

FLAWED FREEDOM OF ASSOCIATION IN BRAZIL: HOW UNIONS CAN BECOME AN OBSTACLE TO MEANINGFUL REFORMS IN THE LABOR LAW SYSTEM

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I. INTRODUCTION

Recently the academic literature has come to the conclusion that institutions matter for development,¹ but we still do not have a good explanation as to why developing countries are not able to replace dysfunctional institutions with functional ones.² This paper tries to shed some light on the obstacles faced by developing countries by analyzing one specific institutional arrangement: the eighty-year-old corporatist trade union system in Brazil. The corporatist trade union structure eliminates labor-capital conflict by considering trade unions as organizations that must cooperate with the State to achieve public goals, such as social peace and economic development. In order to make trade unions collaborate with the State, the Brazilian government has imposed a number of restrictions on freedom of association. However, as we will argue in the paper, these restrictions generate more costs than benefits. Therefore, it would be preferable if Brazil moved away from this corporatist system, toward a system of full freedom of association.

If Brazil's current corporatist trade union structure is indeed not a desirable structure, why has Brazil kept it for so long? The specialized

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1. The hypothesis was originally formulated by Douglass North, and widely adopted in what become known as the New Institutional Economics. This hypothesis was empirically tested, and a series of economists found a strong correlation between institutions and economic development. Some of these studies claim that they can prove not only correlation, but also causation, i.e., institutions generate economic growth. For a brief overview of this literature, see Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reforms*, 59 UNIV. TORONTO L.J.341 (2009).

2. DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 67 (2005) ("We know a lot about politics but not how to fix them").

literature has identified a number of obstacles to institutional change that have prevented countries from eliminating dysfunctional institutional arrangements. These obstacles include lack of resources, social-historical-cultural factors, and political economy problems.³ This paper is particularly concerned with the latter obstacle: political economy problems. More specifically, we argue that, in the course of the past eighty years, different groups have benefited from the current structure of the trade union system in Brazil and have resisted changes. This includes the government, employers, and political parties.

The paper aims to offer a new insight into this literature, by suggesting that the most surprising group to benefit from the corporatist structure is the trade unions themselves. Unions take advantage of workers' lack of freedom of association to maintain their own benefits, guaranteed by the corporatist law that makes trade union dues and workers' representation mandatory. This is an illustration of one particular type of obstacle to institutional reforms, called "reform trap."⁴ A reform trap happens when early reforms can create obstacles to future ones. This happens for instance, when a certain institutional reform creates or strengthens an interest group that will resist further improvements in the system. This seems to be the case of the trade union system in Brazil, which was created in the 1930s and was retained by the 1988 Constitution.

This article is structured as follows. It begins by analyzing the trade union system in Brazil and its pitfalls. The main claim is that the Brazilian system could benefit from a reform toward freedom of association (Section II). The paper then analyzes the reasons why the corporatist model has survived in Brazil since the beginning of the last century, suggesting that the "reform trap" seems to be a plausible explanation (Section III). In the last part, the essay focuses on possible strategies for Brazil to get out of this trap, and build new labor laws that foster freedom of association (Section IV).

II. THE PROBLEMS WITH THE BRAZILIAN LABOR SYSTEM

A. *Why Should Freedom of Association be Protected?*

There is consensus among labor law experts that freedom of association is one of the founding principles of labor law, together with the

3. Michael Trebilcock & Ronald J. Daniels, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99 (2004–05). Although these obstacles will be invariably present in institutional reforms, their intensity will vary depending on whether there is a window of opportunity for reform, or whether these reforms are being conducted during "normal times." See also Prado & Trebilcock, *supra* note 1.

4. Mariana Mota Prado, *The Paradox of the Rule of Law: How Early Reforms May Become Obstacles for Further Institutional Changes*, 60 UNIV. TORONTO L.J. 555 (2010).

legal protection of work.⁵ As a consequence, academic research often focuses on questions related to how freedom of association can be guaranteed. In this context, one of the questions that have often engaged scholars is why, despite being so strongly supported in academia, is freedom of association one of the most resisted labor rights.⁶ For instance, Convention No. 87 is the least ratified of all eight fundamental International Labour Organisation (ILO) Conventions.⁷ Why this is so is a matter of debate in the literature. We will engage with this debate in the second part of this article, where we will argue that Brazil does not have an effective system to guarantee freedom of association. Before that, however, it is necessary to deal with the underlying assumption of these debates, that freedom of association is worth pursuing. What is the rationale for protecting and promoting freedom of association? Why there is a consensus in the literature about the desirability of freedom of association?

There are three major reasons to protect and promote freedom of association. First, it is an embodiment of values such as freedom of choice and human dignity; second, it is a strategy to reinforce democracy; and, third, it is an instrument to promote economic development.⁸

Freedom of association is guaranteed as a fundamental human right by a number of international declarations, such as the United Nations Universal Declaration of Human Rights and the ILO Declaration of Principles and Rights at Work, which is evidence that it is regarded as a value in itself.⁹ Along these lines, the ILO emphasizes that all work must

5. VALENTE SIMI, *IL FAVORE DELL'ORDINAMENTO GIURIDICO PER I LAVORATORI* 6 (Dott. A. Giuffrè Ed., 1967).

6. For a narrative about the struggle for freedom of association in different states members of the ILO, see Karen Curtis, *Democracy, Freedom of Association and the ILO*, in *LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR. MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS* (Jean-Claude Javillier & Bernard Gernigon eds., 2004).

7. Convention 87 has been ratified by 150 of the 183 ILO Member States. The second least ratified fundamental convention is the 138 Minimum Age Convention with 157 ratifications. ILO, *ILOLEX*, at <http://www.ilo.org/ilolex/english/convdisp1.htm>. According to Royle, half of workers in the world “do not enjoy protection under Convention 87.” Tony Royle, *The ILO's Shift to Promotional Principles and the 'Privatization' of Labour Rights: An Analysis of Labour Standards, Voluntary Self-Regulation and Social Clauses*, 26 *INT'L J. COMP. LAB. L.* 270 (2010). See also ILO, “Freedom of association in practice: Lessons learned”. *Report of the Director-General - Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 97th Session 2008, p. ix.

8. This is not to say that freedom of association is more important than other labour rights, or that there is a hierarchy of labour rights and a “core” that needs to be unconditionally protected, as Phillip Aston suggests. In the context of labor law, Brian Langille argues that Amartya Sen's distinction between ends and means broke down any attempt to establish a hierarchy of rights. Sen did that by first distinguishing between means and ends, and then acknowledging their interdependency. He shows that protecting non-core rights (means) is necessary to protect the core rights (ends), and vice-versa. In this context, the dichotomy between what is more or less important vanishes. Brian Langille, *Core Labour Rights: The True Story (Reply to Aston)*, 16 *EUR. J. INT'L L.* 409 (2005).

9. United Nations Declaration of Human Rights, Article 23, n.4. ILO Declaration, Article 2. As the last ILO Global Report on Freedom of Association stated: “Freedom of association is a fundamental human right and, together with collective bargaining rights, a core ILO value. The rights to organize

be done in conditions of freedom, equity, and safety in order to guarantee the human dignity of workers.¹⁰ According to the ILO, freedom of association is one dimension of general freedom of association and must be integrated into the set of fundamental freedoms.¹¹ Many scholars have supported this idea by showing that the connection between freedom of association and the exercise of one's autonomy can be traced back to the origins of labor law. The Industrial Revolution revealed the inequality of bargaining power in labor relations and labor law was formulated as a mechanism to reduce such power imbalances.¹² It did so by guaranteeing decent working conditions and recognizing freedom of association, which included the right to form unions and bargain collectively. Collective agreements were then negotiated between employers and trade unions, and in turn began informing and influencing the terms of individual contracts. In these collective contracts, workers still exercise their autonomy, but they do so collectively so as to increase their bargaining power vis-à-vis the employer.¹³

Second, freedom of association is instrumental to democracy. Freedom of association and democracy reinforce each other because “[f]reedom of association and democracy share the same roots: liberty, independence, pluralism, and a voice in decision-making. These fundamental freedoms cannot be suppressed in one sphere and flourish in another.”¹⁴ In this sense, the ILO claims that freedom of association is one of the constitutive elements of a democratic society.¹⁵ As a result, freedom of association can be used as an instrument to reinforce or to strengthen an

and to bargain collectively are enabling rights that make it possible to promote democracy, sound labour market governance and decent conditions at work.”

10. See CEPAL/PNUD/OIT, EMPREGO, DESENVOLVIMENTO HUMANO E TRABALHO DECENTE: A EXPERIÊNCIA BRASILEIRA RECENTE 80 (2008).

11. OIT, *Libertad sindical y relaciones del trabajo*, CIT, 30^a reunión, 1947, Informe VII, pág.11, *apud* OIT. *Libertad Sindical y Negociación Colectiva*, Conferencia Internacional do Trabalho, 81^a Reunión, 1994, p. 14. For example, considering the relationship between freedom of association and political freedoms, the ILO suggests that the democratization of the Mercosur countries contributed to respect of freedom of association. Tribunal Superior do Trabalho. *Horácio Guido mostra avanços da liberdade sindical no Cone Sul*. 30 de março de 2004. Access on 2 February 2009. http://www.direito2.com.br/tst/2004/mar/30/horacio_guido_mostra_avancos_da_liberdade_sindical_no_cone_sul.

12. See ALAIN SUPIOT, CRÍTICA DEL DERECHO DEL TRABAJO Chapter 1 EL TRABAJO, OBJETO DE DERECHO (Ministerio de Trabajo y Asuntos Sociales, 1996). See Eligio Resta, *Metáfora del Contrato*, 5 DOXA—CUADERNOS DE FILOSOFÍA DEL DERECHO 227 (1988).

13. Analyzing the collective bargaining system in United Kingdom, Deakin & Wilkinson explain that “the superior bargaining power of capital over labour was to be redressed by collective bargaining and legally enforceable labour standards. . . .” S. DEAKIN & F. WILKINSON, *THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT AND LEGAL EVOLUTION* 243 (2005).

14. Curtis, *supra* note 6, at 91.

15. The connection with democracy is recognized by the ILO, which states that “[t]he right of workers and employers to form and join organizations of their own choosing is an integral part of a free and open society.” ILO, *available at* http://www.ilo.org/global/Themes/Freedom_of_Association_and_the_Right_to_Collective_Bargaining/lang-en/index.htm.

existing democratic regime. At the same time, freedom of association seems incompatible with an authoritarian political regime. Thus, where there is no democracy, there is no actual freedom of association.¹⁶

What about economic development? Can freedom of association foster economic growth? Freedom of association and collective bargaining are likely to result in better economic deals to workers, that “will tend to eventually give rise to higher labour costs even after accounting for labour productivity.”¹⁷ Along these lines, the conclusion is that freedom of association imposes costs on private companies, making the countries that protect these rights less attractive to investors. Thus, by increasing costs for companies, this argument contends that labor rights will reduce investment and negatively impact economic growth.¹⁸ However, there is empirical evidence showing that freedom of association increases labor productivity, which can potentially reduce costs for companies and is likely to impact positively on economic growth.¹⁹ Besides the increase in productivity, Neumayer and Soysa argue that higher labor standards motivate workers, and can encourage them to “to invest in work-relevant human capital.”²⁰ Moreover, these rights may also have positive non-economic effects that then play a role in countries’ economic performances.²¹ For example, freedom of association rights can promote economic and social stability, which have positive effects on trade competitiveness.²² In line with these hypotheses, the ILO notes that there is “no solid evidence that respecting freedom of association and collective bargaining rights adversely affects a country’s global competitiveness. Indeed, the evidence generally points in the opposite direction.”²³ Similarly, quantitative studies have found a

16. See M. RODWAN ABOUHARD & D. CINGRANELLI, HUMAN RIGHTS AND STRUCTURAL ADJUSTMENT (2007).

17. D. Kucera & R. Sarna, *How do Trade Union Rights Affect Trade Competitiveness?* 1 (Policy Integration Department Statistical Development and Analysis Group International Labour Office, Working Paper No. 39, Mar. 2004).

18. For an analysis on the connection between international trade and labour standards, see M. Trebilcock & R. Howse, *Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics*, 6 EUR. J. L. & ECON. 37 (1998); Christian Barry & Sanjay G. Reddy, *International Trade and Labor Standards: A Proposal for Linkage*, 39 CORNELL INT’L L.J. 545 (2006).

19. E. Neumayer & I. Soysa, *Globalization and the Right to Free Association and Collective Bargaining: An Empirical Analysis*, 34 WORLD DEVELOPMENT 31, 35 (2006); Kucera & Sarna, *supra* note 17, at 17; Eddy Lee, *Trade Union Rights: An Economic Perspective*, 137 INT’L LAB. REV. 315 (1998).

20. The authors explain that this argument is “supported by qualitative evidence.” See Neumayer & Soysa, *supra* note 19, at 35.

21. Kucera & Sarna, *supra* note 17, at 1.

22. *Id.* at 26.

23. ILO, “Freedom of association in practice: Lessons learned,” Report of the Director-General - Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 97th Session 2008, p. 21. See Lee, *supra* note 18; T. AIDT & Z. TZANNATOS, UNIONS AND COLLECTIVE BARGAINING: ECONOMIC EFFECTS IN A GLOBAL ENVIRONMENT (2002); D. KUCERA, EFFECTS OF LABOR STANDARDS ON LABOR COSTS AND FDI FLOWS (2002). C. Daude et al., *Core Labor*

positive correlation between freedom of association rights and countries' economic performance.²⁴ While the evidence on the impact of freedom of association on growth is not conclusive, freedom of association may contribute to a country's development prospects (broadly defined) by enhancing participatory processes, strengthening civil society, and promoting social development.²⁵ We believe that this would be a strong reason to promote freedom of association in developing countries.

In sum there are three reasons to protect freedom of association: it is a value in itself, it is an instrument to reinforce existing democratic regimes and it promotes economic growth.

B. *Is Freedom of Association Protected in Brazil?*

The Brazilian labor law system is contradictory. On the one hand, Brazil is a democratic country with a Constitution proclaiming labor rights (including freedom of association) as fundamental rights since 1988.²⁶ On the other hand, there are significant restrictions to freedom of association imposed by the Constitution itself and by statutory provisions.²⁷ These provisions establish a trade union system that is characterized by three elements: (i) mandatory representation by a single, legally recognized, union (*unicity* rule);²⁸ (ii) the organization of unions around occupational categories; and, (iii) compulsory dues payment. This system is protected by

Standards and Foreign Direct Investment in Latin America and the Caribbean: Does Law Enforcement of Labor Standards Attract Investors?, INTER-AMERICAN DEVELOPMENT BANK PAPER (2003).

24. Kucera & Sarna, *supra* note 17. See also Z. Tzannatos, *The Impact of Trade Unions: What Do Economists Say?*, in IN DEFENCE OF LABOUR MARKET INSTITUTIONS 150 (J. Berg & D. Kucera eds., 2008).

25. Joseph Stiglitz, *Participation and Development: Perspectives from the Comprehensive Development Paradigm*, 6 REV. DEV. ECON. 163 (2002). But see Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006) (showing that such concerns have not been fully incorporated in the development discourse).

26. Article 7 of the 1988 Constitution guarantees urban and rural workers their fundamental rights, most of them employment rights. Article 8 deals with collective rights, guaranteeing freedom of association.

