constitutional mutation is externalizing the dynamic character and prospective legal rules through informal processes. It's reinterpretation of the constitutional norm.

It is because "the evolution of the trade union constitutionalism in Brazil has not achieved the compatible levels with the principles that would allow it to include among the modern systems", says NASCIMENTO (2011:176)

In practical terms, the constitutional mutation allows the interpreters to produce a different result from that legislative rule which is written in the Constitution. But this technique is only possible in those situations where it became clear the gap between constitutional rule and social expectations, as the Brazilian reality.

By constitutional mutation, we aim to increase the effectiveness of the fundamental right to freedom of association, making the Constitution more suitable to the spirit of democracy enshrined in the *Magna Charta*. As we see below.

5.2. Prevalence of the principle of freedom of association against the rule on a union unity: a matter of theoretical overrun.

Taken all reasonable precautions regarding the interpreters, we propose to incorporate the principle of freedom of association in Brazilian law.

Our proposal is made on a factual support: the Brazilian democratic constitutional model is incompatible with the union legal monopoly.

Applying the constitutional mutation on our research object, we affirm that, in spite of Article 8, section II of the Constitution of 1988 to impose a monopoly union, the fact that the Brazilian government has already ratified, later, international treaties that guarantee freedom of association and also due obedience to the ILO, regarding compliance with the principle enshrined in the Convention n. 87, the practical result that we give to this circumstance is the overlap of the freedom of association.

Likewise admitted that the warning that the interpreter cannot be authoritative, we also recognize the caution of BOBBIO (2001:33), who said that "nothing is more dangerous to democracy than the excess of democracy".

This is why we follow the guidelines of the ILO (1993:43) to ensure that it is not contrary to the principle of freedom of choice, established by the Convention n. 87, to distinguish between the most representative union and other unions; but this distinction does not mean that they can prohibit other unions, which wanted to join a number of workers.

That means recognizing that the current constitutional order ensures the Social Democratic State of Law; assuming legal rules organizing the harmonious coexistence between social

intermediaries groups. But we can no longer perpetuate the prohibition rule on the free establishment of trade unions.

Because the Legal Social State, according to SAYÃO (1993:15) “recognizes, alongside individual rights and guarantees the existence of so-called intermediate social bodies and establishes the principle pluralistic, ensuring the development of spontaneous social forces".

In our view, freedom of choice of employees and employer is the only way to recognize the legitimacy of the unions.

Currently we live with two types of union: those who - before the 1988 Constitution - have obtained grants from the Brazilian Government to operate under the foundations of corporatism; and others who have first obtained the administrative record at the Ministry of Labor, after the new constitutional order. That is, once the legitimacy was granted for the convenience of the Government, and today, the time criterion. And where is the will of those concerned?

As stated by CHAISON and BIGELOW (2002:14), the legitimacy is given to the unions by those who depend on the organization, after all, “legitimacy does not necessarily have to be conferred by all of society, or even a large segment of society, but it does need to be conferred by important constituencies on whom the organizations depends for its resources and, ultimately, its survival”.

So the legitimacy of union is only true when workers and employers can choose which organization to join; and this is only possible by removing the monopoly established by law.

Eventually, the groups focus their representation within a single entity. In this case, the monopoly naturally follows the will of the parties - confirming, then the legitimacy of union.

On the trade union unity, the choice of the group itself, SILVA (2008:91) says that “The freedom to choose which union it is desired to associate does not prevent the system of trade union unity, nor does it impose pluralism, since these are essentially political concepts and options. From the normative point of view, trade union freedom is incompatible with the unity of association, but ILO highlights the fundamental difference between the trade union monopoly established or maintained by law and resulting from a voluntary decision of the interested”.

We'll live with those who sustain the weakening of labor unions by the plurality, but we must give ourselves the opportunity to mature as a consolidated democratic society. AROUCA (1998:107) ensures that "plurality is a necessary evil”.

As said before, the full freedom of association will not lead us necessarily to the proliferation of trade union groups, but rather the freedom of choice by those concerned about the survival of these groups or not.

6. Conclusive synthesis

For these reasons, we conclude that the recognition of freedom of association through the full application of constitutional mutation is the only - and the closest - way of realizing the democratic constitutional principles.

The right to choose union organization is a fundamental right of workers and employers, whose result will show the real legitimacy of action of the unions.

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