



Licenciado sob uma licença Creative Commons
ISSN 2175-6058
DOI: <http://dx.doi.org/10.18759/rdgf.v22i2.1962>

A UNION LEGAL ASSISTANCE: A FUNDAMENTAL RIGHT OF ENFORCEMENT OF ACCESS TO JUSTICE*

A ASSISTÊNCIA JURÍDICA SINDICAL: UM DIREITO FUNDAMENTAL DE CONCRETIZAÇÃO DO ACESSO À JUSTIÇA

José Roberto Freire Pimenta
Simone Soares Bernardes
Mauricio Godinho Delgado

ABSTRACT

This article analyzes the union legal assistance institute as an effective tool for the concrete access to justice and your importance lies in the pressing need to implement means that can guarantee real access to justice, especially for the low-income. The legal-theoretical line of argumentative research was adopted, through the hypothetical-deductive method of investigation, in the analysis of legislation and doctrine on the subject. The main conclusion of the work is that union assistance has an essential role in the context of a Democratic Rule of Law, as a guaranteeing mechanism of material equality and other fundamental rights of workers.

KEYWORDS: Access to justice. Union legal assistance. Fundamental rights.

RESUMO

O presente artigo analisa o instituto da assistência jurídica sindical como uma efetiva ferramenta para a concretude do acesso à justiça e sua importância está na necessidade de implantação de meios que garantam o real acesso à

justiça, notadamente do hipossuficiente. Foi adotada a linha jurídico-teórica de pesquisa argumentativa, através do método de investigação hipotético-dedutivo, na análise da legislação e da doutrina sobre o tema. A principal conclusão do trabalho é a de que a assistência sindical ostenta papel essencial dentro de um Estado Democrático de Direito, enquanto mecanismo garantidor da isonomia material e dos demais direitos fundamentais dos trabalhadores.

PALAVRAS-CHAVE: Acesso à justiça. Assistência jurídica sindical. Direitos fundamentais.

INTRODUCTION

Historically, workers have always been in a position of disadvantage regarding the entrepreneur, who holds the productive means of the contemporary socioeconomic system, thus forcing them to alienate their work as a means of subsistence.

This financial and social dependence in the employment context also affects access to justice by the underprivileged worker, who encounters physical, financial, and technical obstacles on his or her way. Such obstacles range from difficulties concerning mobility and availability to attend hearings (the employee lives from his or her daily work), as well as - and, in our study, more prominently - the lack of technical legal knowledge and the financial difficulties to hire a lawyer.

It is true that the State is constitutionally obliged to guarantee access to justice, and it does abide by it by means of Public Defenders¹. However, it is also known that such body does not have sufficient structure to meet the demand. On the other hand, the *jus postulandi* is not consistent with the current legal and procedural complexity, not being thus able to ensure effective access to a fair trial which ensures equality between the parties.

In this context, departing from the premise that unions have a relevant role in the enforcement of workers' fundamental rights, notably in a democratic Rule of Law, it is important to analyze the importance of union legal assistance as a mechanism to ensure access to justice, minimizing the abyss between the right of action and its effective implementation for underprivileged workers.

1. THE CONTEMPORARY CONCEPTION OF ACCESS TO JUSTICE: INSTITUTIONAL GUARANTEE FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

Defining the access to justice institute is not and has never been an easy undertaking. In a classic book on the subject, Mauro Cappelletti and Bryant Garth already taught that:

“The term ‘access to justice’ is admittedly difficult to define, however it serves to determine two basic purposes of the legal system - the system by which people can claim their rights and/or resolve their disputes under the auspices of the State, which must first be truly accessible to all; and second, it must produce results that are individually and socially fair” (CAPPELLETTI; GARTH, 1988, p. 3).

The institute of access to justice can be understood in a general, strict and full sense.

In the general sense, the term “access to justice” is seen as synonymous with social justice, that is, it is related to the very realization of the universal ideal of justice. This notion was initially incorporated in the *Encyclicals Quadragesimo Anno*, of May 15, 1931, and *Divini Redemptoris*, of March 19, 1937. Later, the expression “social justice” came to be adopted by many other norms and documents, as “a legal-political-sociological category on which there is still no common understanding”. (LEITE, 2010, pp. 45/46). In the strict sense, the term is conceived in its dogmatic aspect of access to a jurisdiction, granting thus every individual the right to file suit before the Judiciary. Finally, in the full sense, access to justice incorporates the spirit of the theory of fundamental rights and of the legal, political, and social scopes of the judicial procedure. Ultimately, access to justice assumes the role of access to law, to a fair legal order, ensuring thus access to courts and alternative (mainly preventive) mechanisms as well as legal information, guidance and to the necessary material and psychological support for the exercise of those rights (LEITE, 2010, pp. 45/46).

The right of action arises precisely in the context in which the State attracts to itself the monopoly of jurisdiction to eliminate “justice by one’s own hands”, assuming the prerogative to resolve conflicts between parties

from an impartial standpoint. The evolution of the theory of the right of action and the necessary State structure to solve conflicts, along with the classic separation of powers adopted by Western States, elevated the right of action to the category of constitutional right (NAHAS, 2018, p. 30).

In Bobbio's words:

“When the rights of man were considered only as natural rights, the only possible defense against their violation by the State was an equally natural right, the so-called right of resistance. Later, in the Constitutions which recognized the legal protection of some of these rights, the natural right of resistance was transformed into the positive right to file suit against the State bodies themselves” (BOBBIO, 2004, p. 51).

Further, the Universal Declaration of Human Rights (1948) enshrined in its articles 8 and 10 the right of access to courts:

Article 8

Everyone has the right to an effective remedy granted by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. (...)

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Similarly, the American Convention on Human Rights regarding Economic, Social and Cultural Rights (Pact of San Jose de Costa Rica), ratified by Brazil, established the access to justice, in its article 8, item 1, in the following terms:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

The 1988 Constitution establishes as well the guarantee of access to justice, raising it to the category of fundamental right, in its art. 5, XXXV:

“the law shall not exclude from the Judiciary’s assessment any violation or threat to a right” (BRASIL, 2021a).

The concept of access to justice has not remained static over time. It has undergone profound changes throughout history, as the paradigms of the State have also evolved.