27. Many of these statutory provisions are established by the Brazilian labor code (CLT), which has all the rules covering individual and collective labor relations. The CLT (*Consolidação das Leis do Trabalho*) was promulgated by the federal Decree-law # 5.542 on 1 May 1943.

28. The *unicity* rule was established in the 1930s and the mandatory due in the 1940s. The *unicity* rule has its origin in the Decree #19.770/31, Article 9, that demand for the trade union formation the membership of 2/3 of the workers class. As the fulfillment of this requirement was not practicable to most trade unions of the time, the real meaning of the article was to impose the recognition of a single trade union. Only in 1939, the rule was expressed clearly by the Decree # 1.402/39, Article 6. The mandatory due (*imposto sindical*) was established by the Decree # 2.377/40. These two rules were incorporated in the CLT in 1943. Concerning the *unicity* rule, see Article 516: "Não será reconhecido mais de um Sindicato representativo da mesma categoria econômica ou profissional, ou profissão liberal, em uma dada base territorial." Concerning the mandatory due, see article 579. Art. 579. "A contribuição sindical é devida por todos aqueles que participarem de uma determinada categoria econômica ou profissional, ou de uma profissão liberal, em favor do Sindicato representativo da mesma categoria ou profissão, ou, inexistindo este, na conformidade do disposto no art. 591."

the Brazilian Constitution, which explicitly acknowledges the *unicity* rule.²⁹ Despite the enactment of the new Constitution in 1988, there has been no change regarding the main rules that govern union formation and freedom of association.³⁰ The system in Brazil is structured in a way that imposes significant constraints on the freedom of association, as we will explain in greater detail below.

The most significant CLT provision hindering freedom of association is the one imposing the trade union *unicity* rule (in Portuguese, *unicidade sindical*). *Unicity* means that only one trade union can represent a given category of workers over a certain territory. A territory can be the entire country, a state, several municipalities,³¹ or a single municipality, but it does not include anything smaller than a municipality.³² Therefore, there are no enterprise unions in Brazil. A category, in turn, is normally defined by industry. In exceptional circumstances, the law authorizes categories to be defined by occupations.³³ For instance, “drivers” is a category based on occupation that is authorized by the law to form unions. Thus, a driver working in any industry will be represented by the drivers’ trade union.

Workers are free to take the initiative to create a trade union, but whether the union will be formally registered and will be able to operate depends on one single criteria: the lack of an existing union to represent that category of workers.³⁴ An application to register a trade union will succeed only if there is no trade union representing that category at the time of that application (exclusive representation).³⁵

29. The *unicity* rule is found in Article 8, Section II, of the Constitution:

Article 8. Professional and trade union association is free, with regard to the following: II. It is forbidden to create more than one union, at any level representing a professional or economic category, in the same territorial base, which shall be defined by the workers or employers concerned, which base may not cover less than the area of one municipality.

(Translation by authors.)

30. This is not to say that labour law has not been modified in Brazil since 1943. On the contrary, many changes and additions were made to CLT, and there is much dispute regarding the constitutionality of rules governing the daily functions of the unions. However, these rules do not form the basis of a corporatist structure, such as the ones discussed in the body of the paper.

31. For example, in the cities of São Paulo and Mogi das Cruzes, in São Paulo state, only one trade union can represent metal workers, the Metal Workers’ Trade Union of São Paulo and Mogi das Cruzes. In the cities of Santo André, São Bernardo, São Caetano, in São Paulo state, only one trade union can represent metalworkers, the Metal Workers’ Trade Union of the ABC.

32. In São Paulo city, only the Trade Union of drivers and workers in urban road transport (Sindicato dos Motoristas e Trabalhadores em Transporte Rodoviário Urbano de São Paulo) can represent drivers in the city.

33. See Article 577, CLT.

34. For example, the first general assembly for the formation of trade union of advertisers in the state of Rio Grande do Norte was prevented by a court order. An existing trade union, the Trade Union of Workers in Broadcasting, Television and Advertising, went to court arguing that they were already representing advertisers; therefore the other trade union could not be formed. Available at <http://colunas.digi.com.br/patricio/radialistas-x-publicitarios-briga-sindical-comeca>.

35. When the corporatist system was created in 1930s, the criteria to have exclusive representation was an ideological one. See J. SLUYTER-BELTRÃO, RISE AND DECLINE OF BRAZIL’S NEW UNIONISM: THE POLITICS OF THE CENTRAL ÚNICA DOS TRABALHADORES 54 (2010). The State would not grant

A major problem of this system is that the registration system is based on a formal criteria of exclusive representativeness.³⁶ This means that the maintenance of an existing union does not depend on its level of representativeness. If a trade union is registered by the Ministry of Labor representing a certain category, this recognition will prevent any other trade union from challenging this representation. This means that the *unicity* rule, combined with a registration system based on a first-come, first-serve basis, has become a mechanism to guarantee the survival of a union regardless of its level of representativeness.³⁷ If instead of creating a new trade union, workers decide to challenge the exclusive representation of a trade union running for union's executive elections, they will also face significant difficulties. As Sluyter-Beltrão reports there are corporatist rules and practices on trade union elections that turn the whole process quite undemocratic:

the ability, first, to hide the fact that they had “publicly” set the date for an election . . . second, to maintain exclusive control over the official list of union members; third, to present obstacles to the affiliation of new members suspected of supporting the opposition; fourth, to strategically place voting booths in locations favorable to the incumbents; and fifth, to name the crew of union members who would supervise the voting process.³⁸

Essentially, the system lacks mechanisms to eliminate or discontinue the activities of trade unions irrespective of whether they are performing their duties. An important consequence of this is that differentiating categories has become the only feasible option to create a new union within the Brazilian system, if workers are unhappy with their current union. The result is that new unions tend to represent all sorts of workers, no matter how atypical or informal the activity may be.³⁹

representation to those trade unions that would oppose Vargas' authoritarian government. Now, the Ministry of Labour does not have discretion to authorize or not the creation of a trade union, because the 1988 Constitution prohibits the State to interfere in the trade unions. Thus, the Ministry became a rubber stamper, which is only able to declare if there is already a union registered for that category or not.

36. To make sure that union formation is abiding by the rules and regulations imposed by the State, the trade union must be registered in the Ministry of Labour to operate. In order to obtain such registration, the union needs to follow strict procedures, which are controlled by the Ministry of Labour and the labour courts. The procedure to form a trade union is regulated by the Ministry of Labour regulation n. 186/2008. Portaria n. 186, 10 April 2008.

37. In a court decision concerning two trade unions representing the same category of workers in the same city, the court based its decision on seniority criteria, deciding on favour of the trade union who “for years have negotiated collective agreements” for the category. Acórdão Inteiro Teor nº RR-110400-52.2005.5.02.0058 de TST. Tribunal Superior do Trabalho, 13 de Maio de 2010.

38. SLUYTER-BELTRÃO, *supra* note 35, at 62.

39. For instance, motorcycle couriers claimed to be a new category, different from the category of couriers and drivers. Also, acarajé street vendors, which would be the equivalent of a hot dog street vendor, distinguished themselves from other street vendors, creating a category of their own. Similarly Afro-style-hairdressers have claimed to be a distinct category, that should be separated from hairdressers.

The Brazilian system does not guarantee workers the freedom to organize trade unions in accordance with their own convenience and interests, such as cross-category trade unions or enterprise trade unions.⁴⁰ For instance, workers are not free to form one union to represent two different categories, such as teachers and support staff in a school. Similarly, workers do not have the freedom to form unions that represent workers of one single company, even if their interests may be considerably different from the interests of workers performing the same function in other companies within the same industry. For instance, a union must represent auto workers of all companies in a certain territory, usually a city, such as São Bernardo. This trade union is the only one that can conduct bargaining with the employer(s). There are two bargaining options. First, the union can negotiate with the employers' association (which are also organized as trade unions in Brazil) of that city to agree on a *collective convention* (*convenção coletiva*, in Portuguese). A collective convention covers all workers in that category in the city (or any other territory) where the trade union has exclusive representation. Second, the union can negotiate with one company to agree on a *collective agreement* (*acordo coletivo*, in Portuguese). A collective agreement covers all workers in that category in that company, that is situated in the territory (which can be a city) where the trade union has exclusive representation. In this second example, in terms of the application of the agreement, the trade union is acting at the enterprise level. However, the union cannot be considered a true enterprise union because the union might not have in its executive ranks any employee of that enterprise.

It is important to clarify that the problem is not with the exclusive representation *per se*. Indeed, numerous labor law systems around the world have exclusive representation. Instead, the issue lies with how this system has been coupled with a series of restrictions to freedom of association in Brazil. For example, in other systems that choose the exclusive representation rule, the quintessential condition for a certain union to be exclusive is that it has been chosen by the majority of the membership. This is the case of Canada and the United States, for instance, where the exclusive representation rule gives bargaining rights exclusively to one union. Thus, exclusivity is granted, but it is conditional upon effective representativeness. In contrast, in Brazil, the right to be an

40. In Brazil, employers also organize in trade unions, by economic categories; and workers organize themselves in professional categories. According to the CLT, Article 511, §1º, "The solidarity of economic interests of those who undertake identical activities, similar or connected, constitute the basic social bond called economic category", and §2º, "The similitude of life conditions resulting from the profession or work in common, from an employment relationship at the same economic activity or similar or connected economic activities, composes the elementary social expression understood as professional category" (translation by authors).

exclusive union is granted by the State independent of the will of the membership and with no mechanism to guarantee that membership interests will be properly represented. In sum, systems that guarantee freedom of association usually result in more genuine representation. In such a system, representation comes from the will of the workers as members or supporters of the trade union, because the union does not exist without them. Representation in Brazil, on the other hand, comes from the law.⁴¹

This is not to say that the principle of freedom of association is not compatible with rules to regulate the exercise of this freedom. Many countries regulate their trade union system in some manner, with rules, for example, determining which trade unions will have the right to represent workers, whether one union will have the exclusivity of representation or more than one union will share the representation, and how the collective bargaining will proceed in different situations.⁴² There are also systems in which the trade union system is more deregulated, as it is the case in Italy.⁴³ In both these models (regulated and deregulated), trade unions must count on membership or workers' support to exist and to represent interests of workers. Thus, the trade union must have *de facto* support of workers to be able to negotiate.⁴⁴ If we are to think about a union system in terms of competition, one could say that the exclusivity rule is a way of authorizing the system to have monopolies. The difference is that in some systems the monopoly can be challenged by a new entrant, who can credibly threaten to enter the "market" and replace the incumbent monopoly that is not "performing its functions" properly. In Brazil, however, there is no such a threat. Thus, there is no "competition" between unions that have the

41. See AMAURI MASCARO NASCIMENTO, COMPÊNDIO DE DIREITO SINDICAL 162-68 (2d ed. 2000).

42. The ILO Committee on Freedom of Association, for instance, establishes that states would remain free to provide such formalities in their legislation as appeared appropriate to ensure the normal functioning of occupational organizations. Consequently, the formalities prescribed by national regulations concerning the constitution and functioning of workers and employers organizations are compatible with the provisions of that Convention provided, of course, that the provisions in such regulations do not impair the guarantees laid down in Convention No. 87.

ILO, Digest of decisions of the Committee on Freedom of Association, fifth (revised) edition, 2006, Decision 275.

43. According to the ILO, "in Italy unions do not need any recognition and can organize themselves without any pre-established legal model". ILO, National Labour Law Profile: Italy at <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/it.htm>.

44. Italian Constitution: "Art. 19. Tutti hanno diritto di professare liberamente la propria fede religiosa in qualsiasi forma, individuale o associata, di farne propaganda e di esercitarne in privato o in pubblico il culto, purché non si tratti di diritti contrari al buon costume." According to the ILO, in Italy "unions do not need any recognition and can organize themselves without any pre-established legal model. They can conclude collective agreements, which are legally enforceable under civil law rules, i.e. on the assumption that the parties to a collective agreement have stipulated on behalf of their respective membership." ILO, National Labour Law Profile: Italy. Access on 27 February 2009, available at <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/it.htm>.

exclusive right to represent workers. As a consequence, workers are not free to choose who will represent them.

As described above, the way around this system is to try to create a new union by differentiating its category from the the preexisting category that is already represented by an existing union. For instance, a group of primary private school teachers could propose to form a new category that is distinct from the category of primary school teachers. In this case, the Ministry of Labor will publicize the application so as to give a chance to the existing trade union to impugn the application. If the existing union of primary school teachers impugns the application, then the applicant can either give up the application or it can “insist.” If the applicant decides to insist, the conflict is solved in the following way. First, the parties are required to try to conciliate under the supervision of the Ministry of Labor. If the conciliation fails, trade unions can take the case to the labor court to decide which trade union will hold the representation. According to the law, the labor court must consider whether the trade unions have the same territorial base or represent the same category. The court usually gives preference to the trade union that already holds the representation. In the case of division of an already existing category, the onus is on the new trade union to prove that in the new category the workers’ activities are essentially different from the existing category.⁴⁵

This complicated bureaucratic system, which is supposed to determine whether the new category is indeed distinct from the preexisting one, does not operate in the most transparent way, and there is a great deal of discretion for courts to determine what qualifies as the “same category.”⁴⁶

One would think that such a system would fail quickly for lack of membership involvement. The lack of representativeness could potentially drive workers away from the union, and the union would soon wither away. However, this does not happen in the Brazilian system because the law mandates not only that all employees in the relevant professional category

45. A successful case was the one of metal workers’ trade union of Osasco that decided to represent also independent metal workers, who signed contracts for services, instead of having employment contracts (*terceirizados*). This decision was challenged by the independent workers’ trade union in São Paulo state. The labor court decided that for representation purposes, it was more important to consider the type of work done than the type of contractual relationship a worker had with the company (if independent or not). 4ª TURMA do Tribunal Regional do Trabalho da Segunda Região. ACÓRDÃO Nº: 20090140340. PROCESSO TRT/SP Nº: 01663200738102004, São Paulo, 03 de Março de 2009.

46. For instance, recently, the Superior Labour Court did not recognize the formation of a new trade union to represent workers of airplane industries that were already represented by the metal workers trade union. The court decided that the new category (airplane industry workers) was not essentially different from the existent category (metal workers). Proc. nº TST-RR-668/2006-083-15-00.6, 26 September 2008, on line: Tribunal Superior do Trabalho, at <https://aplicacao.tst.jus.br/consultaunificada/inteiroTeor.do?act...blicacao=26/09/2008&query=Embraer%20or%20Pedro%20Paulo%20Manus>.

be represented by the union that is authorized by the State, but it also obliges them to pay dues (*contribuição sindical*) whether or not they are members of the union. These dues are automatically deducted from workers' salaries by employers and remitted to the unions.⁴⁷ These mandatory dues—when combined with the lack of an exit option for workers—guarantee the financial survival of a trade union system that can be an empty shell or whose activities have no membership input. Although financial stability of trade unions is a desirable goal in most systems, the Brazilian case stands out because of the lack of accountability. There is no requirement in the law for the unions to publish their finances or to account for how the money is spent to their own members.⁴⁸

The main consequence of the trade union system in Brazil is a gap between official representation (i.e., the state acknowledgment of one union as the official representative of a certain group of workers) and actual representativeness. The restraints on the latter combined with little room for collective bargaining allows the State to play a strong role in regulating the employment relationship and in solving labor conflicts.⁴⁹ This is the reason why, in order to modernize the labor relations in Brazil, the first challenge to be faced is the trade union structure. Real change demands legitimate representative trade unions.

In conclusion, there are many different types of systems that respect the principle of freedom of association. Some can be more regulated than others, as we discussed above. The issue in the Brazilian case it is not that the system is regulated or even over-regulated, but the quality of the regulation. The Brazilian trade union system violates the principle of

47. Article 579 of the CLT: "The union dues contributions must be paid by all those that participate in one certain economic or professional category, or of a liberal profession, in favor of the representative trade union of the same category or profession. . . ." (translation by authors). The contribution is paid annually and, for the workers trade unions, is based on the remuneration of one day of work

48. Maria Hermínia Tavares de Almeida, *Sindicatos em Tempos de Reforma*, 12 SÃO PAULO EM PERSPECTIVA 5 (1998).

49. The Brazilian system is characterized by an intense degree of regulation and State control of conflict resolution procedures. The strong State intervention in the employment relationship through a detailed regulation of union formation and union affiliation is complemented by a constant State's presence through courts in the resolution of labour conflicts. The CLT regulates all aspects of individual and collective labor relations, addressing general and specific rules of labor tutelage, individual labor contract, trade union organization, collective agreements, mediation, conciliation and arbitration commissions, application and collection of administrative fines, Labour Courts, Public Labour Prosecution, and the judicial labour process. L. Yeung, *The Need for Modernization of Brazilian Labour Institutions*, in SOCIAL ACTORS, WORK ORGANIZATION AND THE NEW TECHNOLOGIES IN THE 21ST CENTURY 126-27 (IIRA 14th World Congress) (Fondo Editorial, 2006). The provisions of the CLT are enforced by specialized courts, which have exclusive jurisdiction over labor law (henceforth referred to as labor courts). The labor court system has a very broad jurisdiction. Labor courts hear not only all the usual employment-related disputes, but also disputes involving independent contractors, non-competition covenants, and professional services contracts (lawyer-client disputes, for example). Federal Constitution, article 114, Amendment 45, 2004.

freedom of association because it is regulated in a way in which workers' do not have the freedom to form, join, or not join unions.

C. *Is There a Rationale for Such Weak Protection of Freedom of Association?*

Brazil's labor law regime is a system with major corporatist features, as workers' freedoms of association are restricted.⁵⁰ What is the rationale for adopting this corporatist system? Corporatism is a school of political thought that conceives politics as a live organism. Indeed, the term corporatism derives from *corpus*, the Latin word for body. Similar to the human body, in the corporatist State there should be a brain commanding the organs and muscles to better serve the needs and interests of the body as a whole. In this context, political leaders (the brain) make sure that society's welfare prevails over particular interests.⁵¹

Why did Brazil adopt this system as opposed to a system of freedom of association? According to Erickson, this decision is connected with the severe disillusionment with liberal democracy in Brazil in the 1930s.⁵²

Brazilian political thought, even under the Old Republic, included a major component which dismissed liberal democracy as a foreign import which ill suited Brazil's social, economic, and political heritage and reality. . . . Brazil's corporative theorists believed the essential function of modern society to be economic, and they naturally expected the main social and political division to run along economic lines as well.⁵³

In this context, the main goal of the country's corporatist system was "to build 'harmonious' relations between capital and labor" in order to promote and protect the nation's interest.⁵⁴

The type of corporatism implemented in Brazil is what Schmitter calls "state corporatism," in which "the legitimacy and functioning of the State were primarily or exclusively dependent on the activity of singular, noncompetitive, hierarchically ordered representative 'corporations'."⁵⁵ This type of corporatism is opposed to what is termed "societal corporatism," in which there is also an attempt to replace the struggle

50. See L. Baccaro, *What is Dead and What is Alive in the Theory of Corporatism*, International Institute for Labour Studies, Discussion Paper, DP/143/2002 3 (2002). See Philippe C. Schmitter, *Still the Century of Corporatism?*, 36 THE REVIEW OF POLITICS 85, 93 (1974) (defining corporatism as "a system of interest representation . . ." and indicating that even though this is an ideal concept, the Brazilian system was very close model in the 1970s). For an analysis of the definition of corporatism, see also Tonia Novitz & Phil Syrpis, *Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism*, 35 IND. L.J. 367 (2006) (Item 3. Corporatist).

51. KENNETH P. ERICKSON, THE BRAZILIAN CORPORATIVE STATE AND WORKING-CLASS POLITICS 1 (1977).

52. *Id.* at 16.

53. *Id.* at 17-18.

54. SLUYTER-BELTRÃO, *supra* note 35, at 53.

55. Schmitter, *supra* note 50, at 102.

between capital and labor with an harmonius relationship, but this is done through societal (as opposed to State) mechanisms of control.⁵⁶ While Schmitter also sees problems with societal corporatism, he seems particularly skeptical about the long-term survival of state corporatism, arguing that this form of corporatism becomes more costly to maintain overtime (as it requires more and more repressive measures), and is less capable of attending to the needs of a modern capitalist State.⁵⁷

In this system, the corporatist trade union supposedly acts in the defense of the public interest and has a public character. As Vianna explains, in the corporatist system, trade unions should act with the State to guide workers "in a specific way useful to the country and to the national collectively."⁵⁸ Thus, the corporatist system's main rationale is to coordinate labor relations with governmental policies in such as way as to promote a greater public good. This symbiotic relationship between trade union and State contrasts with real freedom of association systems, where trade unions are private associations representing groups of workers and their private interests.

This was the rationale that motivated the creation of this corporatist system in Brazil in 1930s, during Vargas authoritarian government.⁵⁹ As one of the architects of the corporatist trade unions system, Oliveira Vianna⁶⁰ explains that the Brazilian State had two options:

to do nothing as the liberal democracies do, letting the economic impulses and orientation to come exclusively from the lower level, from the social classes with all their individualistic and particularistic perversions; or the state could act to guide these classes in a specific way useful to the country and to the national collectively.⁶¹

This explains why the current Brazilian system has mandatory representation and compulsory dues, as these are both consistent with the theoretical rationales of the corporatist system. These two elements undermine the private autonomy of the trade union membership and guarantee that the trade union is an extension of the State to organize

56. *Id.* But see S. Gacek, *Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21, 50 (1994) (disagreeing with the distinction between state corporatism and societal corporatism. The author concludes that "The corporatist effort to condition 'the deployment of the social forces in struggle' into a more collaborationist mode 'is always a state strategy which will be inserted differently into the institutional ensemble of the state and contribute differently to the structuring of state - civil society relations in distinct state forms and specific historical moments.'"). Joe Foweraker, *Corporatist Strategies and the Transition to Democracy in Spain*, 61 COMPARATIVE POLITICS 58 (1987).

57. Schmitter, *supra* note 50, at 126.

58. OLIVEIRA VIANNA, *PROBLEMAS DE DIREITO SINDICAL* 11 (Max Limonad, 1943).

59. In Section III, we will analyze the origin of the Brazilian trade union system.

60. The sociologist Oliveira Vianna was a labor relations expert working for the Ministry of Labour from 1932 to 1940.

61. *Id.*

workers and employers according to the public interest. Collective labor conflicts are regarded as obstacles to the social peace and economic development—the common goals of the nation.⁶² Thus, trade unions could not be relegated to the “darkness of the private life.”⁶³

While this system seems consistent with the State-interventionism and the centralizing ideology of the Varga’s *Estado Novo* or the New State (which was the Brazilian version of the New Deal during the Great Depression) in the 1930s, the corporatist ideology has faded away since the end of Vargas’ authoritarian regime. However, despite Brazil no longer being guided by and supportive of a corporatist ideology, the corporatist trade union system, with its central features of compulsory representation, monopoly of representation, and non-competition among trade unions⁶⁴ has survived. The corporatist trade union system, operating outside of a corporatist State, has become simply an authoritarian instrument to control labor conflicts.

In 1988, the federal Constitution departed further from the State-centered corporatist model of government and recognized freedom of association with a provision prohibiting the State from interfering with trade unions.⁶⁵ This shift was very much in line with the international discourse on labor relations, as explored earlier (section II.A.), and many interpreted these constitutional provisions as a clear sign that Brazil was on track to adopt a more pluralist system.⁶⁶ However, despite such changes in the Constitution, the corporatist features discussed above have remained strong and alive, as the Constitution retained the *unicity* rule, mandatory representation, and compulsory dues.⁶⁷ The result is an incoherent system that recognizes both freedom of association as a fundamental right and imposes restrictions in the system that negatively affect the exercise of such freedom.

It is important to emphasize that some trade unions and collective agreements within the Brazilian system of industrial relations can

62. See A. de C. Gomes, *Ideologia e trabalho no Estado Novo*, in REPENSANDO O ESTADO NOVO 55 (D. Pandolfi ed., 1999).

63. VIANNA, *supra* note 58, at 6.

64. These elements are described by Schmitter in its concept of corporatism. Schmitter, *supra* note 50, at 93–95.

65. 1988 Constitution: “Article 8. Professional and trade union association are free, with regard to the following: “1 - the law may not require authorization of the State for a union to be founded, except for authorization for registration with the competent agency, it being forbidden to the Government the interference and the intervention in the union . . .” (translation by authors.)

66. Gacek, *supra* note 56, at 50; Foweraker, *supra* note 56, at 34–40.

67. 1988 Constitution: “Article 8. II Professional and trade union association is free, with regard to the following: “II. It is forbidden to create more than one union, at any level representing a professional or economic category, in the same territorial base, which shall be defined by the workers or employers concerned, which base may not cover less than the area of one municipality . . .” (translation by authors).

sometimes be effective. Indeed, there has been periodic collective bargaining in some sectors and some are more successful than others in reaching agreements.⁶⁸ Further, the system is probably more developed than many others in Latin America.⁶⁹ However, our claim here is not that the Brazilian system does not work at all or that it is the least developed system in Latin America. Our claim is that the trade union law in Brazil is a dysfunctional institution, because it allows the system to work in a way that violates workers' freedom of association. This is not a small sin, and it seems questionable that it should be sustained simply because it facilitates trade unions' lives. Moreover, these institutions have costs. First, the system still relies a lot in the CLT, being extremely overregulated. Thus, trade unions negotiate, but there is little room for collective bargaining.⁷⁰ Proposals for a reform of labor law giving more space to collective bargaining faces the obstacle of low representativeness in the majority of trade unions to effectively push for and negotiate workers' rights. Second, the system allows trade union leaders to remain in their "jobs," even in cases of corruption and mismanagement.

Therefore, in Brazil there is an anachronistic trade union system that was built by a (now dismantled) corporatist State, has survived democracies and dictatorships in the last century, and is still alive in a democratic State.⁷¹ The historical origins of this trade union system and circumstances that allowed its existence until now will be analyzed in Section III of this article. Before that, however, it is important to ask if there is still any reason to keep such an anachronistic system in place.

Currently, there are two central arguments in defense of the *unicity* rule and of the system of mandatory dues.⁷² First, the *unicity* rule is regarded as necessary due to the risk of trade union fragmentation. Some argue that with freedom of association more unions can be formed and there

68. For example, Amorim analyzes trade unions' responses to the recent economic crisis in Brazil and concludes that Brazilians trade unions has achieved significant results through collective bargaining during that started in 2008 due to their experience in negotiating in times of economic crisis. W. Amorim, *Crise Econômica Recente e Negociações Coletivas no Brasil: Algumas Lições?*, 13 REVISTA ADMINISTRAÇÃO EM DIÁLOGO 16, 01-18 (2009).

69. For sure, there are situations involving the physical safety of trade unions' leaders, as in the case of Colombia, where in 2009 48 trade union leaders and labour activists were killed, comparing with four in Brazil. International Trade Union Confederation—ITUC, Annual Survey of violations of trade union rights 2010, available at <http://survey.ituc-csi.org/General-Intro.html>.

70. See *supra* note 49.

71. The 1988 Constitution in article 1 declares Brazil a democratic constitutional State. According to the Freedom House, Brazil is considered an electoral democracy since 1989 and has been classified as mostly free since 1985.

72. A. Borges & J.G. Vargas Netto, "Adital - Os riscos da reforma trabalhista". Accessed on 10 February 2009, available at <http://www.adital.com.br/site/noticia2.asp?lang=PT&cod=10105>. See also Edilson José Gracioli, "A ANDES e seu apego a dois elementos da estrutura sindical oficial." Accessed on 10 February 2009, at http://www.adufu.org.br/Artigo_edilson_A%20ANDES%20E%20A%20ESTRUTURA%20SINDICAL1.doc.

is a risk that the system will end up with a large number of weak trade unions.⁷³ Ironically, however, this situation is exactly what the current system has produced. The latest survey of worker and employer trade unions in Brazil, carried out by the Brazilian Institute for Geography and Statistics (IBGE), in 2001, counted 11,416 worker trade unions and 4,545 employer trade unions, of which 64.3% are urban trade unions and 35.7% rural trade unions.⁷⁴ This proliferation of unions is even more evident when one analyzes the survey carried out in June and July of 2005 by the Labor Relations Office, a department of the Labor Ministry, which identified 23,726 union bodies registered with the Ministry of Labor and Employment (MTE)—23,077 trade unions, 620 federations, and 29 confederations. As well, there are 8,405 new associations that are in the process of being registered as trade unions with the Ministry of Labor.⁷⁵

Trade union fragmentation is happening in part because the *unicity* system guarantees that there is no competition, and the compulsory dues keep unions alive despite the absence of any real representation. Thus, unions never fade away and cease to exist. At the same time, there is a large number of new trade unions due to the dismemberment of similar or connected categories, previously represented by a single trade union.⁷⁶ For instance, workers in the amusement industry formed one category that has been divided into two, with the creation of a union of workers in bingo halls (despite the fact that bingo is illegal in Brazil!).⁷⁷

The second argument in defense of this system concerns the mandatory dues. Those defending the current system argue that mandatory dues guarantee the existence of trade unions regardless of any pressure from

73. Baccaro explains that corporatist theories “emphasized monopolistic associations and compulsory or semi-compulsory membership as solutions to the problems of organizational fragmentation.” Baccaro, *supra* note 50, at 3.

74. IBGE, Diretoria de Pesquisas, Departamento de População e Indicadores Sociais, Pesquisa Sindical 2001.

75. Ministério do Trabalho e Emprego, *Diagnóstico das Relações de Trabalho no Brasil*, online: MTE. Horn analyzes the increase in the number of trade unions in Brazil after the 1988 Constitution, emphasizing that this process has resulted in the increasing in the number of smaller trade unions. C.H. Horn, “Uma caracterização do processo de crescimento numérico dos sindicatos no Brasil após a constituição de 1988”. In: I Conferência Brasileira de Relações de Emprego e Trabalho, 2007, São Paulo. Anais da I Conferência Brasileira de Relações de Emprego e Trabalho at 24.

76. According to the IBGE, “reflecting the atomization of the union representation, the total number of unions has continued to grow, but at a slower rhythm: between 1988 and 1992, the rate of annual average growth was 5.3%; between 1992 and 2001 it was about 4.0%” IBGE, *Sindicatos: indicadores sociais* (Rio de Janeiro: IBGE, 2002) (translation by authors). According to the Labor Ministry, “1,950 professional categories and 1,700 economic categories have been created since 1990. These numbers show that the process of creating a trade union today is limited only by the degree of creativity in the denomination of categories, most of them having no correlation with the real structure of economic and professional activities,” available at http://www.mte.gov.br/EstudiososPesquisadores/fnt/conteudo/pdf/DIAGNOSTICO_DAS_RELACOES_DE_TRABALHO_NO_BRASIL.pdf.