Norberto Bobbio (BOBBIO, 2004, p. 229) affirms that human rights, despite having been considered as natural since the beginning, were not established once and for all, nor together. As fundamental as they are, they are still historical rights, that is, born in certain circumstances, characterized by struggles in defense of new freedoms against old powers.

Under the paradigm of the Liberal State of the 18th and 19th centuries, characterized by typically individual rights, also known as the first generation of fundamental rights, the process and procedure reflected this same individualistic philosophy, when procedural formalism was the rule.

It was in this ideological environment, in the 19th century, that the abstract theory of action was conceived, ensuring the defense in court of all rights in case of threat or violation. The autonomy of the right of action was thus affirmed vis-a-vis substantive rights. This allowed all persons, as equals before the law, to resort to jurisdictional protection in order to obtain the enforcement of their rights. As a result, procedural law was abstracted from substantive law, as a means of ensuring broad and general access to jurisdictional protection (PIMENTA; PORTO, 2007, p. 96).

It was understood that, despite access to justice being a natural right, “natural rights did not need State action for their protection” (CAPPELLETTI; GARTH, 1988, p. 4). The State, therefore, limited itself to ensuring the formal right of access to justice, in a passive posture. It merely sought to prevent this right from being violated by others. The State was not concerned with the practical impossibility of exercising the right of access to justice by some individuals. Therefore, justice was restricted to those who could afford it (CAPPELLETTI; GARTH, 1988, p. 4).

The achievements arising from this first milestone of contemporary constitutionalism are undeniable. It must be highlighted, within our object of study, the elaboration of the theory of action, which “played an important role in the fight against privileges and injustices common

to the feudal society and against abuses and arbitrariness of Absolute States” (PIMENTA; PORTO, 2007, p. 97).

However, the absence of State intervention did not bring greater social justice. The difficulty in obtaining essential assistance by individuals gave rise to the need for an active role of the State in the promotion of rights, culminating thus in the second generation of fundamental rights (DELGADO, 2015b, p.17).

This new landmark was characterized by the creation of social and economic rights, amongst which labor rights, as well as by the construction of the paradigm of the Welfare State. The State began to perform an active role, intervening in the economy, regulating markets and offering social benefits and public services, with the purpose of ensuring material equality as well (and not just formally, as in the paradigm of the Liberal State) (PIMENTA; PORTO, 2007, p. 99).

Along these lines, Canotilho (CANOTILHO, 1992, p. 501) clarifies that access to justice was no longer limited to “defensive or guaranteeing” aspects, as in the protection of rights in courtrooms, but that it also encompassed the State’s duty to provide equal opportunities:

“The guarantee of access to courts also presumes the attribution of certain benefits, insofar as the State must create adequate judicial bodies and procedures (fundamental rights which depend on the organization and procedure) and ensure benefits (judicial support, legal representation, total or partial exemption from payment of costs), which intend to avoid the lack of access to justice due to insufficient economic means (CRP, article 20). Access to justice is materially conditioned by the principle of equal opportunities” (CANOTILHO, 1992, p. 501).

With the birth of the democratic Rule of Law, there has been a true and innovative paradigm of organization and management of civil and political society (State). In this new conceptual paradigm, an also new conceptual tripod is inaugurated: the human person and his or her dignity assume the normative centrality and political society begins to be conceived as democratic and inclusive, alongside civil society itself (DELGADO, 2015a, p.42).

The peculiar aspect of the democratic Rule of Law paradigm, therefore, is evident in the perception of law as a civilizing instrument, and not as an instrument of exclusion and segregation (DELGADO, 2015a, p. 42).

It is in this context that access to justice emerges as a fundamental right, perhaps one of the most basic of them, given its indispensability in contemporary societies, which are characterized by conflict born from the breach of legal duties. The fact is that the mere proclamation of rights would be devoid of practical meaning and effect if the instruments for their effective claim were absent. “Therefore, the jurisdictional protection to be provided through the justice system enables the materialization of substantive rights enshrined in the legislation” (COUTO; TEIXEIRA, 2021).

Thus, from the perspective of contemporary constitutionalism, access to justice assumes the character of an institutional guarantee² “which aims to provide a special type of protection for fundamental rights, in situations of their potential violation” (PAIXÃO, 2018, p. 174).

In the conclusion by Mauro Cappelletti and Bryan Garth:

“Access to justice can, therefore, be seen as the fundamental requirement – the most basic of human rights – of a modern and egalitarian legal system that intends to guarantee, not just proclaim rights” (CAPPELLETTI; GARTH, 1988, p. 5).

In labor relations where the natural economic and social imbalance between the parties is rather evident, access to justice emerges as one of the most important means of enforcement of workers’ fundamental rights - hence, the relevance of its study, - especially about its effective implementation.

Along these lines, it is important to highlight the research by Mauro Cappelletti and Bryant Garth on access to justice, in the context of a wide-ranging reform, encompassing three moments of renovation.

The first moment is related to the economic obstacles to the access to justice, concerned with the problems which underprivileged people face to defend their rights (CAPPELLETTI; GARTH, 1988, pp. 12-18).

These problems have two natures: judicial and extrajudicial. From an extrajudicial perspective, it is about the need to inform these people about their rights and about the provision of legal assistance in case

of conflict resolution before non-judicial bodies. From the judicial perspective, mechanisms should be enforced so that underprivileged workers can adequately defend these rights. To overcome the first barrier, the movement defends the creation of informative bodies on social rights. To overcome the second, the elimination or reduction of the judicial costs, including attorney's fees (SOUTO MAIOR; SEVERO, 2017, p. 300).

The second moment, also known as collectivization of the process, proposes an adequate representation of *lato sensu* collective interests, including diffuse, collective (*strictu sensu*) and homogeneous individual interests. Finally, the third moment, also known as the access to justice approach, encompasses several mechanisms and institutes for the improvement of conflict resolution. This method does not annihilate the techniques of the first two moments of reform but considers them as just a few of a series of possibilities for improving access to justice (CAPPELLETTI; GARTH, 1988, pp. 19-27).

Given the object of this article, we will focus on the first moment of reform, named by its creators "judicial assistance". To do so, we will proceed to explain the concept, purpose, and legal nature of this institute.