77. Apelação Cível nº 193.206-4/0, de São Paulo, Tribunal de Justiça do Estado de São Paulo.

employers against trade union membership.⁷⁸ The compulsory dues payment has indeed created a solid and stable financial resource for the unions.⁷⁹ For non-corrupt, well-governed unions, it assures their stability and can be considered compatible with freedom of association.⁸⁰ However, these dues are problematic in cases like the Brazilian one, where: (i) workers lack an exit option, (ii) the dues are paid to unions that were not chosen by the workers, (iii) the dues are not dependent upon collective bargaining, and (iv) they are not negotiated.⁸¹ Moreover, these dues can also lead to corruption if the use of these financial resources is not subjected to any form of accountability either by workers or by the State. This is the case in Brazil. Finally, the compulsory dues do not encourage workers to join and become active in trade unions.⁸²

In sum, corporatist unions with fragile ties to the membership base need the State to guarantee the privilege of the mandatory representation and compulsory dues. As noted by Mangabeira Unger:

The current system guarantees the official representation without guaranteeing effective, independent, and as a result, legitimate representation. A system that exalts the trade union *unicity* has developed paradoxally to an exuberant proliferation of trade unions—many effectively representative, while many other impostors of representation.”⁸³

78. See 23^o Congresso do ANDES (Sindicato nacional dos Docentes das Instituições de Ensino Superior). Anexo ao Caderno de Textos. *Texto 45 Imposto Sindical*. Contribuição do Prof. Francisco José Duarte de Santana. Salvador, 4 a 9 de março de 2004. Accessed on 7 April 2009, available at http://www.andes.org.br/ANEXO_Circ059-04.doc.

79. In 2008, the mandatory dues constitute an income of R\$ 993,400,000, around USD 442,573,000. The last year the Ministry of Labor release official information on the value of trade union dues collected was in 2006. Folha de S.Paulo—Imposto sindical arrecada R\$ 1,6 bi em 2008—05/02/2009, available at <http://www1.folha.uol.com.br/fsp/dinheiro/fi0502200904.htm>. Access on 08 February 2009.

80. The Supreme Court of Canada, for instance, has affirmed this twice. *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211. *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70.

81. According to the ILO, “When legislation admits trade union security clauses, such as the withholding of trade union dues from the wages of non-members benefiting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements.” ILO, 2006 Committee on Freedom of Association Digest, para. 480

82. Any worker who is part of a professional category, and any employer who is part of an economic category, has to pay a contribution to the trade union or employer association, whether or not they are members of it. According to a 2001 survey, the union membership rate varied only slightly between 1991 and 2001. In relation to the economically active population, it fell from 25% in 1990 to 23% in 2001; in relation to employed workers, it remained at 26%. However, the number of trade unions between 1991 and 2001 grew by 49%. IBGE, SINDICATOS: INDICADORES SOCIAIS 28 (IBGE, 2002).

83. Original in Portuguese (translation by authors): “o regime vigente assegura representação sindical oficial sem garantir representação vigorosa, independente e, portanto, legítima. Um sistema que exalta a unicidade sindical evoluiu paradoxalmente para a proliferação exuberante de sindicatos – muitos representativos de fato e, muitos outros, imposturas de representação”. ROBERTO MANGABEIRA UNGER, “Diretrizes a respeito da reconstrução das relações entre o trabalho e o capital no Brasil.” Access on 9 february 2009, available at http://www.nae.gov.br/doc/doc_2008/opportunidades_economicas_trabalho.pdf

A system that tries to protect these two opposite ideals—corporatism and freedom of association—can only produce dysfunctional results to both ideals, because it is not faithful to either of them. However, the Brazilian order keeps these two opposite ideals, even though it cannot fulfill them. Why is this so? We will explore this question in the next part of the article.

III. HOW THE BRAZILIAN SYSTEM WAS CREATED AND WHY IT HAS NOT CHANGED

Like Brazil, many democratic countries do not offer *effective* guarantees to protect freedom of association. Despite the almost universal agreement about the link between freedom of association and essential values, such as protection of human dignity and freedom, the violations of freedom of association and union formation around the world are still numerous and serious.⁸⁴ One possible explanation for this lack of protection of freedom of association and union formation is political economy: interest groups that benefit from the status quo are resisting changes in the system that are not beneficial to them. More often than not, it seems that the problem is that governments and employers resist changes that empower workers.

Without dismissing this explanation, in this article, we focus instead on another political economy: the resistance to reforms imposed by the very same groups that were created by the initial reforms in the first place—the corporatist trade unions—as they are the main beneficiaries of the current system. In this regard, the Brazilian system represents yet another instance of a *reform trap*, which one of us has previously defined as a situation in which an earlier reform creates an interest group that will resist changes or improvements to the system down the road.⁸⁵

Our general argument is that, although in the past the corporatist ideology of the State acted as a rationale for the trade union system, the corporatist elements of the system no longer serve a corporatist ideal. Instead, the system is currently serving the interests of trade unions that benefit from lack of democracy, transparency, and accountability. To support this argument, this Section will analyze the origins of corporatist trade union law in Brazil and its survival through different periods of the Brazilian history during the last century. It will demonstrate that even

84. According to the International Trade Union Confederation (ITC), its annual survey of violations of trade union rights that covers 138 countries “shows an alarming rise in the number of people killed as a result of their trade union activities, from 115 in 2005 to 144 in 2006.” Access on 7 February 2009, at <http://survey07.ituc-csi.org/getcontinent.php?IDContinent=0&IDLang=EN>. See also Kerry Rittich, *Core Labour Rights and Labour Market Flexibility: Two Paths Entwined?*, in *LABOUR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOUR DISPUTES* (2003).

85. Prado, *supra* note 4.

though there were windows of opportunities for change, trade union reform did not happen.

A. *The Origins of the Trade Union System in Brazil: The Estado Novo (New State) 1937–1945*

The origin of labor regulation in Brazil is linked to the formation of the New State (Estado Novo) and the predominance of corporatist ideals that marked the 1930s. Before this time, labor regulation was largely determined by provisions implemented around the 1890s, shortly after the abolition of slavery in 1888.⁸⁶ At that time, Brazil had a constitutional guarantee of the freedom of association in 1891,⁸⁷ but there was no effective protection.⁸⁸ The lack of effective labor regulation was compatible with a political system that protected the interests of large land owners (*latifundiários*) and an agricultural economy based on the monoculture of coffee.⁸⁹

A series of social and economic changes created the conditions for the rise of corporatist ideals in the 1930s.⁹⁰ One was the rapid growth of the Brazilian labor force promoted by industrialization, combined with an increasing reliance upon migrant workers,⁹¹ who brought with them anarchist and communist ideologies. These changes created the conditions for a trade union movement. Despite being less organized and less militant than their counterparts in Europe, the nascent movement was still subjected to strong employer and government repression.⁹² For instance, one of the

86. In 1891, the first labor regulation was adopted: the Decree #1.313, establishing twelve years old as the minimum age for work in the industry. Yet, this period (post-end of slavery) is characterized by the adoption of isolated regulations and no systematization of labor laws. This trait was compatible with the 1891 Republican Constitution, under which political liberalism predominated, and resulted in a system based on individual contracts of employment and on a rhetorical commitment to freedom of association. This rhetorical commitment is exemplified by the lack of effectiveness of the constitutional rule recognizing freedom of association. ANTÔNIO CARLOS WOLKMER, *CONSTITUCIONALISMO E DIREITOS SOCIAIS NO BRASIL* 29 (1989).

87. In its article 72, § 8º: “a todos é lícito associarem-se e reunirem-se livremente sem armas.”

88. The Decree #979, from 1903, concerning rural workers' trade unions and the Decree #1637, from 1907, concerning urban workers' trade unions were not enforced in a way to guarantee the right of association to these workers. Irany Ferrari et al., *História do Trabalho, do Direito do Trabalho e da Justiça do Trabalho*. São Paulo, LTr, 1998, pp. 76–77.

89. WOLKMER, *supra* note 86, at 31.

90. Ângela Maria de Castro Gomes, *Empresariado e Legislação Social na Década de 30*, in *A REVOLUÇÃO DE 30: SEMINÁRIO REALIZADO PELO CENTRO DE PESQUISA E DOCUMENTAÇÃO DE HISTÓRIA CONTEMPORÂNEA DO BRASIL (CPDOC) DA FUNDAÇÃO GETÚLIO VARGAS* 273 (Editora Universidade de Brasília, 1983) (54 COLEÇÃO TEMAS BRASILEIROS).

91. JOHN W.F. DULLES, *ANARCHISTS AND COMMUNISTS IN BRAZIL—1900–1935*, 4 (1977). (“Between 1884 and 1903 Brazil Received over one million Italians.” “In 1900 approximately 90 percent of Sao Paulo’s industrial work force, still small, was foreign.”)

92. For example, the law #1.641, that regulated foreigners' expulsion from the country, target the foreigners trade union leaders and part of the workers' press. See I.E. DE MORAES, *TRATADO ELEMENTAR DE DIREITO DO TRABALHO* (2d ed. 1965); L.W. VIANNA, *LIBERALISMO E SINDICATO NO*

first strikes, in 1907,⁹³ organized by the Workers Federation of São Paulo— (“Federação Operária de São Paulo” or FOSP),⁹⁴ resulted in the closure of FOSP and the imprisonment of several trade union leaders. As described by Lopreato,

The violence used by the police against workers manifestations would be repeated during the whole period of the first Republic. During this period, it was predominant the idea that labour and capital conflicts did not exist in the country, and any workers’ movement were a product of foreign rioters, who came to Brazil to destabilize workers / employers relations.⁹⁵

The same happened with the the first general strike that took place in 1917, which is known as the “Strike at the Crespi Cotton Factory” (“Greve no Cotonificio Crespi”).⁹⁶ The general strike shows a growing labor movement, but it also shows the State’s resistance in offering protection or support for workers.⁹⁷

The State’s shift toward strong labor regulation was influenced by this nascent and strongly repressed workers’ movement, but it was not caused by it. Despite being protective of workers’ rights and interests, the labor regulation in the New State was not a product of an agreement among social actors—workers and employers—and the government.⁹⁸ Instead, it was imposed on the nascent workers’ organization by the State. The labor movement was strong enough⁹⁹ to be considered an issue that needed to be addressed, but it was too weak to be considered a relevant political player that should sit at the negotiation table. As Faoro describes, “labour demands, before 1930, did not have bargaining power in society, nor official recognition. Lost between anarchism and communism, the labour movement was antagonized by dominant groups in the society, since it was

BRASIL (Ed. UFMG, 4th ed.1999); M. DE LACERDA, *A EVOLUÇÃO LEGISLATIVA DO DIREITO SOCIAL BRASILEIRO* (1980); E. DE MORAES, *APONTAMENTOS DE DIREITO OPERÁRIO* (4th ed. 1998).

93. The two main claims were wage increase and the eight hours of work. Different categories of workers declared strike: steel workers, construction workers, wood workers, shoemakers, semesters, etc. C. DA S. LOPREATO, *O ESPÍRITO DA REVOLTA: A GREVE GERAL ANARQUISTA DE 1917*, 23 (2000).

94. The Workers Federation of São Paulo was a association that joint the first trade unions in the State of Sao Paulo. The Federation was created in 1905, and it was founded in the anarchist and communist ideals. *See id.* at 19.

95. *Id.* at 23 (translation by authors).

96. *Id.* *See also* DULLES, *supra* note 91, at 50; LOPREATO, *supra* note 93, at 26; B. FAUSTO, *TRABALHO URBANO E CONFLITO SOCIAL, 1890–1920*, 203 (1976).

97. It is famous the quote from the Brazilian president from 1926 to 1930, Washington Luis: “the social question is a case for the police” (“a questão social é caso de polícia.”). The president, however, later denied it. *See* Letter from Washigton Luis to Evaristo de Moraes Filho. Biblioteca Virtual Evaristo de Moraes Filho. Accessed in 18 March 2009, <http://www.bvemf.ifcs.uffj.br/imagens/Correspondências/Washington%20Luis/Washington%20Luis.pdf>.

98. PIERRE ROSANVALLON, *LA CRISIS DEL ESTADO PROVIDENCIA* 66 (1995).

99. “The number of strikes in the city of São Paulo went from 12, between 1888 and 1900, to 81, between 1901 and 1914, to 107, from 1917 and 1920.” W.G. DOS SANTOS, *CIDADANIA E JUSTIÇA: A POLÍTICA SOCIAL NA ORDEM BRASILEIRA* 65 (3d ed. 1994).

viewed as a threat to the public order.”¹⁰⁰ In sum, instead of being one of the parties in the debate on the State transformation, trade unions were seen as a problem to be controlled.

The 1930 Revolution marked the beginning of an authoritarian populist State created through a *coup d'état* orchestrated by the party that lost the elections of 1930. From a labor law perspective, this revolution marked the transition from a plural and repressed trade union system to a State-controlled one. The President, Getúlio Vargas, was labelled the “father” of workers for creating a protectionist labor law, providing detailed labor provisions to protect individual employees. Shortly after the 1930 Revolution, for the first time in the country, the government implemented systematic regulation of labor relations, recognizing individual employment rights much beyond what the still early trade union movement could obtain by collective negotiation. However, the economic crisis and the political process that lead to the 1930 Revolution did not involve workers and trade unions but rather was a movement among the economic and political elite of the country.¹⁰¹ According to Bueno:

The Revolution marked the end of the coffee bourgeoisie hegemony and the beginning of a period of great changes in the State. The State became more centralized, interventionist and directed to industrialization. However, these types of State actions did not result from the victory of a project of any of the groups that constitute the elite of the country, or much less, of the middle class or even of workers. It resulted from a rearrangement of a political equation in a situation of power vacuum.¹⁰²

By alienating the workers from the process, however, the legislation killed the nascent labor movement, while at the same time masking the authoritarian and repressive nature of the Vargas Presidency under a false mantra of protectionism.¹⁰³ According to Wolkmer, “the emergence of labour regulation was not spontaneous, but a strategy within an authoritarian process to propel industrial development and the integration of

100. RAYMUNDO FAORO, *OS DONOS DO PODER* 718 (1979); MARIA HERMÍNIA TAVARES DE ALMEIDA, *A REVOLUÇÃO DE 30: SEMINÁRIO REALIZADO PELO CENTRO DE PESQUISA E DOCUMENTAÇÃO DE HISTÓRIA CONTEMPORÂNEA DO BRASIL (CPDOC) DA FUNDAÇÃO GETÚLIO VARGAS* 359 - Coleção Temas Brasileiros, 54 (1983) (translation by authors).

101. For an analysis of the economic aspects of the first republican period (1889–1930) and the economic crisis of its final years, related specifically to coffee exports, see W. FRITSCH, *EXTERNAL CONSTRAINTS ON ECONOMIC POLICY IN BRAZIL, 1889–1930* (1988).