2. FULL LEGAL ASSISTANCE, JUDICIAL ASSISTANCE AND EXEMPTION OF COURT FEES. NECESSARY DISTINCTIONS.

Essentially linked to the guarantee of access to justice is the principle of full and free legal assistance, as established in item LXXIV of art. 5 of the Federal Constitution of 1988. To further understand the issue, we will provide an analysis, albeit brief, of its historical evolution in our legal system.

The Brazilian Constitution of 1934 was a pioneer among Western countries in establishing the duty of public entities to provide judicial assistance to the underprivileged population, and in creating public bodies which would assume the role of providing this service. In this sense, establishes art. 113, XXXII: "The Union and the States shall grant judicial assistance to those in need, creating for this purpose special

bodies and ensuring the exemption from costs, fees and stamps.” The 1934 Constitution, under the strong influence of the Weimar Constitution, was intended to represent a rupture from the liberal Rule of Law model. It intended to implement the new Social State paradigm which was spreading in Europe. This paradigm was politically linked to democracy and also characterized by the search for the enforcement of social rights that emerged in that period” (ALVES, 2010, p. 332).

The 1937 Constitution, consistent with its authoritarian character, was silent about judicial assistance to the underprivileged. However, during its period, the Code of Civil Procedure of 1939 regulated the matter in its articles 68 et seq., establishing, for example, the requirements for obtaining exemption from litigation costs, which should be requested before the judge. The code also regulated the payment by the State of attorney fees in these situations. At the same time, the 1943 CLT appointed the unions as responsible for the provision of judicial assistance to their members (art. 514, letter “b”, of the CLT) (ROSA E SILVA, 2013, pp. 76-77).

With the country’s democratization after the end of World War II, the 1946 Constitution was promulgated in the spirit of reconciliation of the liberal order and the construction of the Social State established in the 1934 Constitution but had not yet incorporated the broader horizons of the European Welfare State of the post-war period. The 1946 Constitution, despite reestablishing the right to judicial assistance, under a practical perspective, was not sufficient to significantly change the situation, remaining only as an abstract rule indicating the recognition of the duty of the State to provide such public service (ALVES, 2010, p. 333).

It is important to highlight that the 1946 Constitution was that which effectively ensured the general right of access to the Judiciary Power, in its article 141, paragraph 4: “The law cannot exclude from the Judiciary Power’s assessment any violation of individual rights” (ROSA E SILVA, 2013, pp. 77-79).

In the following Constitutions of 1967 and 1969, judicial assistance continued to be established, without any evolution regarding the provision: “Assistance will be granted to those in need, in accordance with the law” (respectively, art. 150, paragraph 32 and art. 153, paragraph 32) (MOREIRA, 2021, p. 200).

With the 1988 Constitution, Article 5, LXXIV, established that “the State shall provide full and free legal assistance to those who prove to lack sufficient financial resources”.

Brazil is one of the few countries which refers to the institute of legal assistance in its very constitution as a fundamental right. It is also worth noting that the Brazilian constitutional text innovated by imposing on the State the obligation to provide legal assistance, abandoning the restricted notion of judicial assistance, which is limited to litigation free of charge. Therefore, art. 5, item LXXIV, does not use the term “judicial assistance”, but rather adopts the expression “full legal assistance”, expanding its scope, which then includes not only representation in court, but also counseling, legal information, including for extrajudicial legal acts, such as notarial acts. More than that, the expression “full” means exemption from any payments for the practice of these acts (MOREIRA, 2021, p. 205).

Legal assistance is, therefore, a genre that encompasses the provision of legal services free of charge in two modalities: a) judicial assistance, which corresponds to the representation by a lawyer before a judge; and b) extrajudicial legal assistance, which consists of providing legal guidance to individuals about their rights (ROSA E SILVA, 2013, p. 50).

Another important distinction to be made regards the institute of legal assistance and the exemption of court fees, which, despite being closely related, are not to be confused.

The exemption of court fees consists in the right to provisional release from procedural expenses during an action for those who do not have the financial conditions to bear the costs of a litigation in court. It is, therefore, an institute of pre-procedural law. Judicial assistance is, however, related to a State or parastatal organization, which, along with the temporary exemption from expenses, consists in the designation of an attorney who will represent the individual in his or her lawsuit. It consists thus in an institute of administrative law. The judge will have the power to grant or deny the exemption of court fees; judicial assistance is applied according to the rules established in the Judicial Organization Act, which establishes the competent court for such (ROSA E SILVA, 2013, pp. 82-83).

It is important to clarify, as pointed out by Raphael Miziara, that there is not much technical rigor in the doctrinal, legal, and even jurisprudential

scope as to the use of the expressions “full legal assistance”, “judicial assistance” and “exemption of court fees”. These institutes, as explained above, have quite different characteristics. The author highlights, as an example, *Súmula*³ 463 of the TST, which, mistakenly, uses the expression “free legal assistance” to refer to the institute of “exemption of court fees” (MIZIARA, 2017. p. 1).

Once the details of each of these important institutes concerning access to justice are clarified, it becomes necessary to face an essential question to move forward in this study: the fundamental right to full legal assistance, as established in item LXXIV of art. 5 of the Constitution, also covers union assistance?

For this purpose, we will initially proceed to an analysis of the historical context that gave rise to union assistance, and then understand the nature of the institute and its importance within a democratic Rule of Law.

3. BRIEF HISTORICAL OUTLINE OF UNION ASSISTANCE

In addition to the rules established in the Constitution, Act n. 1,060/1950 also covers the topic of legal assistance provided by the State (the statute refers to “judicial assistance”).

As of the Code of Civil Procedure of 2015, most of the topics on exemption of court fees were removed from Act n. 1,060/1950 – which still applies, but in fewer hypotheses – and were included in the body of the Code.

In the area of labor law, in 1943, the CLT (Consolidation of Labor-related Legislation) initially assigned to unions, in its article 514, letter b, the duty to provide *judicial assistance* to members. Subsequently, the matter was regulated in articles 14 to 20 of Act n. 5,584/1970, imposing on unions the duty to provide free judicial assistance to all workers from the category who were deemed in a state of financial struggle.

It is worth noting that, in this regard, the enactment of Act n. 5,584 revoked art. 514, b, of the CLT, which limited union judicial assistance only to members, expanding therefore this provision of services to the category (AROUCA, 2019, p. 194).