102. In Portuguese: “A Revolução marca o fim da hegemonia da burguesia cafeeira e o início de um período de grandes mudanças na ação do Estado, que se torna mais centralizado, intervencionista e orientado para a industrialização. Esta forma da ação estatal, entretanto, não resultou da vitória de um projeto de qualquer das frações da classe dominante ou, muito menos, da classe média ou ainda do operariado, mas de um rearranjo da equação política em uma situação de vazio de poder.” P. Bueno, *A Revolução de 1930: Uma Sugestão de Interpretação Baseada na Nova Economia Institucional*, 37 *ESTUDOS ECONOMICOS* 435, 445 (2007) (translation by authors).

103. LUIZ WERNECK VIANNA, *LIBERALISMO E SINDICATO NO BRASIL* 57 (4th ed. 1999).

the Brazilian bourgeois society.”¹⁰⁴ One of the first acts of Vargas was the creation of the Ministry of Labor and the publication of Decree #1.970 in 1931, which created the trade union *unicity* rule and established the idea of trade union as a “State collaborative body.”¹⁰⁵ This new labor legislation also made the State involved in all stages of trade union life, authorizing their creation, approving the elected leadership bodies, and intervening when some unions were not acting in accordance with the State ideology.¹⁰⁶

Workers did not participate in the rule-making process, as mentioned above, and some groups such as existing trade unions, which had survived despite strong State repression, were strongly opposed to this form of State intervention in the trade union constitution and functioning. From 1931 until 1933 there was a strong antagonism between these independent trade unions and the Ministry of Labor, which was trying to transform them in corporatist trade unions by making them “official” trade unions (i.e., unions recognized by the State and functioning under its auspices).¹⁰⁷ One of the first labor inspectors of the Ministry of Labor reported that to legitimize State leadership and garner the support of workers and employers, labor inspectors employed their best efforts in mediating the conflicts between workers’ associations and enterprises.¹⁰⁸ Thus, although the independent trade unions “still enjoyed greater prestige and respect among workers,”¹⁰⁹ they faced difficulties competing with the Ministry of Labor.¹¹⁰ These independent trade unions ceased to exist in 1933, when the government opened up elections for the constitutional Assembly that would enact a new Constitution. In order to be part of this process, trade unions had to be recognized by the Ministry of Labor. The independent trade union leaders decided then to submit themselves to the process of recognition and become “official” trade unions. After this time, these leaders continued to fight against State intervention in the trade unions, but they became far less resistant to certain aspect of the system, such as the *unicity* rule.¹¹¹

A new Constitution was approved on July 16, 1934, and Getúlio Vargas was indirectly re-elected by Congress, gaining four more years as President. However, this was a social democratic constitution in an authoritarian State, which reflected the fragmented political scenario in

104. WOLKMER, *supra* note 86, at 35 (translation by authors).

105. A. DE C. GOMES, *A INVENÇÃO DO TRABALHISMO* 176 (1988). The first minister of Labour, Lindolfo Collor, was substituted only one year later for Salgado Filho (translation by authors).

106. A. de C Gomes, *Ideologia e Trabalho no Estado Novo*, in *REPENSANDO O ESTADO NOVO*. (D. Pandolfi ed., 1999).

107. GOMES, *supra* note 105.

108. *Id.* at 178–79.

109. *Id.* at 180 (translation by authors).

110. MINISTÉRIO DO TRABALHO: *UMA HISTÓRIA VIVIDA E CONTADA* RIO DE JANEIRO 33 (A. de C. Gomes ed., 2007).

111. GOMES, *supra* note 105, at 181–82.

which all the different groups represented in Congress were too weak to effectively oppose Vargas.¹¹² The trade union rules are a good example of this inconsistency. Article 120 of the Constitution established that the trade unions should be recognized according to the law, but there should also be respect for trade union plurality and autonomy. The latter portion of the provision was added by groups that opposed the *unicity* rule, including the Catholic Church and some employers. In contrast, workers were supporting trade union unity without State intervention; while the government supported the *unicity* rule (i.e., unity with State intervention).¹¹³ While the trade unions wanted to guarantee their autonomy, they also thought that unity was essential to strengthen the trade union movement. The Catholic Church advocated for trade union plurality to assure the survival of its associations. Finally, some employers opposed any social legislation promoted by the New State, including any type of intervention in labor relations. In sum, neither the groups that supported the government, nor the opposition, had a unified discourse, and the result was a Constitution full of incompatibilities.

There was, however, an even more important consequence of this political fragmentation. As had happened during the 1930 Revolution, the lack of powerful political groups created a power vacuum that gave rise to an authoritarian government. Thus, there were no political forces to stop Vargas from exercising his power autocratically. Indeed, four days before the promulgation of the 1934 Constitution, the government issued a decree, #24.694, that created a *de facto* trade union *unicity*. The decree allowed trade union plurality, but it established as a condition of trade union formation the affiliation of at least one-third of all workers from the category. As a result, trade union plurality became unfeasible, given that no independent trade union had the ability to recruit so many workers.¹¹⁴

The ensuing period, between 1934 and 1937, was marked by intense social and political agitation, which can be illustrated by the high number of strikes¹¹⁵ and a communist rebellion.¹¹⁶ Using strong anti-communist propaganda,¹¹⁷ the Vargas government engaged some of the country's elites

112. For the analysis the power balance of the constitutional assembly, see A. AMARAL, *O ESTADO AUTORITÁRIO E A REALIDADE NACIONAL* 74–75 (1981). For an analysis of the democratic character of the Constitution, see WOLKMER, *supra* note 86, at 141.

113. GOMES, *supra* note 105, at 189.

114. Ferrari, *supra* note 88, at 88. (“A exigência de que o sindicato deveria reunir no mínimo 1/3 dos empregados da mesma profissão no mesmo local fez com que em cada localidade só pudesse existir um número limitado e não um número ilimitado de sindicatos. . . .”)

115. A.M.C. Araújo, *Estado e Trabalhadores: a Montagem da Estrutura Sindical Corporatista no Brasil*, in *DO CORPORATISMO AO NEOLIBERALISMO: ESTADO E TRABALHADORES NO BRASIL E NA INGLATERRA* 56 (A. Araújo ed., 2002).

116. Organized by the National Freedom Alliance, it was called “Intentona Comunista.”

117. *O BRASIL REPUBLICANO: O TEMPO DO NACIONAL-ESTATISMO—DO INÍCIO DA DÉCADA DE 1930 AO APOGEU DO ESTADO NOVO* 115 (J. Ferreira & L. Delgado eds., 2003).

and the army to support a State coup in 1937. This was the beginning of a dictatorial regime called the “New State” that lasted until 1945.

In the same year, the President approved a new Constitution, the 1937 Constitution, that restored the corporatist ideology that had been adopted in the early 1930s and abandoned by the 1934 Constitution.¹¹⁸ Subscribing to the view that conflicts should be eliminated by State intervention, the 1937 Constitution ruled out any possibility of freedom of association, recognizing the *unicity* rule and the government’s right to intervene in the trade unions.¹¹⁹ In addition, the new Constitution gave jurisdiction to the labor courts to decide collective labor conflicts (called *Poder Normativo*)¹²⁰ and prohibited strikes and lock outs.¹²¹ In sum, the system controlled the freedom to create and organize unions and established “a set of institutionalized channels of representation that will provide at least a simulacrum of access and accountability.”¹²²

The 1937 Constitution implemented a system of control of trade unions by the State. In order to make trade unions comply with the State’s interests, the Constitution guaranteed

the State control of the election of trade union’s executive; the State power of destitution of the executive in case of violation of the law and of the associations’ principles; the State intervention in case of internal conflicts; and, finally, the State power of annulment of any illegal act taken by the trade union.¹²³

This system would allow effective control reflecting the totalitarian and autocratic nature of the system.¹²⁴

The New State system of severe restrictions against freedom of association combined with strong individual employment rights guaranteed by the State was supported by a number of groups. First, the government wanted to control the social actors and keep social peace in order to foster industrialization and impede the advancement of communist ideologies.¹²⁵ Second, employers also wanted to keep social peace, without having to effectively negotiate. Thus it was convenient to keep the conflict resolution

118. 1937 Constitution, Art. 135. VIANNA, *supra* note 58, at 15.

119. 1937 Constitution, Art. 138. “A associação profissional ou sindical é livre. Somente, porém, o sindicato regularmente reconhecido pelo Estado tem o direito de representação legal dos que participarem da categoria de produção para que foi constituído, e de defender-lhes os direitos perante o Estado e as outras associações profissionais, estipular contratos coletivos de trabalho obrigatórios para todos os seus associados, impor-lhes contribuições e exercer em relação a eles funções delegadas de Poder Público.”

120. OLIVEIRA VIANNA, *PROBLEMAS DE DIREITO CORPORATIVO* 173 (1938).

121. 1937 Constitution: “Art 139 - A greve e o *lock-out* são declarados recursos anti-sociais nocivos ao trabalho e ao capital e incompatíveis com os superiores interesses da produção nacional.”

122. PHILLIPPE SCHMITTER, *INTEREST CONFLICT AND POLITICAL CHANGE IN BRAZIL* 112 (1997).

123. VIANNA, *supra* note 58, at 31–33 (translation by authors).

124. *Id.* at 33.

125. For this, the State would regulate labor relations, even though without a concern with the efficacy of these rights.

in the hands of the State. Finally, trade unions wanted to enjoy the privileges of being official, at the expense of real workers' representation.¹²⁶

In the beginning of the 1940s, the government started a movement to motivate workers to affiliate to trade unions since the Ministry of Labor itself had recognized the lack of representativeness of the trade unions.¹²⁷ In this context, the last element of the corporatist structure was created: the compulsory trade union dues.¹²⁸ The government's goal was to strengthen trade unions with financial resources that would be used to raise the membership. However, the possibility to receive resources irrespective of the membership generated the opposite: trade unions ceased to be concerned with membership, since their economic stability was already guaranteed. Despite this setback, the government decided to maintain the mandatory dues to reduce the risk of possible struggles within official trade unions, which could potentially empower independent trade unions, thus disturbing the social order.¹²⁹

The government's motivation to increase the financial stability of trade unions can be explained by the political scenario at the time. The 1937 Constitution established that the presidential elections would happen after a plebiscite to approve the Constitution. The idea was that the plebiscite and the election would legitimize Vargas' authoritarian regime.¹³⁰ Strengthening trade unions' financial stability was then a way to create political support to the Vargas' government in the transition from the New State regime to democracy.¹³¹ However, the election process did not develop as the government had foreseen: the army deposed Vargas, who agreed to renounce the presidency on October 29, 1945.¹³²

126. Arturo Bronstein, analyzing Latin-America labor legislation, concludes:

(I) La nueva actitud obedeció probablemente a razones tanto políticas como económicas y éticas. En lo político guarda relación con el proceso de modernización, caracterizado por el desplazamiento del poder desde las oligarquías rurales hacia las clases medias urbanas, quienes buscaron una alianza tácita con el proletariado, en cuyo favor promulgaron una legislación generosa para la época. Además de ofrecer protección, las llamadas leyes obreras enviaban a los trabajadores el mensaje bismarquiano de que su defensa debería venir del Estado y no de los sindicatos, cuya ideología predominante, anarquista o comunista, no podía sino inspirar desconfianza al poder de turno.

Arturo S. Bronstein, *Reforma Laboral en América Latina: Entre garantismo y flexibilidad*, 116 REVISTA INTERNACIONAL DEL TRABAJO 7 (1997).

127. GOMES, *supra* note 105, at 269.

128. Decree # 4.298, from 14 May 1942.

129. GOMES, *supra* note 105, at 271.

130. *Id.* at 293.

131. *Id.* at 277. See also P. Swavelly, *Organized Labor in Brazil*, in L. GRAHM & R. WILSON, THE POLITICAL ECONOMY OF BRAZIL: PUBLIC POLICIES IN AN ERA OF TRANSITION 263 (1990).

132. Numerous factors led to the fall of Vargas in 1945. First, the victory of the allies in the Second World War was followed by the decline of the New State corporatist ideals—that were shared by the fascists. Second, the opposition alleged that the government' strategy was to impose an illegitimate reelection of Vargas. GOMES, *supra* note 105, at 302.

B. The Consolidation of the Trade Union System in Brazil: The Return to Democracy (1946–1964)

After the end of the New State, a new democratic Constitution was approved in 1946, but the corporatists' ideals concerning labor relations were not completely removed. The 1946 Constitution, in article 159, recognized the freedom of association, but also stated that such a freedom was to be regulated by law.¹³³ Likewise, the Constitution recognized the right to strike, which would also be regulated by law.¹³⁴ In the absence of new statutes to regulate these provisions, the courts resurrected the legislation enacted during the New State to regulate the right to freedom of association and the right to strike.¹³⁵

The continuity of the corporatist structure despite the return to democracy is a result of political economy problems, as interest groups benefiting from the status quo resisted changes. One of the major political parties at the time was the Brazilian Labor Party—PTB (*Partido Trabalhista Brasileiro*), which was created from the corporatist trade union base.¹³⁶ Also, the labor regulation had created a labor bureaucracy that had specialized in corporatist laws, and those working within this bureaucracy would keep their jobs as long as the State had an active role in solving labor disputes and conflicts.¹³⁷ Finally, the official trade unions became accustomed to the benefits of being officially recognized, and did not want to go back to a system where they would have to fight for members.¹³⁸ In sum, in the legislative and executive branches, and in civil society, there were strong groups resisting reforms.

In 1947 the matter was brought before the Supreme Court, by groups opposing the maintenance of this corporatist structure. However, the Court declared the constitutionality of the CLT articles that regulated the trade union activities.¹³⁹ A possible explanation for this outcome is the fact that the *Supremo Tribunal Federal* (STF), the Brazilian Constitutional Court, might have been still under the influence of Getúlio Vargas, given that he appointed a total of twenty-one judges to the STF without congressional

133. 1946 Constitution, art. 159: "É livre a associação profissional ou sindical, sendo reguladas por lei a forma de sua constituição, a sua representação legal nas convenções coletivas de trabalho e o exercício de funções delegadas pelo Poder Público."

134. 1946 Constitution, art. 159: "É reconhecido o direito de greve, cujo exercício a lei regulará."

135. In the case of the right to strike, since it was illegal according to the 1937 Constitution, the regulation was adopted after the New State, but before the 1946 Constitution. The Decree #9.070, from 15 March 1946 regulates this right in detail, turning its exercise impossible in practice.

136. SCHMITTER, *supra* note 122, at 127. See also A. BOSI, *DIALÉTICA DA COLONIZAÇÃO* 300 (4th ed. 1992).

137. *Id.*

138. *Id.*

139. Supremo Tribunal Federal, Mandado de Segurança #767, 18 June 1947.

approval, and many of those were still sitting in the court.¹⁴⁰ This hypothesis is supported by the fact that the judgement revived much of the New State discourse, affirming that trade unions were still seeing as organizations that helped the State to eliminate conflicts and should therefore be subjected to State control.¹⁴¹

Even though the corporatist law did not change, the transition from an authoritarian regime to a democracy reduced the rigid State control upon the trade unions. For instance, during the New State, there was a control on the election of trade union executives to avoid the dissemination of communists among these associations. In addition, the Communist Party was banned. Paradoxically, the party supported Vargas' attempt to remain in power at the time when political forces were trying to remove him. The support was based on the fact that Vargas—in light of the threat to be removed from office—had promised a compromise to opposition forces: having a new Constitutional assembly. Moreover, the party opposed the other candidates.¹⁴² Nevertheless, Vargas was peacefully deposed in 1945, democracy was reinstated, and then the Communist Party was again legalized and started to participate in the executives of official trade unions.

Similar to its relationship with Vargas, the relationship between the federal government and the Communist Party after 1945 has been marked by unresolved tensions.¹⁴³ In the Cold War context, the new democratic regime found itself under external pressures to reassert government's hegemony over workers' associations.¹⁴⁴ As Schmitter describes, referring to trade unions as syndicates:

Syndical elections were postponed repeatedly. A formal 'certificate of ideological antecedents' was demanded of both candidates and electors. In 1947, the principal though unofficial, Communist-directed peak association, the Confederation of Brazilian Workers (CTB), was closed down along with several of its state federations, and heavy

140. Análise editorial. Leis que fizeram a História. Accessed on 22 April 2009, available at <http://www.analisejustica.com.br/anuario/historia/index.php>.

141. This argument is made in different votes. Supremo Tribunal Federal, Mandado de Segurança #767, 18 June 1947, p.42, p.43, p.51. (The Court states, for instance, that the "trade unions can exercise functions delegated by the public authority," and "the law give to the trade unions the privilege of the mandatory dues." The Court concludes that: "From that results the necessary subordination of the trade unions to the public power. It is inevitable the restriction of liberty at the expense of the privilege acquired with this delegation . . ." Supremo Tribunal Federal, Mandado de Segurança #767, 18 June 1947, p.30).

142. MOISÉS VINHAS, *O PARTIDÃO: A LUTA POR UM PARTIDO DE MASSAS—1922—1974*, 86 (1982).

143. The role of the Communist Part in Brazil's political history is extremely complex and is beyond the scope of this paper. For an overview of their role, see Lucília de Almeida Neves, *O Partido Comunista Brasileiro: trajetória e estratégias*, 16 REV. BRAS. CI. SOC. [online] 171–74 (2001), at http://www.scielo.br/scielo.php?pid=S0102-69092001000300013&script=sci_arttext and MARCO AURÉLIO SANTANA, *HOMENS PARTIDOS: COMUNISTAS E SINDICATOS NO BRASIL*. (Boitempo Editorial/UFRJ, 2001).

144. SCHMITTER, *supra* note 122, at 128.

restrictions were imposed on syndicates and syndicates leaders who supported it. The Communist Party was also declared illegal at this time.¹⁴⁵

In tightening up the control over trade unions, the Ministry of Labor found allies within the long standing leadership in trade unions. This leadership, “loyal to the idea of a paternalist reformist State as the protector and the benefactor of the labor movement, retained its hold on the top posts,” with the support of the Ministry.¹⁴⁶

This tight control over unions loosened up in 1951, when Vargas was elected President with significant support of workers and returned to power under a democratic regime. Indeed, Vargas abolished the requirement of a “certificate of ideological antecedents” and loosened control over elections.¹⁴⁷ Despite the absence of overt control, covert control remained in place. The Brazilian Labor Party (PTB) was a part of the ruling coalition and kept an “unofficial hold” of the Ministry of Labor, maintaining policies of cooptation and paternalism in place.¹⁴⁸

In 1961, when João Goulart was elected president, the trade union movement had its most active moment since the 1930s. Goulart was the candidate for the Communist Party and was politically close to the trade union organizations. More specifically, he had close ties with a non-official association constituted by the Communist Party: the General Workers’ Command—CGT (*Comando Geral dos Trabalhadores*). The CGT was created in order to unify the activity of major trade unions, which were then under the control of the Communist Party. The CGT and other trade unions associations acquired therefore a lot of political influence when Goulart was elected. Following Goulart’s inauguration, they assumed a very active role in the policy-making process.¹⁴⁹ Indeed, as Schmitter describes:

The independent stance, militant activity, and ideological radicalism of the sindicatos in the later months of the Goulart regime made observers wonder whether the lines of dependency had become reversed, with the Labour Ministry becoming the agent of militant worker’s leaders, rather than vice-versa.¹⁵⁰

It is puzzling, however, to see that despite the political power of trade unions, Brazil did not move away from the corporatist structure during this period of time. One possible explanation for this is the organizational structure of Communist Party at that time. Ronald E. Chilcote, in a book about the Brazilian Communist Party, argues that the Party worked

145. *Id.*

146. *Id.* at 129.

147. *Id.*

148. *Id.* at 130.

149. See V. GIANNOTTI, *HISTÓRIA DAS LUTAS DOS TRABALHADORES NO BRASIL* 170 (Mauad Editora, 2007).

150. SCHMITTER, *supra* note 124, at 130.

differently from conservative or liberal parties in the United States or England. The latter would follow Robert Michel's "iron law of oligarchy," which "asserts that inevitably a minority assumes leadership and control of the parties." In Brazil, in contrast,

[t]he Communist party attempts to recruit the masses in its ranks and holds to a strict scheme of individual subscriptions upon which the party depends for finances. . . . Large membership necessitates administrative organization, and this frequently results in an ever growing number of permanent officials and a party bureaucracy.¹⁵¹

This suggests that the party was a slow moving machine, lacking effective mechanisms to respond rapidly to changes in the political scenario and as a result was incapable of pushing for reforms.

A complementary explanation suggests that this lack of change is the result of the fact that the trade unions themselves wanted to keep the system, and the benefits derived from it. For instance, Swavely explains that the trade unions used the CLT system to gain political favors as the system worked as a "patron/client relationships with government officials who were willing to grant benefits, favors, and services in return for the political support of organized labour groups."¹⁵² Along the same lines, Costa argues that:

It is important to remember that in the beginning of the 1960s, even though the communists criticized the trade union structure, they used this structure intensively to disseminate their political theses, leading the major workers' confederations at the time. Therefore, we argue that if this structure was not beneficial at all to anybody at any point, it would not have survived (since its consolidation) during a period when profound economic and political changes happened in the country.¹⁵³

The use of the trade unions as political instruments by the Communist Party, the government and other political groups, resulted in trade unions with weak membership, low representativeness, and little popular support. This became clear during the 1964 military coup when the labor movement found itself with no power to resist the military.¹⁵⁴

151. RONALD E. CHILCOTE, *THE BRAZILIAN COMMUNIST PARTY: CONFLICT AND INTEGRATION* 102 (Oxford University Press, 1974).

152. Peter Swavely, *Organized Labor in Brazil*, in *THE POLITICAL ECONOMY OF BRAZIL: PUBLIC POLICIES IN AN ERA OF TRANSITION* 269 (L. Graham & R. Wilson eds., 1990).

153. Translated from the original Portuguese by the authors:

Vale lembrar que no início dos anos 60 os comunistas; embora criticassem a estrutura sindical, dela também se serviram, de forma intensa, para propagar suas teses políticas, liderando as principais confederações de trabalhadores então existentes no País. Portanto, em nosso entender, caso tal estrutura fosse prejudicial em todos os momentos a todos os setores da sociedade, é evidente que ela não permaneceria praticamente intacta (desde sua consolidação), durante um período em que várias modificações profundas ocorreram no país, tanto em termos econômicos quanto no que concerne à política.

SÉRGIO COSTA, *ESTADO E CONTROLE SOCIAL NO BRASIL* 86 (T. A. Queiroz ed., 1986).

154. Swavely, *supra* note 152, at 264.

C. *The Maintenance of the Trade Union System in Brazil: The Military Dictatorship and the New Syndicalism (1964–1985)*

In 1964 the military dictatorship began, and Brazil returned to an autocratic regime of government. During this period, the rigid State control of the trade unions returned and the little flexibility that existed during the democratic period vanished. Indeed, the Labor Ministry resumed its intervention in the trade unions executives, its control of the elections, and its closure of trade unions—including the CGT, controlled by the Communist Party.¹⁵⁵ State authorities began to demand an ideological certificate from trade union leaders (attesting they were not communists), and the right to strike became illegal.¹⁵⁶ The government aimed at blocking any Communist influence or political organization in the trade unions. In order to do this, the military government used the same structure built by the New State.

During this period, the labor movement endured not only State repression against trade unions, but also a series of policies unfavorable to workers. For example, the provision guaranteeing stability after ten years on the job was replaced by an unemployment insurance (called the Time in Service Guaranteed Fund, FGTS).¹⁵⁷ In addition, the government adopted “anti-inflationary policies, which included a ‘wage-squeeze’” (*arrocho salarial*).¹⁵⁸

The fact that the military dictatorship offered less protection to workers gave birth to more autonomous trade unions.¹⁵⁹ There were a few isolated strikes in the beginning of the 1970s,¹⁶⁰ and by the end of the decade the trade union movement began to rebel against State control. Strikes against wage losses caused by inflation in 1978, 1979, and 1980 in the ABC,¹⁶¹ São Paulo, were the starting point of a new trade union syndicalism that became known as New Unionism.¹⁶² As described by Sluyter-Beltrão,

the [New Unionism] movement brought together a heterogenous coalition of grassroots labor activists, rank-and-file oriented union leaders, progressive Catholic Church-based groups and revolutionary

155. *Id.*

156. See Law #4,330, from 1 June 1964.

157. The Law #5.107, from 13 September 1966.

158. Swavely, *supra* note 152, at 264.

159. *Id.* at 265.

160. *Id.*

161. ABC corresponds to three cities around São Paulo: Santo André, São Bernardo, and São Caetano. Those cities are where the automobile industry was centralized in Brazil during the 1970s and where the new unionism was born (*novo sindicalismo*). Cf. RICARDO ANTUNES, *A REBELDIA DO TRABALHO. O CONFRONTO OPERÁRIO NO ABC PAULISTA: AS GREVES DE 1978/80* (UNICAMP ed., 1992).

162. Gacek, *supra* note 56, at 22.

left party “cells.” These component groupings shared basic commitments not only to the defense of workers’ wages and livelihoods and to the remaking of Brazil’s highly constraining system of corporatist labor law, but also—indeed, first and foremost—to the broader political objective of ending military rule.¹⁶³

A series of factors promoted the raise of this new syndicalism: a modern industrial center in the ABC region, a trade union structure that was ineffective in dealing with company-specific issues, and a government hostile to labor claims. All these factors led to intense political pressure, which resulted in the creation of more authentic workers’ representation. As Gacek explains, “[d]efying the intervention of the labor courts, they [the autonomous unions] directly confronted the transnational automakers and negotiated impressive wage gains. They also established the celebrated *comissões de fábrica*, or factory commissions, which served as new vehicles for the negotiation of agreements and the resolution of labor disputes.”¹⁶⁴ This movement was the origin of the first “central trade union” (*central sindical*), the CUT (Unified Labor Central),¹⁶⁵ which became an important actor in the Brazilian labor relations system. At that time, the new syndicalism was able to achieve representativeness and promote negotiations that were favorable to workers, despite the fact the labor law system that existed in Brazil—not because of it. Indeed, the new syndicalism was mostly operating outside of the Brazilian labor law system. The central trade unions are not part of the traditional confederative structure, but are national, multi-sector associations made up of a range of trade unions. How they managed to bypass the system is a topic that deserves further analysis, but it is beyond the scope of this paper.¹⁶⁶

This new syndicalism was able to promote significant changes in the automotive industry, where it was particularly strong, but it was not able to eliminate the most important elements of the corporatist system. The new syndicalism goals—“union democracy and autonomy”¹⁶⁷—faced the opposition of the official trade unions and of part of the leftist labor movement, who alleged that workers were not ready for freedom of association. Swavelly suggests that these groups feared that “the

163. SLUYTER-BELTRÃO, *supra* note 35, at 4–5.

164. Gacek, *supra* note 56, at 22.

165. There are more than ten central trade unions in Brazil, such as *Força Sindical* (Union Strength), *Social Democracia Sindical* (Union Social Democracy) and the CGT (Workers’ General Confederation). The 2001 census indicates that 65.85% of the trade unions are associated to CUT, 19.49% to *Força Sindical*, 6.71% to *Social Democracia Sindical* and 5.53% to CGT. IBGE, 2001, at 68.

166. According to Lang and Gagnon, while a minority of trade unions were able to disconnect themselves from the corporatist practices, most trade unions rely on the corporatist system for their survival. Karen Lang & Mona-Josée Gagnon, *Brazilian Trade Unions: In (In)Voluntary Confinement of the Corporatist Past*, 64 RELATIONS INDUSTRIELLES/INDUS. REL. 250, 262 (2009).

167. Letter of Principles of the National Confederation of Workers in Industry. Swavelly, *supra* note 152, at 266.

proliferation of autonomous unions might eventually lead to deeper divisions within a heterogeneous working class and to a strictly 'economistic' activism (such as U.S.-style 'business unionism') on the part of the 'labour aristocracy' willing to play by the capitalist rules."¹⁶⁸ This labor aristocracy would be constituted by the ABC trade unions, which represented the labor force of an industrialized and modern sector of the economy. In sum, the official trade unions feared that if a system of freedom of association was implemented, the associations of the new syndicalism would take the system over, and the old unions would be eliminated.

There was then no homogeneity in the trade union movement: the new syndicalism movement was fighting against the corporatism system while other parts of the trade union movements supported its maintenance.¹⁶⁹ The disagreements among the trade union movement were essentially about the maintaining the *unicity* rule and the trade union dues—the basic structures of the corporatist system.¹⁷⁰

This division carried over to the period of democratization of the country (1985–1988), and influenced the negotiation of the terms of the 1988 Constitution. During this process the heterogeneity of the trade union movement could be seen clearly in the different positions taken by the two biggest central trade unions at the time: CUT and CGT.¹⁷¹ Both defended freedom of association and collective autonomy, but these principles had different meanings to each. CGT defended a trade union system free from any State interference, but maintaining the *unicity* rule. CUT defended the end of the *unicity* rule and of mandatory trade union dues. Rodrigues explains that this heterogeneity was based on the different political parties that supported different segments of the trade union movement.¹⁷² For example, CGT was connected to PMDB, a central-right wing party, and during the constitutional assembly, CGT moved close to a central right block, called "Centrão." CUT was linked to PT (Workers' Party), a left wing party.¹⁷³

168. *Id.* at 267.

169. For an analysis of the different ideological positions of the central trade unions, see Antonio Thomaz Jr., *Movimento sindical e praxis política na agroindústria sucro-alcooleira*, 5 REVISTA ELECTRÓNICA DE GEOGRAFÍA Y CIENCIAS SOCIALES (1997), available at <http://www.ub.edu/geocrit/sn-5.htm> (last accessed June 2, 2011).

170. Lourenço Filho & Ricardo Machado, *Liberdade Sindical, Autonomia e Democracia na Assembléia Constituinte de 1987/1988—Uma reconstrução do dilema entre unicidade e pluralidade* 72 (2008) (unpublished Ph.D dissertation, Faculty of Law, University of Brazil).

171. See SLUYTER-BELTRÃO, *supra* note 35, at 110.

172. Leôncio Martins Rodrigues, *As Tendências Políticas na Formação das Centrais Sindicais*, in O SINDICALISMO BRASILEIRO NOS ANOS 80, 41 (A. Boito Jr. ed., 1981).

173. *Id.* See also SLUYTER-BELTRÃO, *supra* note 35, at 110.

To be sure, in this process many trade unions did not argue for the maintenance of the corporatism system as a whole. Instead, they maintained a contradictory position: defending freedom of association and opposing reform of the *unicity* rule.¹⁷⁴ The result, as discussed in the first part of the paper is a contradictory system, in which the Constitution recognizes freedom of association but preserves the *unicity* rule.