As Mauricio Godinho Delgado (DELGADO, 2019, p. 1607) explains, the duty to provide judicial assistance assigned by the CLT to unions (art. 514) was not included in the 1988 Constitution: “such activities are not exactly duties, but only functions and prerogatives which may naturally be undertaken by unions”.

This provision could not be understood otherwise, as it was issued under the influence of the corporatist doctrine which understood that unions should operate as part of the State body. As of the Federal Constitution of 1988, two strong reasons which support the abandonment of the idea that unions must provide judicial assistance stand: the creation of the Public Defender’s Office as the institution responsible for offering legal assistance to the underprivileged (art. 5, LXXIV) and the presence of the principles of union freedom and autonomy in art. 8 of the Constitution, which prevent any interference by the State in unions (ROSA E SILVA, 2013, pp. 166-167).

It is important to note that article 592, item II, letter a, of the CLT determined that union dues paid by workers should obligatorily finance legal assistance services (and not judicial assistance) to its members, which led part of the doctrine to defend that legal assistance would be the union’s duty if the compulsory union dues persisted (ROSA E SILVA, 2013, pp. 166-167).

The labor law reform of 2017 extinguished the obligation of payment of union dues, from which one may conclude that currently, from any standpoint of analysis, it is not possible to defend the union’s duty to provide judicial assistance services (or even legal).

However, although it does not strictly consist in obligation of the unions, it is necessary to proceed to the analysis of this institute from the perspective of the underprivileged worker, who is entitled to the fundamental rights established by the Constitution. That is the object of the next item.

4. UNION LEGAL ASSISTANCE AS AN INSTRUMENT FOR THE ENFORCEMENT OF THE FUNDAMENTAL RIGHT OF ACCESS TO JUSTICE

The Federal Constitution of 1988 innovated by creating a model to be adopted at the national level for the provision of legal assistance as established in art. 5, item LXXIV. The Constitution has listed, therefore, in the chapter referring to the structure of the Judiciary, a list of institutions defined as “essential functions to justice” and, amongst them, the Public Defender’s Office. In this sense, art. 134 establishes: “Art. 134. The Public Defender’s Office is an essential institution to the jurisdictional function of the State, responsible for the legal guidance and protection, in all degrees, of the underprivileged, according to article 5, item LXXIV” (ALVES, 2010, p. 338).

However, even though the Public Defender’s Office has been assigned by the Constitution the duty to provide legal assistance to the underprivileged, in reality, it is well known that this institution does not have sufficient structure for this service, notably in the labor sphere, in which it intervenes little or, in the case of the Federal States’ public defenders, never (ROSA E SILVA, 2013, p. 98).

On the other hand, it is known that in the Labor Justice system, the parties are allowed to file a suit without lawyer’s representation, at least in the first degree, by virtue of the *jus postulandi*, established in article 791 of the CLT and whose scope is outlined in *Súmula 425* of the TST.⁴

Although *jus postulandi* is an important instrument that helps reduce economic obstacles to access to justice in the labor field, it is no less true that the practice shows that technically unattended parties end up being placed in a position of procedural inferiority, in a context characterized by the presence of individuals who are already in an unequal economic and social position.

There is no doubt about the unfavorable condition in which the employee who makes a personal claim is submitted: without technical knowledge of substantive and procedural law, he/she claims against an employer, usually represented by a lawyer, who does indeed have the necessary knowledge. “It’s an unequal battle, due to the enormous

disproportionate nature of the weapons available to the parties” (PIMENTA; PORTO, 2007, p. 104).

In addition, it seems that there is a great repressed demand in the poorest spheres of the population, for substantive rights and their respective claims which are not filed and for legal acts which are not practiced, of which birth registration is a clear example. The phenomenon has numerous and varied causes, which begin with the lack of access to information and pass by financial and physical difficulties, psychological and cultural obstacles (MOREIRA, 2021, p. 207).

Finally, the State does not enforce any policy to implement the constitutional principle of access to jurisdiction for underprivileged workers, especially for labor-related lawsuits. On the contrary, the recent legislative changes promoted were exactly in the sense of imposing greater barriers to access to justice, especially the Labor Reform Act, which established, for example, the mandatory payment of court and lawyer fees, including for the litigant who benefits of exemption from those fees⁵.

It is also worth noting that the same Labor Reform carried out by Act n. 13.467/2017 also revoked paragraphs 1 to 3 of article 477 of the CLT – provisions that, since Act n. 5.584/1970, had established the possibility for workers’ unions to provide assistance to the employee in the termination of the employment contract of over one year of duration, thus ratifying the payment of his or her severance pay. Thus, an important mechanism for accessing legal information, which was guaranteed to every employee in the category, was also abruptly erased from the legal order.⁶

Based on all these elements, the irreversible conclusion is that the individuals who mostly need access to the Judiciary, either because of their state of poverty, or because of the difficulty in accessing information, do not have the conditions to effectively enforce their rights.

In this scenario, the legal assistance provided by unions assumes an extremely important role as a mechanism for the access of underprivileged workers to justice.

In fact, it seems necessary to read article 14 of Act n. 5.584/70 under a constitutional light to understand that the reference to “judicial assistance” of unions should be read as “full legal assistance”, in the sense of providing underprivileged workers not only with representation in

court by a lawyer, but also legal information on their rights, also as a preventive attitude against litigation.

It should be noted that, at the time of the enactment of Act n. 5.584/70, the concept of full legal assistance did not yet exist, which as previously highlighted, was established only in the Constitution of 1988, so the interpretation that the legislator intended to limit the scope of such an important institute has no basis.

This understanding is corroborated by the fact that article 592, item I, letter “a” and item II, letter “a”, of the CLT, when defining the objectives of the union contribution, establishes that its value will be allocated, among other purposes, for the provision of “legal assistance” by the workers’ unions and for “technical and legal assistance” by the employers’ unions.

Although it is not the unions’ duty, it is undeniable the importance of union assistance as a crucial means to implement the fundamental right of access to justice, especially for underprivileged workers.

In this regard, José Carlos Arouca highlights how union assistance was important in the construction and consolidation of the Labor justice system, an unmistakable result from the work of union lawyers, “*pioneers in the construction of labor law and it’s shaping according to the principles of social justice*” (AROUCA, 2019, p. 198).

The importance of the provision of legal assistance services by unions is also stressed by the Committee on Freedom of Association of the ILO, in its conclusions 744 and 745:

744. Neither legislation nor the application thereof should limit the right of employers’ and workers’ organizations to represent their members, including in cases of individual labor complaints.

745. The right of workers to be represented by an official of their union in any proceedings involving their working conditions, in accordance with procedures prescribed by laws or regulations, is a right that is generally recognized in many countries. It is particularly important that this right should be respected when workers whose level of education does not enable them to defend themselves adequately without the assistance of a more experienced person, are not permitted to be represented by a lawyer and so can rely only on their union officers for assistance (OIT 2018, p. 142).

Labor protection has its origins in the union movement, which, in turn, has always been characterized as one of the main sources of improvement of working conditions, whether by means of collective bargaining or by the possibility of manifestation, action and pressure which union entities possess, including the filing of lawsuits, because of union legal assistance.

One must say: the union is not just a reaction of a particular social group to the changes brought about by industrialization and globalization, it may and should be understood as an agent of change in a global society, *“a privileged instrument for the transformation of the world”* (MASSONI, 2007, p. 36).

Thus, in the exercise of its condition as a social agent, to whom the Constitution has granted the very important role of defending workers' rights, both in the administrative and judicial spheres (art. 8, III, CF/88), unions will also be entitled to implement the constitutional right to access to justice, which has full legal assistance as its corollary.

In this scenario, the legal assistance provided by unions assumes an extremely important role as a mechanism for the access of underprivileged workers to justice, whether in the assistance provided to certain workers in individual or multiple claims (through the traditional procedural mechanism known as joinder), or by means of procedural substitution, as established in article 8, III, of the Federal Constitution and by means of the microsystem of protection of collective rights jointly implemented in our country by the Consumer Protection and Defense Code (Act n. 8.078/1990, articles 90, 110 and 117) and by the Public Civil Action Act (articles 1, V, and 21).⁷

As established in article 5, LXXIV, of the Constitution, full legal assistance is an instrument for the enforcement of the democratic Rule of Law, as it assumes, at the same time, the role of a fundamental right of the individual and that of a mechanism to achieve social justice through State action (ROSA E SILVA, 2013, p. 47).

However, it is important to understand that, despite the State being the protagonist of the enforcement of constitutional promises, it is not the only one which is responsible for the arduous task of making fundamental rights real and tangible, amongst which resides full legal assistance.

As Barbosa Moreira explains, “nothing authorizes us to suppose that the Constitution has reserved the monopoly of assistance to the State. If it has the duty to assist, it should not be concluded that it bears it in exclusivity” (MOREIRA, 2021, p. 204).

Fundamental rights, in the 1988 Constitution, gather values of great relevance to Brazilian society. The centrality assumed by these rights demands the imposition of duties of optimization, which “consist in the deontic command that the norms which define fundamental rights be carried out to the greatest extent possible” (CLÈVE, 2014).

This is the premise which should guide the interpreters of labor procedure rules, to provide the greatest possible effectiveness to the institute of full legal assistance, which therefore demands that article 14 of Act n. 5.584/70 is read according to the Constitution, so as to comprehend this institute in the core of article 5, LXXIV, of the Constitution.

As from this understanding, it is necessary that both the legislator and the interpreter seek to eliminate, or at least reduce, any barriers in the exercise of this constitutional duty by the unions. After all, on balance, union assistance is a logical consequence of the constitutional principle of full legal assistance, whose fundamentality and centrality in the Brazilian legal order imposes its greatest effectiveness.

FINAL CONSIDERATIONS

From the perspective of contemporary constitutionalism, access to justice assumes the character of an institutional guarantee. Thus, access to justice assumes an extremely important role within the legal system, as it holds the condition of a fundamental right which enables the exercise of other fundamental rights.

Essentially linked to the guarantee of access to justice is the equally fundamental principle of full and free legal assistance, as established in item LXXIV of art. 5 of the Federal Constitution of 1988.

It is true that the State is constitutionally obliged to guarantee full legal assistance and thus it implements it by means of public defenders,

who, however, do not have sufficient structure to meet the demand, notably in the labor sphere, in which they little or hardly ever intervene.

Furthermore, the institute of *jus postulandi*, except in a residual and limited manner, is no longer in line with the new legal reality, which is more complex and bureaucratic than in the past, and therefore does not satisfactorily meet the demands of workers.

In addition, the State does not have an established policy to implement the constitutional principle of access to jurisdiction for underprivileged workers.

What one can extract thus is that the individuals who mostly need a response from the Judiciary are not able to defend their rights on their own, especially those concerning going to court and bearing the high costs of a lawsuit, notably lawyer fees.

In this scenario, the legal assistance provided by unions assumes an extremely important role as a mechanism for the access of underprivileged workers to justice, whether in the assistance provided to certain workers in individual or multiple claims (through the traditional procedural mechanism known as joinder), or by means of procedural substitution, as established in article 8, III, of the Federal Constitution and by means of the microsystem of protection of collective rights jointly implemented in our country by the Consumer Protection and Defense Code (Act n. 8.078/1990, articles 90, 110 and 117) and by the Public Civil Action Act (articles 1, V, and 21).

Although the State is the protagonist in the enforcement of constitutional rules, it is not the only one responsible for the arduous task of making fundamental rights real and tangible, amongst which emerges that of ensuring full legal assistance.

The fundamental rights established in our *Magna Carta* gather values of great relevance to Brazilian society and the centrality of these rights imposes a duty of optimization, as in the norms which define fundamental rights should be carried out to the greatest extent possible.

This is the premise which should guide interpreters who apply the labor procedural rules, to give the greatest possible effectiveness to the institute of full legal assistance, which therefore demands that article 14 of

Law n. 5.584/70 is read according to the Constitution, so as to comprehend this institute in the core of article 5, LXXIV, of the Constitution.

Union assistance thus has an essential role within a Democratic State of Law, as a guaranteeing mechanism of material equality and other fundamental rights of workers, insofar as it allows effective access to jurisdiction, notably for the under-resourced party who have numerous difficulties in this attempt and does not find effective state support to overcome such barriers.

Thus, in the exercise of its condition as a social agent, to whom the Constitution has granted the very important role of defending workers' rights, both in the administrative and judicial spheres (art. 8, III, CF/88), unions will also be entitled to implement the constitutional right to access to justice, which has full legal assistance as its corollary.