D. *Back to Democracy: The 1988 Constitution*

The 1988 Constitution diverged in two points from the labor system adopted in the 1930s: (1) it expressly recognized freedom of association, and (2) it also expressly prohibited State interference in trade unions.¹⁷⁵ The similarities were that it maintained the *unicity* rule and mandatory dues. On the one hand, these changes symbolize a development toward freedom of association. On the other hand, the changes modified the logic of the corporatist system, transferring the control over the corporatist trade union structure from the State to the trade unions themselves.¹⁷⁶ In sum, the changes in the 1988 Constitution removed the repressive elements of the corporatist system, giving more freedom for trade unions to act, while at the same time maintaining their privileges.

Since the 1988 Constitution, labor law has been a recurring issue in every presidential election and every major policy debate about the country's economic development. However, the debate has been focused on individual rights, instead of dealing with changes in the trade union system. Furthermore, even in the area of individual rights, the process of reform has not gone very far.

What could explain this silence (or perhaps lack of interest) in a reform of the trade union system? As it had happened during the short democratic period between the New State and the military dictatorship, employers' trade unions, workers' trade unions, and the government each had their own interests in keeping the system in place. From the government's perspective, the system makes labor conflicts more manageable, given that workers are not really empowered by the process of collective bargaining.¹⁷⁷ Indeed, every two years new collective agreements are

174. Antônio Rodrigues Freitas, Jr. & José Rodrigo Rodriguez, *Origin and contents of legislative policies striving to introduce flexibility*, 3 REVISTA DIREITO MACKENZIE 214 (2002).

175. According to the Ministry of Labor Regulation #186, April 2008, the Labor Ministry has now the power to arbitrate and mediate conflicts on exclusive representation between trade unions. Only if an agreement is not reached, the case can go to a labor court.

176. For instance, as mentioned before, the Ministry of Labor can no longer impose (via regulation) a pre-defined framework of economic and professional categories. As a consequence, there is no limit to the creation of categories and, consequently, there is no limit to the creation of trade unions.

177. See *supra* note 42.

reached without major social or political disruptions. Employers share the government's interests.

From the perspective of workers' trade unions, the corporatist law guarantees economic resources and the right to negotiate. The problem is that these guarantees come with no incentives for trade unions to effectively connect with or represent workers. Indeed, in 2003, the Ministry of Labor was receiving one thousand requests per year to create new trade unions. The major incentive to submit such requests was the compulsory trade union dues, which were not attached to any level of actual representativeness.¹⁷⁸ The result is that Brazil has weak unions in terms of representativeness, but strong financially due to mandatory dues that are not attached to a choice among different unions, an exit option for workers, and are not dependent upon collective bargaining or the performance of the union in representing the workers. This financial power allows them to finance political campaigns and create ties with political parties, creating some political leverage. The problem is that the proliferation of unions could be weakening the existing unions due to their increasing fragmentation. This is likely to have a negative impact on their financial and political power and there is hope that this could potentially open space for reforms in the near future. However, the union fragmentation described earlier has not opened enough space for structural reforms thus far.

In 2003, for the first time a general proposal to change the trade union law began to be discussed. Under the presidency of Luís Inácio Lula da Silva,¹⁷⁹ a former trade union leader from the new syndicalism, the government created the National Labor Forum, a space to encourage social dialogue about the labor law reform. The first item discussed was the trade union law. The idea was to bring together the social partners—government, employers, and trade unions¹⁸⁰—to negotiate a consensual package of changes that would be submitted to the Congress. However, the debates at the National Labor Forum did not lead to a consensus and no proposal was formulated. According to Horn, the dialogue did not take place due to the trade unions' resistance to change. Indeed, at the provincial levels of the Forum the majority of the trade unions supported the *unicity* rule.¹⁸¹

178. O.M. Bargas, *Novos Paradigmas para as Relações de Trabalho*, in MERCADO DE TRABALHO 5 (IPEA, 2004).

179. President Lula was a trade union leader of the metal workers trade union in São Bernardo, one of the cities that integrated the ABC. Under his leadership, the new syndicalism in the late 1970s started.

180. The National Labour Forum is composed of 72 members: 21 representing employers, 21 representing employees, 21 from the government, and 9 representing small enterprises and cooperatives.

181. C.H. Horn, *Os debates estaduais do Fórum Nacional do Trabalho: entre a reforma e a continuidade*, in 1 ENSAIOS SOBRE SINDICATOS E REFORMA SINDICAL NO BRASIL 146 (Carlos Henrique Horn et al. eds., 1st ed. 2009).

Despite this frustrating outcome of the National Labor Forum, the federal Government presented a bill proposing a Trade Union Reform (*Reforma Sindical*) 2005 to Congress. The bill had not been voted at the time of this writing (January 2011), stalled due to insufficient political support, including the political apathy of the employers' associations and the resistance of trade unions that had participated in the Forum.¹⁸²

In the meantime, other reforms have been implemented. Despite the extremely negative consequences of the trade union system for labor relations in the country, the most recent reforms have strengthened the corporatist structure. However, instead of favoring the fragmented unions, these reforms favored a powerful actor operating outside the system: the central trade unions that were active in the new syndicalism movement. In 2008, Congress approved a bill proposed by the government of President Luís Inácio Lula da Silva, by which the central trade unions were officially recognized by the government as part of the labor system,¹⁸³ guaranteeing a share (10%) of the compulsory trade union dues to them.¹⁸⁴ The central unions had lobbied for a long time for the recognition of freedom of association in Brazil. Ironically, after becoming part of the corporatist system, according to the ILO, the major Brazilian central trade union, CUT, "indicated that it did not support the ratification of C.87 as it favors the creation of a single Syndicate."¹⁸⁵ Likewise, the ILO's 2008 Review of the annual reports concludes that "the Single Central Organization of Workers (CUT) supports maintaining the single trade union system and therefore does not favour ratification of Convention No. 87."¹⁸⁶ It is important to note that, in its official announcements, CUT defends the ratification of ILO Convention 87 and the end of the compulsory dues.¹⁸⁷ However, CUT has been receiving the dues since 2008.

This shows how the system was appropriated by trade unions and employers' associations that in turn now fight for the maintenance of the

182. Besides the constitutional Amendment Proposal, there was also a proposed reform of the Trade Union Law that would establish a transition to a system based on freedom of association. This proposal has never been presented to the Congress. See Ministério do Trabalho e Emprego, online: Fórum Nacional do Trabalho (FNT), at <http://www.mtb.gov.br/fnt/default.asp>.

183. Projeto de Lei/Câmara dos Deputados 1990/2007.

184. Statute n. 11.648/08. According to this statute, the contribution was divided among the trade union (60%), the federation (15%), the confederation (5%) and the Ministry of Labour (20%).

185. COUNTRY BASELINES UNDER THE 1998 ILO DECLARATION ANNUAL REVIEW (2000–2008): BRAZIL, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_facb_bra.pdf (last accessed on Mar. 7, 2009).

186. Paragraph 25 of the Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Geneva, GB301_3_[2008-03-0042-1]-En.doc/v2, March 2008, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meeting_document/wcms_091454.pdf (last accessed on Mar. 7, 2009).

187. See "CUT quer cobrar fim do imposto sindical," available at <http://clippingmp.planejamento.gov.br/cadastrros/noticias/2011/3/2/cut-quer-cobrar-fim-do-imposto-sindical>.

system for the sole purpose of preserving the benefits they derive from it. The New Unionism was one of the only hopes for change in this corporatist system, but the movement has eroded since the transition to democracy started in 1985, and it has been largely declining since 1990, when democracy was reestablished. While Brazilian and international scholars disagree on the reasons why this decline happened,¹⁸⁸ it is clear that the recent inclusion of the *centrais sindicais* in the system changes the incentive structure, and reduces the likelihood that the “new unionism” (or what is left of the original movement) will press for radical changes in the system.

IV. IS IT POSSIBLE TO REFORM THE TRADE UNION SYSTEM IN BRAZIL?

The fourth section of the article will examine ways to reform the trade union system in Brazil. Thus far, we have argued in favor of freedom of association and union formation, have indicated that the Brazilian labor law system has not offered effective protections to this freedom, and have analyzed why this is the case. Our main claim is that the persistence of the corporatist trade unions system in Brazil derives from a political economy problem. More specifically, we claim that trade unions themselves, the main beneficiaries of this system, have blocked reforms. In this section we turn to another question: what can be done about it? Instead of suggesting concrete reforms that could be implemented in the system, we are more concerned with *how* any possible reform to guarantee freedom of association could be implemented in the system.

Some strategies to overcome the political economy obstacles and to build the political consensus that would allow for institutional changes in developing countries were identified by Trebilcock and Daniels.¹⁸⁹ To design these strategies they distinguish between the demand and the supply side of reforms.¹⁹⁰ In the Brazilian case, the supply side (the potential willingness to promote reforms among political actors) is hindered by the significant political cost to reform the trade unions system. This is especially true in a scenario where the majority of the trade union movement itself is against the reform. A significant part of these political costs are associated with the fact that trade unions support some political parties, which will certainly resist change. The demand side (i.e., groups

188. David Parker, Book Review, *Pelegos No More? Labour Historians Confront the “New Unionism” in Brazil*, 33 *LABOUR/LE TRAVAIL* 263 (reviewing JOEL WOLFE, *WORKING WOMEN, WORKING MEN: SÃO PAULO AND THE RISE OF BRAZIL’S INDUSTRIAL WORKING CLASS, 1900–1955*; JOHN D. FRENCH, *THE BRAZILIAN WORKERS’ ABC: CLASS CONFLICT AND ALLIANCES IN MODERN SÃO PAULO*; MARGARET E. KECK, *THE WORKERS’ PARTY AND DEMOCRATIZATION IN BRAZIL* (1994)). For an account that diverges from most of the accounts of Brazilian scholars, see SLUYTER-BELTRÃO, *supra* note 35.

189. Trebilcock & Daniels, *supra* note 3.

190. *Id.* at 109.

that could be potentially requesting changes) is hindered by the trade union movement and employers. Trade unions that already hold the legal right of representation do not support reforms. While they are able to keep workers' representation based on their seniority in the corporatist system, in a freedom of association system they would have to face competition from other trade unions and prove their representativeness.¹⁹¹ Employers also do not support changes, because they generally prefer a system within which they do not have to deal with a truly representative trade union.¹⁹² We discuss how to overcome this resistance next.

A. Changing the Demand Side of Reforms

One possible strategy to change the demand side of trade union reform is to entice workers who are not engaged in the trade union system to actively pursue a better system of representation. One way to do that is providing them with information about the negative aspects of the current system and the possibilities for reform. Many workers only know about the corporatist system. Therefore, simply providing information about viable alternatives may go a long way in conquering workers' support for reform. Other workers may be already willing or actively trying to unionize outside of the trade union system. These workers could not only receive resources to lobby for reforms (from outsiders or insiders of both), but they could also be the ones in charge of disseminating among colleagues information about the advantages of a freedom of association system, such as, participation in the decisions taken during collective bargaining, accountability from the trade unions, and having a voice in the election of the trade union that will represent them. However, even if these information and dissemination strategies succeed, the government must be aware that workers (outside the trade unions) do not constitute an organized group that can easily or effectively pressure for reforms. Therefore, these strategies can result in a broad popular support for the changes, which gives legitimacy to a process. Nevertheless, at the end, this demand for reform needs to be matched with some willingness on the supply-side (i.e., the worker will need support from political actors).

Who could possibly fund and finance such attempts to gather support from workers? In order to initiate the process, it is necessary to identify the groups that can play a role in the reform and the condition by which they

191. Even though there are different systems of representation in freedom of association regimes, one aspect common to all of them is that unions have to be representative to attract attention of management.

192. It is a well accepted fact that employers are unenthusiastic participants on collective negotiations. Given a choice, most employers would prefer a non-union workplace. This observation is nearly universal across countries and over time.

can act. As indicated above, the government is likely to incur high political costs if it tries to promote such actions. Thus, it is more likely that such support should be granted by non-governmental organizations or international institutions. These groups can be divided in “insiders” and “outsiders,”¹⁹³ and each of them could perform a different role in promoting the reforms. According to Trebilcock and Davis, while “outsiders” should perform a secondary role in national institutional reforms, “insiders” must perform the protagonist role, since these groups have a “detailed local knowledge of both local values and the innumerable factors that determine the consequences of adopting or adapting specific legal institutions.”¹⁹⁴ We analyze each of these in turn.¹⁹⁵

1. The Role of Outsiders

As an “outsider,” the ILO can perform an important role in this process. The ILO has two important international norms: the Convention No. 87 concerning freedom of association and the right to organize (an international treaty not ratified by Brazil) and the 1998 Declaration of Fundamental Rights and Principles at Work. The Declaration guarantees the freedom of association and collective bargaining as fundamental rights.¹⁹⁶ While Convention No. 87 provides the normative framework for what constitutes freedom of association, the 1998 Declaration establishes a follow-up mechanism for the implementation of these rights, which includes reports by the Member States that did not ratify the conventions and the development of cooperation programs between the ILO and its member States.

In this context, the ILO can pressure the country to ratify Convention No. 87 and to comply with the principle of freedom of association. Since the ILO does not have power to impose compliance with the Convention, it uses alternative methods, such as “naming and shaming,” to pressure its

193. For an analysis of the role of insiders and outsiders in institutional reform, see Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895, 945–46 (2008).

194. *Id.* at 919.

195. There could be a third option here, transnational networks, where “multiple transnational public and private actors would operate not only at the national level but also in public and private arenas within and beyond national borders.” However, no fully effective transnational system for labor regulation has emerged yet, and the countries where it has shown some promise are those in which there is a process of regional integration, such as the European Union and Nafta. For an analysis of their potential, see David M. Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 L. & SOC. INQUIRY 1187–1211 (2000).

196. The protection of collective bargaining is guaranteed by Convention 98, ratified by Brazil. The other rights guaranteed by the 1998 Declaration are the abolition of forced labor, the end of discrimination at work, the end of child labor.

member States.¹⁹⁷ For instance, Brazil has been subject to 110 complaints in the ILO Committee on Freedom of Association, and all these cases are published on the internet.¹⁹⁸ The idea is to make the violation public, causing reputational damage to the violator, and pressuring the country to change its behavior.

Another role the ILO could perform is to provide information to governments and social actors on freedom of association. Concerning this task, in 2004 the ILO signed a Protocol of Understanding with the Brazilian government to train judges and jurists on freedom of association.¹⁹⁹ Every year since 2004 almost 400 people have participated in the training program. According to the ILO, "increased knowledge of fundamental principles and rights by the judiciary is expected to lead to a better application of those rights and principle in their judgments."²⁰⁰ This program is important in helping labor courts to challenge the corporatist system, as mentioned above.

Despite these initiatives, the ILO has no technical cooperation program with the Brazilian government. In these programs, the ILO provides the country with advice on labor law reform; capacity building of labor administrations; strengthening employers' and workers' organizations; developing tripartism and institution building; "advocacy awareness raising, [and] training."²⁰¹ The ILO Brazilian Office develops programs combating child labor, forced labor, and discrimination of work, but it has no specific program to promote freedom of association and collective bargaining.²⁰² The reason for this is that the ILO depends on the government's invitation to develop a technical cooperation program. Thus far, the Brazilian government has not demonstrated an interest in receiving the ILO's aid. To

197. Besides the regular report mechanism, the ILO prepares a general report each year about one of the fundamental labor rights in the scope of the 1998 Declaration. The report details the situation of compliance with that right by the Member States. The tripartite structure of the ILO is an important characteristic of the ILO in order to achieve more transparency and legitimacy. This is because the tripartite structure enables real participation and dialogue of employees and employers in the negotiations and approval of all conventions, recommendations and declarations. As for example, the ILO. REPORT OF THE DIRECTOR-GENERAL, FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED. GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (ILO, 2008).