As from this understanding, it is necessary that both the legislator and the interpreter seek to eliminate, or at least reduce, any barriers in the exercise of this constitutional duty by the unions. After all, on balance, union assistance is a logical consequence of the constitutional principle of full legal assistance, whose fundamentality and centrality in the Brazilian legal order impose its greatest effectiveness.

NOTES

* Tradução de Bianca Kunrath.

¹ In the Brazilian Democratic Constitution of 1988, the matter is regulated in its article 134, according to the Constitutional Amendment No. 80, of 2014, *in verbis*:

Article 134. The Public Legal Defense is an essential institution to the jurisdictional function of the State and is responsible for the judicial guidance and the defense, in all levels, of the needy, under the terms of article 5, LXXIV. (CA No. 45, 2004)

Paragraph 1. A supplementary law shall organize the Public Legal Defense of the Union, of the Federal District and the Territories and shall prescribe general rules for its organization in the states, into career offices filled, in the initial class, by means of a civil service entrance examination of tests and presentation of academic and professional credentials, with the guarantee of removability being ensured to its members and the practice of the legal profession beyond the institutional attributions being forbidden.

Paragraph 2. The Public Legal Defense of each state shall be ensured of functional and administrative autonomy, as well as the prerogative to present its budget proposal within the limits set forth in the law of budgetary directives and in due compliance with the provisions of article 99, paragraph 2.

² For a valuable and incisive exposition on the constitutional right of access to justice as the "right to having rights", see ROCHA, 1993, pp. 31-51.

³ Pronouncements issued by the Courts, based on repeated decisions, which delimit the understanding and interpretation of the law on a certain matter.

- ⁴ Art. 791 of the CLT: Employees and employers may personally file suits before the labor judge and follow up their claims until their conclusion.
Súmula 425 of the TST: JUS POSTULANDI IN LABOR JUSTICE. Resolution 165/2010, DEJT, published on April 30, 2010, and May 3 and 4, 2010. The *jus postulandi* of the parties, established in art. 791 of the CLT, is limited to the labor courts and the regional labor courts, not encompassing the *ações rescisórias* the injunction, the writ of mandamus and the appeals under the jurisdiction of the Superior Labor Court.
- ⁵ It is important to inform that the Direct Action of Unconstitutionality – ADI n^o. 5.766, reported by Justice Luís Roberto Barroso, filed by the Attorney General’s Office, alleging the unconstitutionality of the amended CLT provisions introduced by the Labor Reform Act No. 13.467/2017, notably articles 790-B, paragraph 4; 791-A, paragraph 4; 844, paragraphs 2 and 3, on the grounds that they characterize legal restrictions to the guarantee of exemption of court fees, by imposing on its recipients: i) the payment of expert and losing litigant fees, when they have obtained in court, including in another action, credits capable of supporting the expense; and (ii) the payment of costs, in case they have given rise to the dismissal of the action, due to non-attendance at the hearing, being also a condition to the filing of a new action. The judgment of the aforementioned ADI began with the vote of the Justice in charge of the report, upholding the maintenance of the text of the reform to avoid “excessive litigation”, setting limiting parameters, namely: a) the amount allocated to the payment of loss of suit and expert fees cannot exceed 30% of the net value of credits received by the employee; b) said credits may only be used when they exceed the benefit amount limit of the General Social Security System, under the responsibility of the INSS, which is currently R\$ 5,645.89. Justice Edson Fachin also expressed his vote in the sense of “complete unconstitutionality in the restrictions imposed, such as the payment by the losing party, even though when they lack financial resources; loss of action due to the absence of the party at the first hearing”. For Justice Fachin, “it is necessary to re-establish the integrity of the fundamental right of access to labor justice for underprivileged population”. The judgment was suspended after a request for inspection by Justice Luiz Fux, and the resumption of the judgment session was scheduled for October 7, 2021, according to the information on the website BRASIL (BRASIL, 2021b).
- ⁶ The elimination of the need for such approval, as is known, has been the target of justified doctrinal criticism, as it substantially weakened a practice that, for many years, ensured direct contact between union entities and workers, members or not, represented by them, ensuring to these the right to accurate and detailed information about their labor rights (as is known, an essential element of their constitutional right of access to justice) and the possibility of not only pointing out, when signing the respective contract termination term, any rights that they may eventually consider that they have not been properly paid, as well as of claiming before a Labor Court the rights which they may consider to be due. See, in this regard, PINTO, 2018, p. 166-172.
- ⁷ On the subject of meta-individual or collective protection of rights and interests in the labor sphere, see, PIMENTA, 2009. pp. 9-50.

BIBLIOGRAPHICAL REFERENCES

ALVES, Cléber Francisco. O percurso histórico da consolidação do direito de acesso igualitário à justiça no Brasil, pp. 329-362. In: **Revista de Processo**, vol. 184, 2010.

AROUCA, José Carlos. **Organização sindical no Brasil**. Passado – presente-futuro (?). 2^a ed. São Paulo: LTr, 2019.

BOBBIO, Norberto. **A era dos Direitos**. Rio de Janeiro: Elsevier, 2004. 3ª reimpressão.

BRASIL. [Constituição (1988)]. **Constituição da República Federativa do Brasil de 1988**. Brasília, DF: Presidência da República, [2016]. Disponível em < http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm. > Acesso em: 8 de abril de 2021a.

BRASIL. Supremo Tribunal Federal. Ação direta de inconstitucionalidade nº 5766/DF – Distrito Federal. Relator: Ministro Luís Roberto Barroso. **Pesquisa de Jurisprudência**. Disponível em: < <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5250582> >. Acesso em: 9 de julho de 2021b.

CAPPELLETTI, Mauro & GARTH, Bryant. **Acesso à justiça**. Trad. Ellen Gracie Northleet. Porto Alegre: Sérgio Antonio Fabris Editor, 1988.

CANOTILHO, J. J. GOMES. **Direito Constitucional**. 5ª ed. 2ª reimpressão. Coimbra: Almedina, 1992.

CLÈVE, Clémerson Merlin (COORD). **Direito constitucional brasileiro**. Teoria da Constituição e direitos fundamentais. São Paulo: Thompson Reuters, 2014. E-book.

COUTO, Mônica Bonetti; TEIXEIRA, Laís Santana da Rocha Salvetti. O acesso à justiça e seu enquadramento como direito fundamental: contexto atual e evolução. **Publica direito**. Disponível em: < <http://www.publicadireito.com.br/artigos/?cod=e5815151957be36a>. > Acesso em: 8 abril de 2021.

DELGADO, Mauricio Godinho. Constituição da República, Estado democrático de direito e direito do trabalho, p. 31-54. In: DELGADO, Mauricio Godinho; DELGADO, Gabriela Neves. **Constituição da República e direitos fundamentais: dignidade da pessoa humana, justiça social e direito do trabalho**. 3ª ed. São Paulo: LTr, 2015a.

DELGADO, Gabriela Neves. Os paradigmas do Estado Constitucional Contemporâneo, p. 15-30. In: DELGADO, Mauricio Godinho; DELGADO, Gabriela Neves. **Constituição da República e direitos fundamentais: dignidade da pessoa humana, justiça social e direito do trabalho**. 3ª ed. São Paulo: LTr, 2015b.

DELGADO, Mauricio Godinho. **Curso de Direito do trabalho**. 18ª ed. São Paulo: LTr, 2019.

LEITE, Carlos Henrique Bezerra. **Acesso coletivo à justiça como instrumento para efetivação dos direitos humanos: por uma nova mentalidade.** Disponível em: <https://juslaboris.tst.jus.br/bitstream/handle/20.500.12178/104849/2009_leite_carlos_acesso_coletivo.pdf?sequence=1&isAllowed=y> Acesso em: 8 abril de 2021.

FILHO, Hugo Cavalcanti; AZEVEDO NETO, Platon Teixeira. (COORD). **Temas de Direito coletivo do trabalho.** São Paulo: LTr, 2010.

MIZIARA, Raphael. Novidades em torno do benefício da justiça gratuita na CLT reformada e o ônus financeiro do processo. In: **Revista LTR**, v. 81, n. 10, outubro de 2017.

MOREIRA, José Carlos Barbosa. O direito à assistência jurídica: evolução no ordenamento brasileiro de nosso tempo, pp. 197-211. In: Academia Brasileira de Letras Jurídicas. Disponível em <<http://www.ablj.org.br/revistas/revista3/revista3%20JOSE%20CARLOS%20BARBOSA%20MOREIRA%200%20direito%20%20C3%A0%20Assist%20C3%A0ncia%20Jur%20C3%A0dica%20evolu%20C3%A7%20C3%A0o%20no%20Ordenamento%20brasileiro%20de%20nosso%20tempo.pdf>> Acesso em: 8 abril de 2021.

NAHAS, Thereza Christina. Acesso à justiça e reforma trabalhista, pp. 29-59. In: **Revista de Direito do Trabalho**, v. 194, ano 44. São Paulo: Ed. RT, outubro de 2018.

OIT. La libertad sindical: recopilación de decisiones del Comité de Libertad Sindical. *Oficina Internacional del Trabajo*. 6ª ed. Ginebra: OIT, 2018.

PAIXÃO, Cristiano. Acesso à justiça como garantia constitucional: inconstitucionalidade da reforma trabalhista, pp. 163-177. In: HONÓRIO, Cláudia; VIEIRA, Paulo Joarês. (ORG.). **Em defesa da Constituição.** Primeiras impressões do MPT sobre a “reforma trabalhista”. Brasília: Gráfica Movimento, 2018.

PIMENTA, José Roberto Freire. A tutela metaindividual dos direitos trabalhistas: uma exigência constitucional. In: PIMENTA, José Roberto Freire; BARROS, Juliana Augusta Medeiros de; FERNANDES, Nadia Soraggi (Coords.). **Tutela metaindividual trabalhista: a defesa coletiva dos direitos dos trabalhadores em juízo.** São Paulo: LTr, 2009. p. 9-50.

PIMENTA, José Roberto Freire; PORTO, L. V. Instrumentalismo Substancial e Tutela Jurisdicional Civil e Trabalhista: Uma Abordagem Histórico-Jurídica,

pp. 85-122. In: **Revista do Tribunal Regional do Trabalho da 3ª Região**, v. 43, 2007.

PINTO, José Augusto Rodrigues. Revogação da proteção assistencial ao empregado na extinção do contrato de emprego pela Lei nº 13.467/2017. In: **ARRUDA, Kátia Magalhães e ARANTES, Delaíde Alves Miranda (organizadoras). A centralidade do trabalho e os rumos da legislação trabalhista: homenagem ao Ministro João Oreste Dalazen**. São Paulo: LTr, 2018, p. 166-172.

ROCHA, Cármen Lúcia Antunes. O direito constitucional à jurisdição. In: TEIXEIRA, Sálvio Figueiredo (coord.). **As garantias do cidadão na justiça**. São Paulo: Saraiva, 1993. p. 31-51.

ROSA E SILVA, Túlio Macedo. **Assistência jurídica gratuita na justiça do trabalho**. São Paulo: Saraiva, 2013.

SOUTO MAIOR, Jorge Luiz; SEVERO, Valdete Souto. O acesso à justiça sob a mira da reforma trabalhista – ou como garantir o acesso à justiça diante da reforma trabalhista, pp. 289-332. In: **Revista do Tribunal Regional do Trabalho da 3ª Região**, edição especial, novembro de 2017.