198. See <http://www.ilo.org/ilolex/english/newcountryframeE.htm> (last accessed Apr. 17, 2009).

199. In addition, the ILO also has a partnership with the BBC, by which it has trained thirty-six Brazilian journalists on fundamental principles and rights at work. ILO, *supra* note 197, at 70.

200. *Id.* at 65.

201. "ILO assistance is provided in the form of advocacy, awareness raising, training, advisory services and technical cooperation for capacity building and development of institutions." Committee on Technical Cooperation. Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: Technical cooperation priorities and action plans regarding freedom of association and effective recognition of the right to collective bargaining. GB303-TC_3 [2008-09-0133-1]-En.doc/v4, p.1. See ILO Global Report, 2008, at xii.

202. For a description of these programs, visit the ILO-Brasilia website, <http://www.oitbrasil.org.br> (last accessed Mar. 17, 2009).

change this situation, the Brazilian government would need to recognize that the corporatist system violates the principle of freedom of association. This, however, depends on the supply-side of the reform, as we will discuss below.

While the ILO can be considered the most active “outsider,” it is still an open question as to whether there are enough insiders that would be able to support such reform. As highlighted above, there are groups of insiders that have strongly resisted reforms—especially trade unions. Thus, whether it is also possible to minimize their resistance is also discussed below.

2. The Role of Insiders

In Brazil, the trade unions’ resistance to the reform constitutes the more difficult challenge to be overcome. Trade unions, federations, confederations, and trade unions centrals enjoy the benefits of holding the official representation of workers and do not want to change the system. As suggested earlier, the trade unions themselves are not able to disassociate their interest in keeping the corporatist system from their role as associations that should defend and represent workers’ rights, including the right to freedom of association.

In this context, it may be not feasible to pursue of radical reforms. Nevertheless, minor reforms could potentially try to minimize the trade union opposition to the reform by making the system face its own limits. For instance, the government could promote collective bargaining by progressively reducing the role of the Labor Code and opening more room for labor issues to be decided through negotiation. The more the law promotes collective bargaining, the more the limits of the system become visible because, without the effective support of its category, the corporatist trade union may not be as competent to negotiate than a trade union in a freedom of association system.

Another way to promote change from within the system is to change the way labor courts regulate and control unions. These courts could, for instance, start justifying the recognition of representation to one trade union not on seniority, but on the trade union with more associates. In other words, the courts can challenge the statutory provisions of the system, bypass the control of the Ministry of Labor on the creation of unions, and find support in the constitutional provisions that guarantee freedom of association in Brazil.²⁰³

203. We are not proposing that judges can decide against the law. The Brazilian Constitution itself recognizes the principle of freedom of association, giving room to arguments that embrace more freedom of association inside the corporatist system.

While these two proposals suggest that there are measures that can be used to weaken the system, the most recent reforms implemented in Brazil seem to have done just the opposite. The recent statute incorporating the central trade unions into the system and granting them the right to receive the mandatory trade union due constitutes a step back in this process. Now, a powerful political player is also benefiting from the system, and has already joined the choir of those opposing reforms.

B. The Supply Side of Reforms

As explained above, changing things at the demand side alone will not be enough to promote reforms. Reforms will happen only if the supply side is ready to meet these demands. In this regard, the government needs to perform a central role in any trade union reform. The question is how to overcome the existing resistance inside the government against possible reforms.

One first step to reduce resistance within the executive branch is to avoid appointing people who are connected to trade unions, specially for the Ministry of Labor, which ideally should play a major role in promoting change. Labor administration and labor regulation needs to be placed outside the corporatist dynamic. However, this is not what is happening in Brazil. The more recent personnel in the Ministry have had close relations with trade unions. For instance, the Minister of Labor, from 2005 to 2007, Luiz Marinho, was the former president the largest Brazilian central trade union, CUT. From 2007 until now, the current minister, Carlos Lupi, is from the same political party of the president of the second largest central trade union: Union Strength (Força Sindical).

When the top eschelons of the executive branch are filled with appointments that are politically connected with trade unions, the Ministry of Labor becomes incapable of assessing reforms according to the broader social interests. Instead, people occupying these positions tend to side with the trade unions. For example, recently, the Ministry of Labor secretary, Luiz Antonio de Medeiros, a former president of Union Strength, affirmed that Brazil does not need to ratify ILO Convention No. 87 on freedom of association, because the country already guarantees plenty freedom of association.²⁰⁴ In addition, the proximity of members of the Ministry of Labor with one central trade union hampers the position of the Ministry as the reform articulator, since other trade unions will distrust its partiality.²⁰⁵

204. Agência Brasil, *Secretário afirma que no Brasil "há ampla e total liberdade sindical,"* (June 26, 2008), available at <http://www.direito2.com.br/abr/2008/jun/26/secretario-afirma-que-no-brasil-ha-ampla-e-total-liberdade-sindical> (last accessed on Jan. 27, 2009).

205. That is exactly what happened in the Labour National Forum. According to Almeida, "A maioria dos representantes do governo no FNT é formada de ex-sindicalistas, identificados com a

The executive branch should perform a major role in designing a new trade union system, considering not only the ideal of guaranteeing freedom of association, but also the reality of the Brazilian context and its limitations. The ILO can be an important force in pushing for reforms, but the executive branch should be in a better position to define what is better for the country. In this regard, looking at what is happening in other Latin American countries may be useful, because, as Trebilcock and Davis argue:

reference points for legal reforms in many developing countries may not be legal regimes, substantive or institutional, that prevail in particular developed countries but more appropriately legal arrangements that prevail in other developing countries that share important aspects of the history, culture, and institutional traditions with countries embarking upon such reforms.²⁰⁶

C. *Piecemeal Reforms*

A crucial aspect of the reform process is the timing of when reforms should take place and how they should be structured. One option that reformers have is to wait for a “window of opportunity” and then implement all encompassing reforms in a short period of time. A window of opportunity can be defined as an “abnormal time” when something unexpected happens, reducing obstacles and weakening resistance to reforms. One of the advantages of this strategy is that it minimizes the risk of opposition, and is more difficult to reverse.²⁰⁷ The other option is to implement reforms during “normal times” through gradual changes. In these cases, the sequencing of the reforms constitutes one of its most important elements.²⁰⁸ According to Roland, “an appropriate sequencing of reforms would provide demonstrated successes to build upon, thus creating constituencies for further reforms.”²⁰⁹ As the trade union reform is part of the more general labor reform, a successful trade union reform could open the space to a future labor law reform. However, these piecemeal reforms can also do exactly the opposite, creating constituencies that will oppose further changes.²¹⁰ The “reform trap” is a major risk of piecemeal reforms.

Where should we go from here? Despite the risks of piecemeal reforms, we suggest that this would be the preferable path in the Brazilian case. First, it does not seem wise or feasible to ask reformers to wait for a

representação cutista e, portanto, vistos com suspeita por representantes de outras centrais e do empresariado.” G.R. de Almeida, *O governo Lula, o Fórum Nacional do Trabalho e a reforma sindical*, 10 REV. KATÁL 54, 57 (2007).

206. Davis & Trebilcock, *supra* note 194, at 946.

207. Gerard Roland, *The Political Economy of Transition*, 16 J. ECON. PERSP. 29 (2002).

208. *Id.*

209. *Id.*

210. Prado, *supra* note 4.

“window of opportunity” that may never come to be, or when it does it may not be recognized as such by reformers.²¹¹ Within the context of normal times, all encompassing reforms are not feasible due to path dependence problems. The corporatist system cannot be replaced immediately by a freedom of association system. If a Constitutional amendment just revoked the rule of *unicity* from the Constitution, it would not immediately create representative trade unions to act in a new freedom of association system. Instead, there would be chaos in the labor relations system as the system would no longer have the rules of the corporatist system, but would still lack representative trade unions. Workers would not know what trade union would be representing them and employers would not know with which trade union they should negotiate.

When President Lula’s government proposed the trade union reform in the National Labor Forum, some of the critics claimed that the reform did not create a freedom of association system.²¹² The government argued that without a transition from the corporatist past to a future with freedom of association, there would be chaos and the workers would pay high costs. Thus, according to the proposal two pillars of the corporatist system would be replaced gradually: the mandatory dues and the *unicity* rule. Concerning the mandatory due, since trade unions depend on these dues, abolishing them at once would threaten their economic survival. The gradual extinction of this type of due (over a five year period, for example) would prepare trade unions to look for another sources of income. This should not eliminate the possibility of guaranteeing mandatory dues dependent upon collective bargaining or the performance of the union in representing the workers, but it moves away from the current system in Brazil, in which *all* unions who have official representation (granted by the state) benefit from mandatory dues regardless of their performance.

Concerning the *unicity* rule, the reform’s process is more complex. Brazil has now approximately 24,000 trade unions. In this context, revoking the *unicity* rule demands new rules about the negotiation process. Without some transitional rules, there would be chaos. Thus, any transition needs to indicate who will be in charge of negotiation of labor relations the day after the reform, considering that the reform will not transform eighty years of corporatist trade unions in representative trade unions overnight. A transitional period is then necessary to allow the corporatist trade union to make the transition from a corporatist system to a

211. Prado and Trebilcock, *supra* note 1, at 341–80.

212. See CORREIO DA CIDADANIA, ENTREVISTA A RICARDO ANTUNES. BRASIL: REFORMA SINDICAL É UM DESASTRE PARA OS TRABALHADORES (Santiago, Mar. 30, 2005) (last accessed Apr. 7, 2009), at http://www.galizacig.com/actualidade/200503/correio_brasil_reforma_sindical_desastre_trabalhadores.htm.

freedom of association system. During this period, the goal is that the less representative trade unions will not survive due to low membership, low number of supporters, and economic difficulties.

To deal with these problems, the government's proposal was that during this transitional phase negotiations would be concentrated in central trade unions.²¹³ The advantage of the centrals was that they hold some representativeness as they have been created outside the corporatist system. The risk of this option is that it could create a similar problem to the one that currently exists, i.e., guaranteeing privileges that will distort the incentives to act in the best interest of workers. In other words, the central trade unions could simply become a functional equivalent to the current trade unions. As a result, Brazil would simply replicate the existing problem in a new institution. However, trade unions fiercely opposed the government's proposal, and as a result the idea was not implemented.²¹⁴

As any option will have its advantages and disadvantages, two important conditions should be fulfilled in any proposal for reform: to have one or more associations ready to represent workers on the next day after the reform and to create clear rules about who will negotiate. Moreover, it should be clear that these rules are transitional (i.e., there are sunset clauses) and will only be valid until the system is ready to operate according to the freedom of association principles. Hopefully, at this point, the most representative trade unions, the ones with the largest memberships or with more supporters, will represent workers.

Another reason to promote piecemeal reforms is the fact that there is no "one size fits all" trade union model concerning freedom of association.²¹⁵ We are aware of the rules that violate this principle and of experiences that have succeeded in other countries. However, each country has to find its own model. In trying to find which model suits Brazil,

213. See Fórum Nacional do Trabalho. Reforma Sindical Proposta de Emenda à Constituição—PEC 369/05. Anteprojeto de Lei. Ministério do Trabalho e Emprego. Brasília, 2005, available at http://www.mte.gov.br/fnt/PEC_369_de_2005_e_Anteprojeto_de_Reforma_Sindical.pdf (last accessed Mar. 7, 2009). For an analysis of the decision reached in the Forum, see R. Radermacher & M. Waldeli, *Mudanças no Cenário Sindical Brasileiro sob o Governo de Lula*, 211 *NUEVA SOCIEDAD* 12 (2007).

214. See E. Sardinha, *Reforma acirra divisão entre governistas*, available at <http://www.adunesp.org.br/reformas/sindical/Reforma%20Sindical%20-%20Entrevista%20Sérgio%20Miranda%20-%202007-03-05.htm> (last accessed Mar. 7, 2009).

215. This is the case for most, if not all, institutional reforms. As Trebilcock and Davis explain, "while empirically there appears to be an increasingly firm consensus that institutions, including legal institutions, are an important determinant of economic development (and probably other aspects of development), there is much less consensus on what an optimal set of institutions might look like." Trebilcock & Davis, *supra* note 189, at 945. According to the author, "There is growing evidence that desirable institutional arrangements have a large element of context specificity, arising from differences in historical trajectories, geography, political economy, or other initial conditions. . . . Consequently, there is much to be learned about what improving institutional quality means on the ground." *Id.*, at 943–44.

piecemeal reforms allow for experimentation and trial and error.²¹⁶ This is a way to define the system that suits Brazil by experiencing the changes and challenges that will be brought by the initial reforms.

V. CONCLUSION

Based on the assumption that institutions matter for development, we ask in this article why countries do not get rid of bad and dysfunctional institutions. We address this question by analyzing a case study: the trade union system in Brazil. In the first part of the article, we analyze the corporatist trade union structure in Brazil, showing that it is immersed in problems and that a system of freedom of association would be preferable. From a development perspective, a trade union structure founded on the principle of freedom of association can be desirable as a value in itself, or as an instrument to promote and protect other values such as democracy and economic growth.

If this is the case, why has Brazil not moved away from the corporatist trade union system? Here, the main argument is that different groups that have taken advantage of the corporatist structure have continued to resist changes in the system. The main beneficiaries have been trade unions, who are the very same groups created by the system. This is an example of a "reform trap": an initial reform that creates obstacles to future ones. While the Brazilian Constitution recognizes freedom of association, it maintains the corporatist structure. The consequence is that any reform of this system is especially difficult, because of the opposition of the trade unions that are currently authorized legally to represent workers. These unions have proved able to turn the corporatist system into a structure that serves to guarantee their interests while working without any effective participation of workers.

Where should we go from here? Is there a way out of this deadlock? We argue that if there is indeed a way, it is likely to be a multi-pronged strategy. First, the demand side of the reform needs to be strengthened. Workers that do not support the current system need to be informed and mobilized and need to become active in lobbying for changes. The ILO can play a major role in providing workers with information about freedom of association and helping national institutions organize, while pressing the Brazilian government for changes. On the supply side, the Brazilian government needs to reduce resistance to reform by finding loci of power that are more prone to change. While the legislature is too deeply embedded in the trade union system (as political parties are supported by

216. Prado and Trebilcock, *supra* note 1, at 341–80.

these institutions), the executive branch and the judiciary are not. Thus, we suggest that these would be two strategic places where resistance to reform could be significantly reduced. Changing the behavior at the Ministry of Labor and within Labor Courts could go a long way in changing the system, as these two bodies have the power to start smaller changes at the regulatory and jurisprudential levels that could potentially affect the rest of the system.

Finally, the reform process must be a gradual process for two reasons. First, revoking the *unicity* rule cannot immediately create representative trade unions in Brazil, and workers will need an alternative representation system ready to replace the current system. A transition process will be necessary to reorganize the trade union system: expelling trade unions with very low representativeness and identifying trade unions with higher representativeness. Second, since Brazil has never had a freedom of association system, a transitional period will help reveal the country's specificities and needs in order to delineate the country's own specific freedom of association model.