Recebido em: 9 – 11- 2021

Aprovado em: 13- 4 - 2022

José Roberto Freire Pimenta

Doutorado em Direito Constitucional pela Universidade Federal de Minas Gerais (2001). Bacharel em Direito pela Faculdade de Direito da UFMG (1978). Ministro do Tribunal Superior do Trabalho desde setembro de 2010 em vaga destinada aos magistrados de carreira. Professor Titular do Centro Universitário do Distrito Federal (UDF), em Brasília-DF (2018-atual.), em sua graduação em Direito e em seu Mestrado em Relações Sociais e Trabalhistas, nas áreas de Direito do Trabalho e de Direito Processual do Trabalho. Professor adjunto III da Pontifícia Universidade Católica de Minas Gerais no período de agosto de 2002 a setembro de 2017, na graduação em Direito (agosto de 2002-setembro de 2010) e em seu Mestrado e Doutorado em Direito do Trabalho (agosto de 2002-setembro de 2017). Magistrado do Trabalho há mais de 30 anos, seja como Ministro do TST (2010-atual.), Desembargador Federal do Trabalho do TRT-MG (2002-2010) e Juiz do Trabalho de 1ª Instância em Minas Gerais (1988-2002). Experiência na área de Direito, com ênfase em Direito Constitucional, Direito do Trabalho e Direito Processual (Civil e do Trabalho), atuando principalmente nos seguintes temas: direitos fundamentais, efetividade da tutela jurisdicional, precedentes

judiciais vinculantes e persuasivos, processo civil, processo do trabalho, direitos sociais e direito do trabalho. Autor de livros, capítulos de livros e diversos artigos publicados em periódicos nacionais. E-mail: freirepimenta@task.com.br

Simone Soares Bernardes

Mestranda em Direito das Relações Sociais e Trabalhistas pelo Centro Universitário do Distrito Federal/ UDF. Especialização em Direito Público pelo Centro Universitário Metodista Izabela Hendrix (2006). Graduação em Direito pela Universidade Federal de Viçosa (2002). Juíza do Trabalho Substituta do TRT da 10ª Região. Ex-Juíza do Trabalho Substituta do TRT da 3ª Região (2011 a 2019). Ex-Juíza do Trabalho Substituta do TRT da 1ª Região (2009 a 2011). Ex-Analista Judiciário (Assistente de Juiz) do TRT da 3ª Região (2005 a 2009). Foi advogada de 2002 a 2005. Autora de dois livros com várias reedições (Direito do Trabalho - 5ª edição e Processo do Trabalho - 4ª edição). Co-autora em vários livros jurídicos na área trabalhista. E-mail: si.sbernardes@gmail.com

Mauricio Godinho Delgado

Doutor em Filosofia do Direito pela UFMG (1994). Mestre em Ciência Política pela UFMG (1980). Bacharel em Direito pela UFJF (1975). Ministro do Tribunal Superior do Trabalho (TST), em Brasília-DF. Professor Titular do Centro Universitário do Distrito Federal (UDF), em Brasília-DF, e de seu Mestrado em Direito das Relações Sociais e Trabalhistas (Professor Decano). Magistrado do Trabalho há mais de 30 anos, seja como Ministro do TST (2007-atual.). Desembargador do TRT-MG (2004-2007) e Juiz do Trabalho de 1ª Instância em Minas Gerais (1989-2004). Professor Universitário há mais de 42 anos. Atual Professor Titular do UDF – Centro Universitário (2014-atual) e de seu Mestrado. Possui publicados 31 livros, sendo alguns com várias reedições (ilustrativamente, Curso de Direito do Trabalho, 19 edições; Direito Coletivo do Trabalho, 7 edições; Princípios Constitucionais do Trabalho e Princípios de Direito Individual e Coletivo do Trabalho, 5 edições; Constituição da República e Direitos Fundamentais, 4 edições); são treze livros individuais, três livros duais, cinco livros coletivos, além de ter sido co-organizador de Coleção de dezenas de artigos em seis volumes; também lançou, em co-autoria, obra em três volumes (Tratado Jurisprudencial de Direito Constitucional do Trabalho) e também a obra CLT Acadêmica e Profissional. É co-autor da obra: A Reforma Trabalhista no Brasil, com os Comentários à Lei nº 13.467/2017 (2ª edição – 2018). É co-organizador, ainda, do livro O Estado de Bem Estar Social no Século XXI (2ª edição – 2018), obra coletiva com diversos autores nacionais e internacionais. E co-organizador, também, do livro Welfare State – Os grandes desafios do Estado de Bem-Estar Social, obra coletiva com diversos autores nacionais e internacionais (2019). Possui publicados também mais de 110 artigos individuais, duais ou triautorais em revista científicas e/ou obras acadêmicas coletivas. Ex-Advogado

inscrito na OAB-MG até novembro de 1989. É Editor Acadêmico da Revista Direito das Relações Sociais e Trabalhistas do UDF – Centro Universitário, desde janeiro de 2015. No TST integra, desde março de 2012, a 3ª Turma. Entre 2007 e 2012, compôs a 6ª Turma do TST. E, entre 2013 e 2017, foi membro do Órgão Especial (OE) e, entre 2017 e 2019, compôs o Conselho Superior da Justiça do Trabalho (CSJT). Integra, desde 2007, a Seção Especializada em Dissídios Coletivos (SDC-TST) e o Tribunal Pleno. Compôs a Comissão de Jurisprudência e de Precedentes Normativos do TST em dois períodos, de fevereiro de 2016 a fevereiro de 2018 e de fevereiro de 2018 a fevereiro de 2020. Preside, desde fevereiro de 2020, a Comissão de Documentação e Memória do TST e, no mesmo período, coordena o Comitê Gestor do Programa Nacional de Resgate da Memória da Justiça do Trabalho (CGMNaC-JT). Coordena a Revista do TST desde fevereiro de 2020. Tem experiência nas áreas de Direito e Ciência Política, com ênfase em Direito Constitucional, Direito Constitucional do Trabalho, Direito do Trabalho, Direito Processual do Trabalho, Direitos Humanos Sociais e Ciência Política. E-mail: mauriciogdelgado@gmail.com

Bianca Kunrath

Bacharel em Ciências Jurídicas e Sociais pela Universidade Federal do Rio Grande do Sul (2014). Especialização em “Droit Comparé et Européen des Contrats et de la Consommation” pela Université Savoie Mont-Blanc (2016-2017). Iacadêmico na Université Paris 1 Panthéon-Sorbonne (2017-2018). Foi bolsista de extensão no projeto “Observatório de Crédito e Superendividamento do Consumidor” mantido pela Universidade Federal do Rio Grande do Sul (2018). Atual membro do Grupo de Estudos CNPq Mercosul, Direito do Consumidor e Globalização, como pesquisadora voluntária, sob orientação da Prof. Dr. Dr. h.c Claudia Lima Marques. Pesquisa nas áreas de Contratos, Consumidor, Direito Comparado, com especial interesse no tema da Linguagem Jurídica E-mail: biancakunrath@gmail.com

UDF Centro Universitário

Quadra SEPS 704/904
Asa Sul
70390045 - Brasília, DF - Brasil

